AKADEMIESE INLIGTINGSDIENS
TYDSKRIFTE
UNIVERSITEIT VAN PRETORIA
2000 -11- 21
VAKKODE 340

Digitized by the Internet Archive
in 2017 with funding from
University of Pretoria, Library Services

https://archive.org/details/tydskrifvirheden62joub

340

TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG

JOURNAL OF CONTEMPORARY ROMAN-DUTCH LAW

V 62

1999

Suid-Afrika	Butterworth Uitgewers (Edms) Bpk **Durban** Walteroord 8, Watervalpark, Mayville 4091 **Johannesburg** Grayston 66, Norwich Close 2, Sandton 2196 **Kaapstad** F10 Centurion Business Park, Bosmansdamweg, Milnerton 7441 Reg No 91/05175/07
Australië	Butterworths, Sydney, Melbourne, Brisbane, Adelaide, Perth, Canberra en Hobart
Kanada	Butterworths Canada Ltd, Toronto en Vancouver
Ierland	Butterworths (Ireland) Ltd, Dublin
Maleisië	Malayan Law Journal Sdn Bhd, Kuala Lumpur
Nieu-Seeland	Butterworths of New Zealand Ltd, Wellington en Auckland
Singapoer	Reed Elsevier (Singapore) Pte Ltd, Singapoer
Verenigde Koninkryk	Butterworths, a Division of Reed Elsevier (UK) Ltd, Londen en Edinburg
VSA	LEXIS Law Publishing, Charlottesville, Virginië

© 2000

Kopiereg van hierdie werk word voorbehou. Geen gedeelte van hierdie werk mag in enige vorm of op enige wyse gekopieer word sonder die skriftelike toestemming van die uitgewers nie. Enige ongemagtigde weergawe van hierdie werk sal as 'n skending van kopiereg beskou word en die dader sal aanspreeklik gehou word onder siviele reg sowel as strafreg.

Alhoewel alles moontlik gedoen is om te verseker dat die inligting in hierdie werk akkuraat is, neem die outeurs, redakteurs, uitgewers en drukkers geen verantwoordelikheid vir enige verlies of skade wat enige persoon mag ly as gevolg van die gebruik van inligting hierin vervat nie.

Gedruk en gebind deur Interpak Books Pietermaritzburg

Inhoudsopgawe

Opgestel deur
Snyman, E
Du Plessis, W

I TITELS VAN BYDRAES

II OUTEURS VAN BYDRAES

(Artikel – (a), Aantekening – (aa), Vonnisbespreking – (v))

III BOEKRESENSIES

IV BESPREEKTE VONNISSE

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T

U

V

W

Y

Z

V WETGEWING

VI ONDERWERPSINDEKS

REDAKSIONEEL

Die *Tydskrif* ly met die uittrede van professor Johann Neethling as redakteur 'n ontsettende groot verlies aan kundigheid en ondervinding. 'n Persoon met sy kennis en aansien skop mens nie sommer agter elke bossie uit nie. Die werk wat hy eers as assistent-redakteur (1983–1987) en daarna as redakteur (1988–1998) verrig het, is miskien die beste getuigskrif waarvoor enigeen kan vra. Aan die ander kant kan mens verstaan dat die verpligtinge waarmee die dekaanskap van 'n groot moderne regsfakulteit gepaard gaan, dit bykans onmoontlik maak om nog met "stokperdjies" soos die redakteurskap van 'n vooraanstaande regstydskrif voort te gaan, al is jy hoe toegewyd daaraan.

Uit 'n persoonlike oogpunt kan ek net sê dat dit 'n besondere voorreg was om vir soveel jare met Johann Neethling saam te werk. Nooit het sy hoflikheid en bedagsaamheid hom in die steek gelaat nie; nooit het ek enige onaangenaamheid ervaar nie; en indien daar ooit irritasie of ergenis by hom ontstaan het oor iets wat sy mederedakteurs aangevang het, het hy dit goed weggesteek. Om by hom oor te neem, sal inderdaad 'n "hard act to follow" wees, des te meer omdat professor Johan Potgieter ook uittree na baie jare diens aan die *Tydskrif*. Gelukkig bly daar darem een lid van die ou garde oor, naamlik professor Chris Nagel van die Universiteit van Pretoria. Die ander twee assistent-redakteurs is doktor Johann Knobel van die Departement Privaatreg, Unisa, en professor Mervyn Dendy van die Universiteit van die Witwatersrand. Dr Knobel neem al vir die afgelope ses maande as assistent-redakteur waar, en professor Dendy is 'n bestuurslid van die *Tydskrif* en is reeds bekend aan lesers vir sy bydraes in die *Tydskrif*.

Doktor ADJ van Rensburg, wat van 1979 tot 1987 die redakteur van die *Tydskrif* was, het ook sy uittrede as bestuurslid aangekondig. Hy bly egter steeds erelid van die Redaksiekomitee. Die besondere bydrae wat hy tot die *Tydskrif* gelewer het, kan nie maklik oorskat word nie.

Lesers van die *Tydskrif* het seker al teen hierdie tyd agtergekom dat die *Tydskrif* so gaandeweg 'n gedaanteverwisseling ondergaan. Melding kan veral gemaak word van die toenemende "publiekregtelike" aard van die bydraes; die afname van bydraes in Afrikaans; en nou die aanstelling van 'n Witsie as assistent-redakteur (*o tempora, o mores!*) en (les bes?) 'n redakteur wat so half Engels voorkom, en dan nog boonop 'n staatsregsgeleerde is. Die veranderinge is egter nie van gister af nie; dit kom al 'n lang pad.

Eerstens is die *Tydskrif* lankal nie meer uitsluitlik toegespits op selfs die eietydse Romeins-Hollandse reg ('n sinsnede wat 'n privaatregtelike konnotasie het) nie. Dink maar aan die bydrae wat CP Joubert toentertyd oor soewereiniteit en die parlement geskryf het. In elk geval is die gedagte dat 'n rigiede onderskeid tussen publiekreg en privaatreg hoegenaamd haalbaar is, dikwels aan kritiek onderwerp. Dié skeidslyn het ook verder vervaag met die koms van 'n oppermagtige grondwet wat sy invloed (daar is diegene wat miskien na tentakels sal verwys) op iedere gebied van die reg laat geld. Die belang van die Grondwet en die uitwerking daarvan op die regswetenskap as geheel is deur die *Tydskrif* erken met die instelling van 'n spesiale prys vir die beste bydrae oor grondwetlike aangeleenthede in 'n spesifieke jaar.

Tweedens is die *Tydskrif* ook al vir baie jare nie meer uitsluitlik 'n Afrikaanse publikasie nie. Toe professor Neethling in 1988 die redakteurskap oorgeneem het, het hy immers in sy afskeidswoord aan sy voorganger melding gemaak daarvan dat die taalstryd grootliks volstry is en dat die *Tydskrif* "in 'n gees van volwasse selfvertroue vandag in 'n steeds toenemende mate verdienstelike Engelse bydraes [plaas]". Soos u kan sien, is die huidige uitgawe omtrent 90 persent Engels. Die rede hiervoor lê voor die hand. Met die koms van die nuwe staatkundige en politieke bedeling wil al hoe meer Suid-Afrikaanse skrywers verseker dat hul werk 'n wye leserskring bereik, en dit beteken dat hulle hulle van Engels moet bedien. Die afname in Afrikaanse bydraes is wel 'n bron van kommer. Die *Tydskrif* wil allermins weer 'n eksklusief Afrikaanse tydskrif word – ons wil graag daarop roem dat ons Engelse bydraes van gehalte publiseer. Dit ly ook geen twyfel dat Afrikaans as regstaal stewig gevestig is en nie noodhulp nodig het om aan die lewe te bly nie. Aan die ander kant is die uitbouing en ontwikkeling van regstaal – ook Engels – 'n nimmereindigende proses.

In die gees hiervan wil ons steeds die verdere ontwikkeling van Afrikaans aanmoedig. Dit hoef natuurlik glad nie ten koste van die groei van enige ander taal te gebeur nie: trouens, die November 1998-uitgawe van die *Tydskrif* bevat vir die eerste keer (as ek dit reg het) 'n opsomming van 'n bydrae in een van die ander Suid-Afrikaanse tale (in die aantekening van David Taylor oor "The insane language of law"). Ongelukkig word ons deur ons onvermoë verhoed om op groot skaal bydraes in ander tale as Afrikaans en Engels te publiseer; ons verwelkom egter enige inisiatief wat taal inklusief eerder as eksklusief benader.

Ten slotte 'n woord of twee oor die pryse wat aan bydraers aangebied word: Eerstens is daar die lank-gevestigde Butterworth-prys vir die beste eerstelingbydrae. Die oogmerk is om skrywers wat betreklik junior of onervare is, aan te moedig; dus word professore en mede-professore aan 'n universiteit uitgesluit. Tweedens is daar die Hugo de Groot-prys vir die beste bydrae (ongeag rang of ervaring) oor die Grondwet waarna vroeër verwys is. Dan twee nuwe pryse: 'n prys vir die beste Afrikaanse bydrae (die regverdiging vir die instelling van dié prys blyk uit wat hierbo gesê is) en 'n prys vir die beste bydrae deur 'n LLB-student. Laasgenoemde prys is ingestel omdat studente (veral met die nuwe vierjaar-LLB en die toenames in studentegetalle wat dit onmoontlik maak vir dosente om geskrewe werk op 'n gereelde grondslag te beoordeel) al hoe minder geleentheid gebied word om hul skryfvaardighede te verbeter. Miskien moet mens eerder sê dat hulle al hoe minder gedwing word om te skryf!

GRETCHEN CARPENTER

Academic freedom and institutional autonomy in South Africa*

CRM Dlamini SC
BProc LLM LLD
Rector and Vice-Chancellor, University of Zululand
Member of the South African Human Rights Commission

OPSOMMING

'n Universiteit is 'n baie belangrike instelling in die onderwysstelsel van enige land as gevolg van die rol wat dit speel. Die rol van die universiteit is om nuwe kennis deur navorsing te genereer en om daardie kennis deur onderrig te versprei. Die doel van kennis is om die lewenskwaliteit van die samelewing te verbeter.

Om daardie rol behoorlik te vervul, het die universiteit sekere eienskappe nodig. Die vernaamste hiervan is akademiese vryheid in die vorm van beide individuele akademiese vryheid en institusionele outonomie. Individuele akademiese vryheid beteken die vryheid van 'n akademikus om sy plig om kennis deur navorsing en publikasie te ontwikkel sonder enige eksterne beperkinge, na te kom. Institusionele outonomie beteken die vryheid van 'n universiteit om sy interne sake sonder enige eksterne inmenging te behartig.

Die universiteit moet derhalwe lede hê wat nuwe idees sonder vrees sal ontwikkel en versprei. Daardie lede moet beskerm word. Dit is die rede waarom akademiese vryheid as 'n reg beskou word en in die Konstitusie beskerm word. Akademiese vryheid is 'n institusionele reg want dit behoort aan 'n individu, nie as gevolg van die feit dat hy 'n mens is nie, maar omdat hy aan 'n instelling behoort. Institusionele outonomie is 'n nodige, alhoewel nie voldoende nie, voorwaarde vir akademiese vryheid. Akademiese vryheid in die vorm van beide individuele akademiese vryheid en institusionele outonomie floreer in 'n vrye en demokratiese bestel. Alhoewel akademiese vryheid in die Konstitusie beskerm word, is dit nie bo enige dreigement nie. Die rede daarvoor is dat daar altyd spanning is tussen universiteite en die regering wat universiteite subsidieer. Die doel van hierdie artikel is om die hele begrip van akademiese vryheid onder die loep te neem.

1 INTRODUCTION

A university is the most important institution in the educational system of any country. For this reason it has been described as an "educational institution at the pinnacle of the country's educational system operating at the highest level of teaching and research, centred on the pursuit of learning of a sort fundamental to the understanding of the physical and human world and necessary for the practice of certain professions and occupations requiring advanced knowledge".[1]

---

* This article is based on the author's LLD thesis, *University autonomy and academic freedom in South Africa* Unisa (1996).

1 Kriel "A university on African soil – towards a definition of goals" in Thembela (ed) *Proceedings of a symposium held on 1981-09-07 at the University of Zululand Kwa-*

continued on next page

According to this definition, the role and function of a university is the generation and transmission of knowledge through teaching and research and the training of students for certain professional occupations which require advanced knowledge. A university therefore occupies an extremely important position in society.

In order to do this effectively, a university not only has to have libraries, laboratories and other facilities essential for research and teaching, but also has to have the ability to recruit the ablest and most creative people who can be attracted to academic life. It also has to provide an environment in which free inquiry can flourish and professors can do their work without constraints or external direction. Highly intelligent and imaginative people often resent and resist orders from above. They do not do their best under those conditions, but prefer a free environment. Freedom of the mind and university autonomy often go together. Free thinkers resent restraints on the types of idea and hypotheses they can publicly entertain. Such restrictions stifle the spirit of "venturesome inquiry while blocking off entire fields of investigation that seem threatening to those who have strong interests in maintaining the status quo".[2] It is the aim of this article to analyse these concepts and to ascertain how effectively they are protected in the Constitution. It will also be necessary to see what threats face them and how these can be contained. This is based on the assumption that academic freedom in the form of individual autonomy constitutes a good in itself which ought to be protected.

2 INSTITUTIONAL AUTONOMY AND ACADEMIC FREEDOM IN GENERAL

As is said above, in order to carry out its function of generating knowledge and pursuing truth and thus fulfilling its role effectively, a university must possess certain attributes. Institutional autonomy and academic freedom are the two most

---

Dlangezwa (1982) 18; see also Dhlomo "University goals in relation to staffing and administration" in Thembela (ed) *op cit* 57; Van Wyk de Vries *Main report of Commission of Inquiry into Universities* (1974) 20; Bergh *Ontwikkeling van universiteite met besondere verwysing na die organisatoriese reëlings van swart universiteite in Suid-Afrika* unpublished DPhil thesis UPE (1987) 56–58; LM du Plessis and AG du Plessis *Introduction to law* (1992) 9–10; Du Plessis *Voorgraadse akademiese produktiwiteit van die PU vir CHO vir die tydperk 1962 tot 1976* DEd thesis PU for CHE (1978) 16; Pauw *Die westerse universiteit – sy ontstaan, aard en toekoms* (1975) 85; Khutsong "Universities in post-apartheid South Africa" 1992 *SAJHE* 88 ff; Higgs "The nature and mission of a university: A fundamental response" 1991 *SAJHE* 164 ff; Strydom "The university on its way to the year 2000" *RSA 2000* (1980) 32; Wallerstein and Starr (eds) *The university crisis reader: the liberal university under attack* (1971) 78; Shils "The academic ethos under strain" in Seabury (ed) *Universities in the western world* (1975) 21; Lowenthal "The university's autonomy versus social priorities" in Seabury (ed) *Universities in the western world* (1975) 75–76; Centlivres (ed) *The open universities in South Africa* (1975) 10; Mosha "The role of African universities in national development: A critical analysis" 1986 *Comparative Education* 94; Shand "The making of a university" lecture delivered at Stellenbosch on the occasion of the passing of the University of Stellenbosch Act, 1916 3; National Commission on Higher Education (NCHE) *A framework for transformation* (1996) 68–69.

2 Bok *Beyond the ivory tower: social responsiblities of the modern university* (1982) 20; see also Polin "Freedom of mind and university autonomy" in Chapman (ed) *The western university on trial* (1983) 39.

important of these. There will obviously be others, but these are the key features to be considered here. In many, and especially Western, societies, they are regarded as fundamental rights, and are regarded as the foundation stones of the university system.[3] However, it has also been said that "academic freedom, like other 'great, abiding truths', is only 'abiding' in so far as each generation re-interprets and makes that truth its own. The concept of academic freedom is, like all concepts, subject to some reassessment in the light of changing needs and changing social circumstances, though the core of belief remains unchanged".[4] It is for this reason that academic freedom and institutional autonomy must be reassessed here. The purpose is not only to obtain greater clarity about them but also to seek ways of safeguarding them.

3 INSTITUTIONAL AUTONOMY AND ACADEMIC FREEDOM DEFINED AND DISTINGUISHED

Although academic freedom and institutional autonomy are often conflated, they are distinguishable from each other, and it is essential to make that distinction. It is essential because, while some may support the idea of academic freedom, they may treat institutional autonomy with scepticism; yet the two are mutually supportive.

Autonomy entails the collective activities of a university, and relates to the corporate freedom of an institution in society which includes the powers of self-government by the university in respect of its affairs free from extraneous regulation. These encompass the academic, managerial and administrative aspects of the university. Of fundamental importance is the power to manage the university and to regulate its affairs. Autonomy is concerned with its independent status as an institution in relation to other external institutions including the government, the church, organised industry and business and other organisations. Academic freedom, on the other hand, is concerned with the working conditions and conditions of service of staff and students as regards teaching, learning, research, the expression of opinions and the publication of these. It entails the freedom of an academic to perform his functions without unnecessary restrictions.[5]

From this distinction, it appears that academic freedom can be regarded as a subset of a larger set of institutional autonomy, although the two can exist independently. For this reason, autonomy has been regarded as a necessary, though not sufficient, condition for academic freedom.[6] Generally, academic freedom in the form of institutional autonomy has been considered as embracing the four essential freedoms, namely "to determine for itself on academic grounds

---

3 Higgs 167; Caston "Academic freedom: the third world context" 1989 *Oxford Rev of Education* 305.

4 Beinart *et al The open universities in South Africa and academic freedom* 1957–1974 (1974) viii.

5 Van Wyk de Vries Commission *Main Report* 35 ff; Pauw 174; see also Caston "Academic freedom" 1992 *The Encyclopaedia of Higher Education* 1295 ff; Malherbe "Die regsbeskerming van akademiese vryheid en 'universiteitsoutonomie' in 'n nuwe Suid-Afrika" 1993 *TSAR* 366; Beinart *et al* 2; McIver *Academic freedom in our time* (1967) 36; Rendel "Human rights and academic freedom" in Tight (ed) *Academic freedom and responsibility* (1988) 74–75; Jasper "Britain's Education Reform Act: A lesson in academic freedom and tenure" 1990 *Journal of College and University Law* 453–4; Polin 28; Loizou 20 ff; NCHE 73.

6 Rendel 80; Tight "So what is academic freedom?" in Tight (ed) *Academic freedom and responsibility* (1988) 123; Jasper 453; Caston 307.

who may teach, what may be taught, how it shall be taught, and who may be admitted to study".[7] Although this has subsequently been considered somewhat restrictive,[8] it remains one of the most authoritative statements on academic freedom in the form of institutional autonomy, not only here but also in the United States of America.

Owing to the nature of the function of the university, appointment to it must be based on high intellectual merit and high academic standards. Once a person has demonstrated superior academic ability through teaching and research, this must be respected and must not be subjected to control. The university's decisive autonomy lies in its choice of people who will do its job. In order to maintain the intellectual calibre of the institution, a uniform and fair system of collegial appointment should be established. This is the only way to ensure equality of opportunity to individuals and to sustain the morale of those involved in co-operative research. Moreover, a university must also have autonomy in such pedagogical issues as the selection of students, the grading of their examinations and the setting of the level and nature of study. It should also be able to define its character and mission.[9]

The autonomy of a university is, however, not absolute; as is well known, no right is absolute. In South Africa in particular, university autonomy is qualified by the nature of the university, which circumscribes its capacity and function. It is also qualified by the fact that its essential structure unites scholars, the community, society and the government, and all of these have to be taken into account in the exercise of all self-governing powers in order to preserve a harmonious equilibrium among them. This is obviously not an easy task. There are various areas where government may, or may wish to, interfere with university autonomy to regulate the admission of students and the hiring of staff. Autonomy may further be qualified by the general law of the country or statutory law relating to its establishment and functioning,[10] and today in the context of a Constitution which entrenches fundamental rights, it may have to be balanced with other rights. But apart from these important considerations, it is undesirable that university autonomy should be unnecessarily restricted. It is well known that there is always a threat of government intervention in the running of universities.

Nor does university autonomy imply that the university is insulated from and is not subject to external influence. It is impossible for a university to be completely free from external influences. But once an external influence becomes irresistible, the autonomy of the university is seriously undermined.[11]

The nature and function of a university largely determine the content of its academic freedom. This freedom is confined to the academic field, although it is

---

7 Centlivres *et al* 11–12, 14; this definition was adopted from an address to new students at the University of Cape Town by the Principal and Vice-Chancellor, Dr Davie (*Cape Times* 1953-02-28); it was approved by Mr Justice Frankfurter in *Sweezy v New Hampshire* 354 US 234 263 (1957); Bok 38; See also Kaul *The governance of universities: autonomy of the university community* (1988) 62–63.

8 Beinart *et al* 1.

9 Polin 40.

10 Van Wyk de Vries Commission *Main report* 74 ff; NCHE 73; see also Bergh 113 ff; Caston 307; Bok 38–40.

11 Miller "Academic freedom in South Africa" 1991 *Aust Univ Rev* 34.

related to other freedoms.[12] The autonomy of the university as an institution consists in its power to regulate, organise and control all the facets of its academic function in its discretion without extraneous regulation by the government or society. As is pointed out above, this relates to the powers of the university to appoint academic staff, to lay down curricula and standards, to decide who must be admitted as students, who should be taught and how to strike a balance between teaching and research.

The academic freedom of a teacher or student entails intellectual freedom for each to perform his respective functions. The teacher is free to perform his teaching function according to his own conception of fact and truth, to express and publish his views, to study, investigate and to do research of his own choice and to be free from discriminatory treatment on the grounds of sex or convictions or any other impermissible grounds. The student is entitled to study, learn, do research and publish in intellectual freedom and should not be discriminated against. This freedom may be curtailed by the nature and function of the university or by the university itself in order to be able to carry out its functions effectively.[13]

According to Tight:

> "Academic freedom refers to the freedom of individual academics to study, teach, research and publish without being subject to or causing undue interference. Academic freedom is granted in the belief that it enhances the pursuit and application of worthwhile knowledge, and as such is supported by society through the funding of academics and their institutions. Academic freedom embodies an acceptance by academics of the need to encourage openness and flexibility in academic work, and of their accountability to each other and to society in general."[14]

This definition attempts to stress that academic freedom is for the benefit of society. It is, however, confined to the academic freedom of teachers and not that of the students. But, as has been pointed out, academic freedom is not a privilege of academics alone; students are also entitled to it. For this reason an examiner has no right to penalise a candidate for reaching a conclusion different from that which he has reached himself as long as the candidate gives sound reasons to support his view.[15] The growth of knowledge would be stifled otherwise. Despite the above attempts to define it, academic freedom has been regarded as defying precise and final definition.[16]

Although one type of definition has been used for academic freedom, the matter is not a simple one. On the contrary, three types of definition have been propounded, all of which reflect certain political and philosophical underpinnings. According to one version, academic freedom "is a fundamental right in the service of the disinterested pursuit of knowledge, and a right to be defended against interference from the state and other movements or organisations outside the university".[17] This view of academic freedom often goes with the ivory-tower conception of the university. According to this idea, the pursuit of knowledge is

---

12 MacIver 9; Loizou *Ethos community and academic freedom* (1989) 1 ff.

13 Van Wyk de Vries Commission *Main report* 75–76; NCHE 73; Pauw 174; Searle 170; Beinart *et al* 2–4; MacIver 6–8; Jasper 455.

14 Tight 132.

15 Brook 153.

16 Beinart 4.

17 Miller 33.

intrinsically valuable and must be carried on regardless of its immediate benefit to society, even though it may also benefit society.[18]

In terms of the second kind of definition, academic freedom is merely a privilege that is afforded universities so that knowledge can be acquired for the good of the community. According to this view, academic freedom is a privilege which has been used by elitist educational institutions in South Africa to hide their fundamental activity of serving the political and economic interests of the white elite. This belongs to the people's-university idea. According to this view, universities must be democratised and made relevant so that control over them is taken away from the reactionary forces and placed in the hands of the progressive forces. In this way university education would become available to the broad mass of the people and research programmes would be geared to the immediate benefit of the broad mass.[19]

According to the third view, academic freedom is seen as a sometimes useful, although "often distracting, fetish that academics have as they go about what it is held ought to be their main business", which is the training of students to service the economy. This model of academic freedom is compatible with the supermarket model of the university. It regards universities as similar to markets or factories, the main business of which is the buying, selling and production of a commodity – in the present case, education. In line with this approach, a good university is one where there are courses for which students and employers have a demand.[20]

Although these various models express important elements of academic freedom, they tend to exaggerate and are not mutually exclusive. There is no doubt that universities are, or ought to be, centres of rational inquiry and of the acquisition and dissemination of knowledge. Consequently, their focus is necessarily wider than the purely economic. Their role is not merely instrumental but also critical and transformative of society.[21]

Even a university that enjoys autonomy can restrict academic freedom, and in many cases institutions treat their staff unfairly or with bias or prejudice.[22] It is, however, doubtful whether academic freedom can exist in the absence of autonomy. There is no doubt that academic freedom can exist only in a free and democratic state although there can be academic freedom even within a limited autonomy.[23] The reason why academic freedom cannot exist in an unfree society is that violations of general liberty will always impinge on the freedoms of the university. For this reason it has been said that academic and human freedom are one and indivisible.[24] This does not mean, however, that it is not possible to

---

18 *Ibid.*

19 Miller *loc cit*; this view has also been prevalent in countries that have not necessarily espoused the concept of a people's university – see Fisk "Academic freedom in class society" in Pincoffs (ed) *The concept of academic freedom* (1975) 5 ff; *contra* Davis "Academic freedom, academic neutrality and the social system" in Pincoffs (ed) *The concept of academic freedom* (1975) 27 ff.

20 Miller *loc cit.*

21 *Ibid.*

22 Rendel 80.

23 Malherbe 366; Beinart *et al* 4; Caston 308–309.

24 Beinart *et al* 4–5; for a further discussion of this, see Griswold *Academic freedom and human freedom* (1967); Spivak *Thinking academic freedom in gendered post-coloniality* (1992).

separate academic freedom from other freedoms for conceptual purposes.[25] Although the university is not a product of a liberal-democratic society, it has contributed to the development of liberal democracy and has in turn benefited from liberal democracy in the pursuit of its mission.[26]

It is important to emphasise that academic freedom is not an end in itself. The same can be said of university autonomy. University autonomy facilitates academic freedom. The purpose of academic freedom is to facilitate the untrammelled attainment of the mission and goal of a university, which is the pursuit of knowledge through teaching and research. This is to the benefit of society in general,[27] although some would argue that in a university "knowledge is its own end and not merely a means to an end".[28] There is no real conflict here. It is a matter of emphasis, which implies that society should not place unnecessary restrictions on the extension of knowledge on the grounds that it is not of immediate benefit to society. Ultimately, all true knowledge is to the benefit of society, even if it may not be perceived to be so in the interim.

University autonomy is an institutional, not an individual, right. It is the right of the institution to govern itself and to direct its affairs free from external interference. Although academic freedom is not a general human right but an institutional one, it is also an individual right in that it has to be exercised by an individual. University autonomy and academic freedom are institutional rights because they are rights which derive from being and belonging to an institution and not from being human in general.[29]

Individual or human rights in general are those rights which human beings have or are deemed to have by virtue of their being human. They have these rights regardless of race, gender, or perhaps age, noble or ignoble descent, social class, national or ethnic origins, and regardless of wealth or poverty, occupation, talent, merit, religion, ideology or other personal idiosyncrasy. It also means that they are inalienable and cannot be transferred, forfeited or lost by having been usurped or by failure to exercise or assert them for any length of time.[30]

Individual or fundamental rights are generally rights against or upon society as represented by the government and its officials. A good society, is therefore, according to the ideology of human rights, one where individual rights flourish, and where the promotion and protection of individual rights constitute a public good. Although conflict often arises between the protection of individual rights and some other public good, according to the ideology of human rights, in the resolution of this conflict individual or fundamental rights should not be lightly sacrificed on utilitarian grounds of the greater good for the greater number, or even for the general good of all.[31] In accordance with this line of reasoning, the

---

25 Rendel 74 ff.

26 Shils "*The modern university and liberal democracy*" (1989) 425 ff.

27 Malherbe 363; Tight 117 ff; Rendel 83–84; MacIver 7; Jasper 449, 455.

28 Centlivres *et al* 10; *contra* Searle 170; see also Goodlad "Four forms of heresy in higher education: aspects of academic freedom in education for the professions" in Tight (ed) *Academic freedom and responsibility* (1988) 57; MacIver 4; Loizou 1.

29 Shils 441; MacIver 9; Chapman 8.

30 Henkin *The rights of man today* (1978) 3; Dworkin *Taking rights seriously* (1977) 185 ff; see also Rendel 74 ff.

31 On some of these conflicts, see Dlamini "A court-enforced bill of rights for South Africa?" 1988 *Journal of Contemporary African Studies* 81.

dichotomy between the individual and society is only temporary and superficial. In the long run it is in the best interests of society if the individual's right is protected.[32]

Although university autonomy and academic freedom are institutional rights, they are also fundamental rights because they are indispensable to the existence of a university and ultimately for the benefit of society. A university without autonomy and academic freedom is a contradiction in terms. It is a fire that burns not. They are also fundamental because they enable a university to attain its mission. It is essential to stress that they are rights and not privileges or concessions; nor are they something that depends on the whim of the authority either inside or outside the institution with which authority can deal as it pleases. On the contrary: they are inherently bound up with the performance of the university's role, "something as necessary for that performance as pen and paper, as classrooms and students, as laboratories and libraries".[33] For this reason they should be treated with care and not be easily sacrificed, qualified or denied.

4 THE RATIONALE FOR UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM

The rationale for university autonomy and academic freedom is, as is mentioned above, to be found in the nature and function of the university. This is the generation, advancement and dissemination of knowledge through teaching and research, which is not an end in itself. The advancement of knowledge is essential for the improvement of the quality of life of society, whether it be physically, socially, economically, spiritually or politically.[34]

This is based on the assumption that knowledge can be advanced only if there is freedom of inquiry, which entails freedom of thought and expression as well as freedom to criticise without fear of sanctions, however unpopular or unorthodox the views expressed may be.[35] As Turner puts it:

> "Academic freedom is not therefore some arcane and anachronistic privilege. It is to the academic what judicial independence is to judges, freedom of conscience to the clergy, the protection of sources of information to the journalists, parliamentary privilege to the MP, the exercise of clinical judgment to the doctor, the right of pursuit to the policeman. It is the simple and basic condition for the job."[36]

There is ample evidence that, throughout history, considerable progress has been made as a result of the growth of knowledge which has led to the better understanding of ourselves, our institutions, and the environment in which we live. Notwithstanding this, experience teaches us that great discoveries and advances in knowledge are often highly unsettling and distasteful to the existing order. It is rare that individuals have the intelligence and imagination to conceive those ideas and the courage to express them openly. If we place a high premium

---

32 Henkin 2–3.

33 MacIver 11; Chapman 8.

34 Tight 117 ff; Jasper 455; MacIver 10; Nolan 5 ff; Rabban "A functional analysis of 'individual' and 'institutional' academic freedom under the first amendment" 1990 *Law and Contemporary Problems* 232; Loizou 27 ff.

35 Turner "The price of freedom" in Tight (ed) *Academic freedom and responsibility* (1988) 106; MacIver 8–15.

36 Turner 107; see also Rabban 233.

on progress, we cannot afford to restrict such persons by imposing orthodoxies, censorship and other artificial barriers on creative thought.[37]

It does not mean that all intellectual thought is infallible. For this reason it has been said that commitment to academic freedom is more a matter of faith than a product of logic and empirical demonstration. It is always likely that the exercise of this freedom can produce mistakes and misconceptions which may mislead the public or lead to the adoption of faulty and harmful policies. The solution is not to censor academic freedom but to encourage it, so that in the process ideas can be subjected to critical scrutiny and errors can be corrected through continuing argument and debate.[38]

Academics should be allowed to subject any idea or practice to critical scrutiny, however hallowed by veneration or practice. Indeed, one of the most important roles of a university, in its service to the society that sustains it, is constantly to subject to critical scrutiny and review that society's institutions, policies, goals, value systems, and its self-image.[39] In doing this, the university should not be what has been regarded as an "ideological handmaiden of the state".[40] On the contrary, the university and its graduates should be able and free to act as critics and agents of social renewal and reconstruction. This does not mean the destructive criticism of the state or plotting its violent overthrow, but rather that social, moral and political issues of contemporary modern concern are subjected by universities to debate while alternative value systems are compared and critically examined. Universities should also be able to challenge existing beliefs and conventions if these are in conflict with justice and truth.[41]

The fundamental question is, as Pontius Pilate once put it, "What is truth?" While no attempt will be made here to answer that question, it is the very existence of that question which necessitates free inquiry so that no one can claim to have a monopoly on truth. There must be a continuous search for truth, which implies the challenging of conventional wisdom and accepted conventions. Moreover, while no attempt will be made here to define justice, there is no doubt that justice is important and that the continued appraisal of societal practices is essential if justice is to be done among fellow human beings. It would not be possible to challenge existing theories and practices if academic freedom were restricted. It is for this reason that academic freedom has been regarded as the very life-blood of a university. In its absence, the mission of a university in society atrophies.

Academic freedom entails that a university should be free to follow its traditional role of pursuing the truth. As Higgs points out

> "a university must be free to weigh up different schools of thought, political, economic and social, a university must be free to disseminate insights flowing from

37 Bok 18.

38 *Ibid.*

39 Higgs 165; Shils 441; Mahony "Autonomy and the demands of the modern state: a systemic study" 1992 *Higher Ed Rev* 8–10.

40 Alexander "The university and morality: a revised approach to university autonomy and its limits" 1986 *Journal of Higher Education* 437. Centlivres *et al* 10 was saying more or less the same thing when he remarked that "A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest"; see also MacIver 11.

41 Higgs 165.

> scholarly activities; a university must be free to appraise trends and tendencies in society, based on scientific research; a university must be free to pass on its knowledge to all students who are capable and wish to learn; and a university must be free to establish a climate in which its members may contemplate and be creative."[42]

It has been pointed out that academic freedom can thrive only within an autonomous and democratic institution and in a democratic and free society. The reason why university autonomy is essential for facilitating academic freedom is the assumption that those who manage and direct the affairs of the university are best equipped by knowledge and experience to run a university and to determine the parameters of academic freedom. As Brook points out:

> "Put in its simplest terms the case for academic freedom for university teachers rests on the belief that, provided he is fit for his job, the man on the spot knows best. This is true of most kinds of work, but there are many occupations, of which university teaching is one, that lose their meaning if there is any attempt to interfere with the independence of the man who is carrying out the duties of that occupation. Those who are paying the salary of the man concerned do not thereby acquire the right to interfere with the way in which he does his work and the first test of fitness to undertake work to which the term 'professional' is often applied is the determination not to allow the paymaster to abuse his position. A doctor's diagnosis and treatment would be valueless if they were prescribed by those who paid his fee, and an accountant must be prepared to arrive at conclusions whose publication will expose and ruin his client. The university teacher should make a similar claim. It is essential that a university teacher or researcher should follow an argument to its conclusion, whatever that conclusion may be, and he cannot hope to do that if his job depends on his reaching one particular conclusion. The success of universities depends on the quality of the teachers and students that they can attract, and neither teachers nor students of the right quality are likely to be attracted to universities unless they enjoy freedom. People are fond of saying, in connection with government grants to universities, that those who pay the piper must call the tune, but, if there is any truth in this it is important to define what we mean by calling the tune."[43]

It is quite clear that the university ought to have control over the awarding of degrees and the methods of teaching and researching to be followed. This follows naturally from the fact that it is the authority in the area of the acquisition of knowledge and rational inquiry. It is the institution responsible for knowledge acquisition and testing claims to knowledge and for inducting members of society into procedures for acquiring and testing knowledge. The university's authoritative status in matters of the acquisition of knowledge and rational inquiry also provides the main justification why the university has to exercise control over who should be employed as teacher and researcher. It is only the university that is competent to judge who among the candidate teachers and researchers is of the appropriate or highest academic standard and who is not. This does not mean that the university is not subject to limitations in this regard. There may well be other factors it has to consider. While, for instance, the university is not supposed to take the factor of race into account, it may legitimately do this in order to address the racial imbalances in its staff complement. It may also prefer to appoint a South African as opposed to a non-South African.[44] The university is also in the best position to determine who should be admitted as students.

---

42 Higgs 167; see also Centlivres *et al* 10; Shils 441.
43 Brook 145.
44 Miller 34.

The mission of a university is committed to the responsible exercise of freedom of expression and of inquiry. In this way, a university in its pursuit of truth should "place genuine academic thought in permanent opposition to received dogmas, and will seek to teach people how to think, and not dictate to them what they should think".[45] It is a right that is liable to abuse but should not be abused.[46]

Similar sentiments were expressed by Centlivres *et al*, in the following terms:

> "A university is characterised by the 'spirit of free enquiry', its ideal being the ideal of Socrates – 'to follow the argument where it leads'. This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself."[47]

Some of the quotations made above seem to emphasise a different perspective of the rationale or justification for academic freedom. This perspective is to the effect that academic freedom is justified by the very nature and role of a university. According to this view, academic freedom is defensible on the ground that it is unjust for persons or groups to prohibit someone from doing or to punish him for doing what they have demanded or expected of him. Universities or higher-education institutions expect teachers and scholars to seek the truth in their various fields of inquiry. Universities themselves are expected to be involved in the pursuit of truth. It would therefore be unfair to prevent academics or universities from doing what they are supposed to do. A university that does not pursue truth and the advancement of knowledge is not a university in the strict sense of the word, even though it may claim to be.[48] This view is not necessarily in conflict with the utilitarian view of academic freedom; it may be regarded as the other side of the coin.

Academic freedom is conducive not only to the creation and expansion of knowledge but also to artistic and scientific creativity. Persecution or absence of freedom impedes both creative and scientific work and "it is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation".[49] This does not mean that lack of freedom and persecution completely stifle these, but they make their realisation difficult. As has been said:

> "Persecution does not preclude creation, of course, any more than it can prevent scientific speculation. After all, *The Pilgrim's Progress* emerged from a prison, as did Grotius's *Introduction to the Jurisprudence of Holland*; and Galileo's *Dialogue of the Two Principal Systems of the World* was published after he had been warned by the Inquisition."[50]

But the ideal is that a university should operate in an atmosphere which encourages free inquiry and scientific and artistic creativity.

---

45 Higgs 167.
46 MacIver 8.
47 10.
48 Jones "Academic freedom as a moral right" in Pincoffs (ed) *The concept of academic freedom* (1975) 44 ff.
49 Centlivres *et al* 10–11; see also Beinart *et al* 2.
50 Centlivres *et al* 11.

Support for academic freedom is not synonymous with encouraging indolence. For this reason, a university teacher cannot claim to be entitled to lecture or not to lecture at the whim of the moment under the guise of academic freedom. If that were so, the university would be as much entitled to be capricious in the payment of his salary. "One should be unsympathetic towards a university teacher who claims that to lecture when he does not feel like doing so is unfair to his students because it would mean that he was not giving them his best."[51]

Although university autonomy and academic freedom are indispensable for the acquisition and dissemination of knowledge for the betterment of society, they are none the less often stifled. The society served by the university or scholar often puts obstacles in the way of his or her service in the form of prejudice, fear, short-sighted interest, complacency and sheer ignorance. The scholar himself may be subject to temptation from within and from without.[52]

5 ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY IN CONTEMPORARY SOCIETY

The perennial problem of organised society is human selfishness, resulting in the hunger for and abuse of power on the part of the rulers and those who are in possession of political power. Lord Acton's famous aphorism that power tends to corrupt and absolute power corrupts absolutely remains true even today. The corrupting influence of power often leads to the violation of the rights of the individual or institution. The violation of individual rights usually leads to conflict and instability, and society in the process suffers. This is a situation that must be avoided. Even in the absence of conflict and instability, society suffers if certain fundamental rights are violated through the abuse of political power. The challenge of democracy has always been how best to limit the abuse of power and to direct its use to good ends.[53] This has been largely responsible for the evolution of rights and guarantees in society. Despite the existence and recognition of these rights, they are never completely beyond threat. For this reason, they need constant appraisal and redefinition. They also need vigilance and effective protection. This is true of university autonomy and academic freedom.

It is usually governments and government officials that violate the rights of individuals and institutions. From the earliest development of universities, there has been mutual rivalry between the university on the one hand, and the government and the church on the other. This is usually because universities are often critical of the practices of governments and other organisations of society. Universities emphasise rationality whereas politicians and churches often appeal to emotions and established practices and beliefs of society. As a result, governments often react by limiting the autonomy of universities and academic freedom if universities prove troublesome in their criticism of what governments do. This should not happen. The government's need to govern and a university's need to enquire freely should be allowed to coexist "in a complex, delicate and trustful balance". Government and university should recognise each other's distinctive natures and their fundamental missions in order "not to maul and manipulate each other".[54] But this is more easily said than done. In order to

51 Brook 155.
52 MacIver 10.
53 Cowen *The foundations of freedom* (1961) 83.
54 Higgs 167.

counter government influence on universities, both the institution of university and individual academics are vested with certain rights in the form of university autonomy and academic freedom which they can assert if the government oversteps the mark.

Governments of developing countries may sometimes emphasise other ideals which have to be attained at the expense of university autonomy and academic freedom.[55] The government often intervenes in internal university matters, with unfortunate results. Too much government interference in the internal affairs of a university often results in the academic ethos of a university suffering and the university being unable to attain its goal of being a beacon of light for society in general.

In most countries, governments are responsible for subsidising university education. Government subsidy is always given with an implicit expectation of loyalty to the government.[56] If the university does not toe the government line, the government may react negatively to this. There is no doubt that governments feel considerably more comfortable if they have the support of universities in what they do. In the process, university autonomy and academic freedom suffer. Society itself may unwittingly aid and abet this. The reason for this is that both government and society may hold ideas which are wrong. People in general tend to defend established institutions and practices even if they are wrong and unjustifiable. They then become hostile to any person who challenges those practices or institutions even if it may not be in the best interest of society in the long run to retain those practices or beliefs. The reason for this is that change is uncomfortable for many people. It brings about uncertainty and anxiety, whereas to follow established practices is both easy and convenient.

The problem of academic freedom, of course, is not that what happens at universities is the exclusive concern of their teachers and students. The problem is, rather, how to satisfy the government's legitimate interest while the government interferes as little as possible with the traditional freedom of universities.[57]

6 THE CONSTITUTIONAL PROTECTION OF ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY

Rights may not be problematic when considered individually. But when they are considered in the context of other rights, it becomes necessary to weigh each right against others in order to come to a decision that is fair and just to the protection of each right. The South African Constitution contains a chapter on fundamental rights,[58] which is binding on the legislative, executive and judicial branches of government.[59] Although a university is not part of the government, there is no doubt that the provisions on fundamental rights will be applicable to it as a result of the provisions of section 8 of the Constitution. A university is also entitled to certain rights in terms of the Constitution: in terms of section 8(4) juristic persons are entitled to the rights contained in the bill of rights, to the extent that the nature of the rights permits.

---

55 Thompson "Some problems of Southern African universities" in Van der Merwe and Welsh (eds) 280 ff.

56 Bickel "The aims of education and the proper standards of the university" in Seabury (ed) *Universities in the Western world* (1975) 6.

57 Brook 155.

58 Ch 2 of the Constitution of the Republic of South Africa, Act 108 of 1996, which succeeded the interim Constitution (Act 200 of 1993).

59 S 8(1) of the Constitution.

Section 16(1) provides:

"Everyone has the right to freedom of expression, which includes –

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research."

Although the Constitution does not expressly protect institutional autonomy, it is accepted that academic freedom includes institutional autonomy. Academic freedom, which is guaranteed in section 16(1)(d), includes both individual academic freedom and institutional autonomy. Institutional autonomy may be construed from the provisions of section 8(4), which entitles juristic persons to certain rights protected by the bill of rights, to the extent that the nature of the rights permits. The NCHE also supported the idea of academic freedom and institutional autonomy.[60]

A fundamental question is whether universities are bound by the bill of rights. Higher-education institutions provide education, which is strictly speaking a function of government. This is so even though these institutions are autonomous and may even act against the government. They are none the less established by the state to perform this function. In the performance of this function, they should be bound by the provisions of the bill of rights. In the United States the Supreme Court developed the "doctrine of state action", which led to constitutional norms being applicable where private persons or institutions performed governmental functions. What is meant by governmental functions has been widely debated. The Supreme Court tried to restrict the scope of this category of activities to those that are traditionally associated with the organs of state.[61]

As is said above, education is strictly speaking a function of government. Moreover, universities and other institutions of higher education stand in a relationship of inequality with their staff, and even if they are not regarded as organs of government, they should, in the performance of their functions or the exercise of their authority, be bound by the provisions of the bill of rights because of this. The academic freedom of an individual would mean little or nothing, even if it could be enforced against the state, if individual universities were entitled to violate it with impunity.[62] Van der Vyver, however, is of the opinion that if universities are bound by the bill of rights, their rights to autonomy as juristic persons would be threatened.[63]

A question that has often been asked is why rights entrenched in the Constitution should bind a democratically elected parliament. The reason behind this question is that it is regarded as anti-democratic for a group of unelected judges to bind the majority of the people's elected representatives. The answer to this is that a bill of rights encapsulates the rights and interests of the people. By elevating these rights to the status of constitutional rights, the people bind their elected representatives to defer to these rights so that transient majorities should not violate them. After all, the majority can also be wrong. This is implicit in the

60 NCHE Report.

61 For a discussion of this, see Nowak and Rotunda *Constitutional law* (1991) 457 ff.

62 Malherbe "Die onderwysbepalings van die 1993 Grondwet" 1995 *THRHR* 10.

63 Van der Vyver "The private sphere in constitutional litigation" 1994 *THRHR* 392. (He was, however, writing about the interim (1993) Constitution – Editor.)

mandate of the elected representatives. Strictly speaking, the elected representatives are supposed to execute the mandate of the people. No person would mandate a representative to act against his interests. This is also implicit in the practice of regular elections in terms of which the electorate can vote a government with which they are not satisfied out of power. Elections take place at certain intervals. In the mean time there should be some mechanism that can keep the elected representatives in check. That is the role of, *inter alia*, a bill of rights. The role of the judges is merely to call to order the elected representatives so that they do not violate the rights of the people. This obviously assumes that the judges will always be right in their interpretation – a highly doubtful assumption. None the less, the rationale is that the people regard these rights as being so fundamental that they should not be easily violated.[64] There is no doubt that there will always be those who will not be satisfied with this arrangement.

The scope of academic freedom as a constitutional right will depend largely on how it is interpreted by the courts and on the powers of the university in terms of autonomy and self-governance. This is usually determined by the Act of each university, which determines the powers of the university as a public-law corporation and which also determines the parameters of academic freedom.

Apart from what is said above, the constitutionalisation of academic freedom does not create a new right. It merely entrenches or elevates a right that has existed over the years and makes it more secure. After all, the primary function of a bill of rights is not necessarily to create new rights, but to protect existing rights from easy violation by the government or other powerful interests. Although the content of that right may be adjusted according to the exigencies of the situation, one can have recourse to history to determine what the content of that right is.

Academic freedom generally entails that the university, as an autonomous employer, is free to enter into contracts and may determine its own conditions of service, subject to the recognition of the freedom of vocation as acknowledged by virtue of its autonomy. This means that an academic member is entitled to membership of the university and to participate in its governance. He is relatively free to choose his field of study and research and may continue his academic work without undue influence from the employer or the government, and subject to the university's syllabi, curricula and regulations. Once he has become permanent, he enjoys all the benefits of that position and is entitled to hold office until he reaches the age of retirement. He may be dismissed for misconduct, but only after he has received a fair hearing.

The freedoms of the academic staff are, however, limited by the fact that the employer is free to select and appoint its members and employees, who must act in the best interests of the university. Obviously once they have been selected or appointed, they may be entitled to membership of and participation in the structures of governance, albeit in accordance with the guidelines provided by the university. Although they are free to pursue their own independent studies and research, these may be affected by rationalisation and specialisation within the university. There is no doubt that academic tenure and security depend on the

64 Davis *et al* "Democracy and constitutionalism: the role of constitutional interpretation" in Van Wyk *et al* (eds) *Rights and constitutionalism: the new South African legal order* (1994) 1 ff.

financial resources of the employer, rationalisation within the system and the possible retrenchment of staff. The employer also determines the grounds for misconduct and disciplinary procedures although the court may intervene where the university has acted in an illegal or irregular manner.[65]

University autonomy is also traditionally recognised as implying self-governance on the part of the university. This has been the case, with some exceptions, throughout the history of universities. It further refers to the freedom of the institution to govern itself, while academic freedom relates to the individual academic who exercises this freedom in the university milieu in terms of academic-related activities.

A crucial question is whether university autonomy is compatible with democracy. The answer is obviously that autonomous institutions in general, and a university in particular, are compatible with a democracy and specifically a pluralist democracy.[66] The reason behind this is that autonomous universities constitute an essential ingredient of democracy; university autonomy is regarded as an integral feature of democracy because it is a way of institutionalising freedom of research and teaching. This does not mean that there cannot be tensions and even conflicts between democracy and academic freedom in general. There may well be such conflicts. There is no doubt that there is interdependence between freedom and truth. Totalitarian systems have demonstrated that in order to abolish freedom it is necessary to control thought. In this sense academic freedom is a necessary ingredient of democracy, and constitutional democracy offers a better guarantee than any other political system that academic freedom will be respected and protected. This interdependence, however, does not preclude friction. Since universities are institutions that are subsidised by the government, some feel that government and society should have a greater say in and influence over the conduct of universities. Moreover, it has also been contended that, as the institution which provides professional training at the highest level, the university should not have an exclusive right to determine what kinds of knowledge and what professional skills are required by society and the economy.[67]

Some people obviously have a fundamental problem with a democratically elected government giving money to unelected officials of autonomous institutions to spend as those officials and institutions deem fit. However, this can be justified on the ground that good universities produce good knowledge and reliable information as well as analytical skills which the citizens may find useful in order to participate effectively in the ordering of society. Universities cannot do this effectively if they have to be restrained by the political agenda of the government in power at a particular time. Universities also improve the socio-economic well-being of the broader community by generating useful knowledge which may lead to the production of useful inventions and the consequent improvement of the quality of life of society. They can do this only if they are not subject to prescription by a transient government on what their research priorities should be.[68]

---

65 Bray 224.

66 Dahl *Dilemmas of pluralist democracy: autonomy vs control* (1982) 1 ff.

67 Kielmansegg "The university and democracy" in Chapman (ed) *The Western university on trial* (1983) 46 ff.

68 Smith 681.

The main mission of the university is to pursue academic excellence through teaching and research for the benefit of the community. The university staff and students also form part of the community, so that the university is involved in a complex relationship which includes society, the government and the community. The university is also dependent on the state for its financial resources. The autonomy of the university is therefore not absolute but limited, because the university is not only dependent on the state for the subsidy but also has to act within the law. The very fact that universities are subsidised by the government has led people to believe that a university cannot claim autonomy from the government, in line with the saying that he who pays the piper calls the tune. If one considers that, strictly speaking, the taxpayer is the one who subsidises the university and not the government, which is merely a trustee, then the picture changes. The taxpayer consists of citizens who belong to different shades of political opinion, and if the taxpayer is regarded as the sponsor of the university, then the university has an obligation to be critically analytical of everything for the benefit of all members of society.

7 CONCLUSION

Although academic freedom is protected in the Constitution, it is not beyond threat. Similarly, although institutional autonomy is recognised as necessary for academic freedom, it is subject to many threats. These may take the form of transformation, affirmative action, other political factors and sometimes legislation. It is necessary to consider certain of these.

BUTTERWORTHS-PRYS

Die Butterworth-prys vir die beste eerstelingbydrae is toegeken aan L Wolhuter *vir haar artikel "Levelling the playing-field: a feminist redefinition of the crime of rape".*

Defending insider trading regulation on ethical and scientific grounds: The inequality of legal access theory

Patric C Osode
LLB (Hons) LLM SJD
Senior lecturer, Department of Mercantile Law, University of Fort Hare

OPSOMMING

Die regulering van binnekennis-transaksies op etiese en wetenskaplike gronde verdedig: die "ongelykheid van die toegang tot die reg"-teorie

Binnekennis-transaksies ("insider trading") in maatskappyeffekte en verwante finansiële instrumente is 'n praktyk wat deurgaans die spook van bedrog of oneerlikheid opjaag. Samelewings dwarsoor die wêreld reageer daarop deur die betrokke praktyk onwettig te verklaar sonder om indringend ondersoek in te stel na die wenslikheid of gepastheid van so 'n reaksie. Toe die behoefte die eerste keer ontstaan het om gesonde beleidsoorwegings daar te stel vir die populêre omvattende statutêre beperkings op die betrokke praktyk, het konserwatiewe regspraktisyns en regsakademici baie gou "insider trading" as "inherent onregverdig", "immoreel", en "verderflik" bestempel. In teenstelling hiermee het die radikale regspraktisyns en regsakademici van die "wet en ekonomie"-beweging, met gebruikmaking van die analitiese gereedskap van die ekonomiese wetenskap, oortuigend aangetoon dat die betrokke reaksie van die reg op valse aannames berus het en dat binnekennis-transaksies in werklikheid voordele vir die aandelemarkte kan inhou.

As gevolg hiervan het dit noodsaaklik geword vir die ondersteuners van statutêre verbiedinge op binnekennis-transaksies om hulle posisie te heroorweeg en om dit te regverdig op grond daarvan dat sodanige wetgewende reaksie ondersteun kan word deur, onder andere, gesonde ekonomiese denke en oorweginge. Hierdie artikel artikuleer 'n verdediging van die regulering van "insider trading" op grond van wat die skrywer verkies om as "die ongelykheid van die toegang tot die reg"-teorie te beskrywe. Dit dui aan dat, volgens daardie teorie, die primêre en aanneemlikste rede vir die verbod op binnekennis-transaksies die feit is dat dit gewoonlik gebaseer is op 'n inligtingsvoordeel wat nie oorkom kon gewees het deur die benadeelde handelsvennoot by wyse van óf harde werk, óf die aanwending van finansiële bronne nie. Hierna demonstreer die artikel dat dwingende ekonomiese redes wel bestaan waarom 'n omvattende statutêre verbod gebaseer op dié teorie gehandhaaf behoort te word.

1 INTRODUCTION

Insider trading in securities has acquired a notoriety in the last five decades. Although insider trading cases naturally feature a diversity of fact patterns, they each possess certain elements[1] which, in concert, generate the spectre of fraud or

1 These elements are: (1) the possession of an informational advantage by one of the parties to a securities transaction which could not have been overcome by the other party through

continued on next page

dishonesty that has consistently dominated discussions about what the attitude of the law towards the practice ought to be. Upon discerning these elements, many observers of the financial markets may be surprised to hear that there is an ongoing debate in North America whether insider trading should be the subject of regulation by "public ordering".[2] Proceeding upon intuition, emotion and everything else unscientific, members of the public have for several decades expressed outrage at the reports of insider trading in the financial press.[3] Worse still, these popular reactions to the practice seem to have chilled any attempts at bold discussion of the possible benefits of the practice in the financial press.

Lawyers and legal scholars driven by the traditions of their profession and the nature of their training, did not initially help to illuminate the issues and interests at stake. Conceptualising insider trading as essentially a transaction between two contracting parties and potential litigants, law students were unable to see beyond these elements of insider trading cases.[4] Hence they inevitably characterised insider trading as "inherently unfair", "immoral", and "pernicious" – all of which characterisations primarily refer to the informational inequality between the parties.[5]

The debate that now surrounds the subject of insider trading regulation has become intense largely because of the case made for "deregulation" by a number

---

the exercise of diligence, industry or the expenditure of financial resources; (2) the exploitation of an informational advantage by a party who obtained the advantage either wrongfully or in circumstances sufficient to notify her that the subject information was not to be used for personal aggrandisement; and (3) the making of abnormal profits or the abnormal avoidance of losses by the informationally advantaged party relative to the performance of other market participants.

2 This phrase "public ordering" is used simply to denote regulation of socio-economic phenomena by means of "mandatory" statutory provisions enforced by government agencies. A statutory provision is considered mandatory in nature if it is expressed in terms that make it the governing law in all relevant circumstances regardless of contractual provisions or other private arrangements to the contrary.

3 An excellent example of such a reaction can be found in the commentary of a financial affairs journalist on the developing insider trading scandal involving the shares of a JSE-listed company, Automakers Ltd. In that commentary, Peter De Ionno writes simply that "insider trading is plain cheating. It is as unfair as rigging a roulette wheel". In no part of the commentary does this commentator suggest that it might be possible that both the stock market and the participants may have benefited from the insider trading activity. See *Sunday Times*, 1997-01-26 25.

4 Here in South Africa, as in virtually all other Commonwealth jurisdictions, much of the recent academic commentary on the subject of insider trading has focused mainly on the best way to devise and enforce a statutory prohibition of the practice, little or nothing being said about the possible positive fallouts of the practice. See eg Luiz "Insider trading: a transplant to cure a chronic illness" 1990 *SA Merc LJ* 59; Luiz "Prohibition against trading on inside information – the saga continues" 1990 *SA Merc LJ* 328; Botha "Control of insider trading in South Africa: a comparative analysis" 1991 *SA Merc LJ* 1; Van Zyl and Joubert, "The European Union Directive on insider trading: a model for South Africa" 1994 *SA Merc LJ* 291; and Luiz "Insider dealing in the United Kingdom: some comments and some comparisons" 1995 *SA Merc LJ* 204.

5 Prof Henry Manne was referring to these limitations in legal reasoning when he stated that "when lawyers, judges and law professors are faced with issues of broad social and economic consequences, their tendency is to approach the subject with relationships between specific individuals in mind". He argued, quite rightly too, that that tendency explains their acceptance or rejection of a practice based on their notion of the fairness of the transaction as perceived by the two individuals involved. See Manne *Insider Trading and the stock market* (1966) 2–4.

of legal scholars applying the tools of economic analysis to the study of law.[6] These "law and economics" scholars assert, *inter alia*, that one has to evaluate every socio-economic phenomenon that is the subject of public regulation and the related legal rules from an economics perspective.[7] They conclude that only those transactions that are "inefficient" should be declared "wrong" by the law and prohibited as such. The normative implication inherent in that conclusion is that all legal rules relating to the practice of insider trading should conform to the standard of "efficiency" which, according to the scholars' analyses, would only produce rules whose enforcement would result in the optimal allocation and use of society's resources.

In the light of the recent "law and economics" scholarship on the subject of insider trading, it has become imperative for the exponents of insider trading regulation by public ordering to invent new justifications or to rearticulate old ones in terms that clearly demonstrate that there are, *inter alia*, sound economic and compelling efficiency considerations that argue for that form of regulation.[8] In articulating the "inequality of legal access theory", this article is basically an attempt to advance the case and cause of "public" regulation of insider trading.

2 THE INEQUALITY OF LEGAL ACCESS THEORY

As already pointed out, a static feature of insider trading is that it involves transactions for the sale of securities in which one party has an informational advantage over the other. More importantly, that advantage is usually not the product of the exercise of superior analytical skills or diligence, but rather often stems from the exploitation of a strategic position either in the "issuing corporation",[9] in the securities marketplace or in a corporation or government department with which the issuing corporation may have to deal from time to time. The *inequality of legal access theory*,[10] articulated here as a basis for the statutory proscription of insider trading, postulates that the practice ought to be prohibited because it is inconsistent with the legitimate expectations of those members of modern society who come to the securities marketplace seeking to invest their hard-earned savings profitably. This theory is not based on a perceived societal

---

6 The emergence and importance of this species of legal scholarship has recently been explored by a South African academic commentator. See Botha, "The incorporation of the "economics of law" into university law curricula" 1992 *Stell LR* 319.

7 As is to be expected, the scholars have pointed us to the fact that the subject of insider trading involves issues that are substantively economic questions and not merely ethical or moral ones. Given this character of the inherent issues, the application of the tools of economic analysis and economic reasoning to resolve them cannot but be accepted as both logical and superior to the traditional legal approach.

8 This is a tacit acceptance by the present writer of the view held by a number of academic commentators that the problematic question whether it is necessary and desirable to restrict the practice of insider trading is not one that can be satisfactorily resolved by purely moral considerations. See eg Rider and Ffrench, "Should insider trading be regulated? Some initial considerations" 1978 *SALJ* 80.

9 The term "issuing corporation" is used here simply to refer to public corporations. The bulk of insider trading involves transactions in these companies' securities.

10 The central idea and basic elements of the type of defence of comprehensive insider trading prohibitions, which this writer prefers to describe as the "inequality of legal access theory" was first articulated by the veritable Harvard University Law School professor, Victor Brudney, in his seminal article: "Insiders, outsiders, and informational advantages under the federal securities laws" 1979 *Harv LR* 323.

or investor moral aversion to the practice, but as will be shown below, it is founded on, compelling efficiency considerations. Accordingly, it is presented neither as an equality theory, nor as a moral (ethical) theory.

2 1 Legitimate expectations

The average stock market participant, in coming to the market, expects that it will function in such a manner that, if he were to decide to enter into any particular transaction, he would have *within his reach* all *available* information relating to the current worth of the securities concerned. As a corollary, he expects that all such information as is not within his reach is similarly beyond the reach of anyone with whom he may deal.[11] This is not to say that every investor in the securities market will carefully apprise himself of all such information before consummating any transaction in the market. Rather, the reasoning of the average investor is that if he chooses to be meticulous and thus peruse "existing price-sensitive information" personally or through a market professional (acting as his agent), all such information should either be within his reach or be unavailable for use by anyone else in securities trading.

What makes this expectation legitimate in the context of the securities markets and why should an investor feel aggrieved when she realizes that a particular trade she has concluded was with a person having an informational advantage? The answer to these questions must begin with both an acknowledgement of the peculiar nature of most unpublished price-sensitive information involved in insider trading and an appreciation of the specialised marketplace in which securities transactions take place. It is submitted below that these peculiarities of the said information and marketplace provide an adequate foundation for the legitimacy of the investor's expectations.

2 2 The special nature of the stock market and inside information

The capital market is not one of the known and easily identifiable markets on which assets are traded; rather, it is a market of intangible assets of both a long and a short term nature.[12] The United States Congress has described the commodity traded on stock exchanges as "intricate merchandise".[13] It is plausible to suggest that it is in recognition of this that the business corporations and securities statutes of the modern world generally require that issuing corporations

---

11 Rider and Ffrench put the point most succinctly when they wrote: "The investor realizes that there are elements of risk in investing. But he does insist that all who are investing be suject to the same chances. If a class of investor is exempt from the inherent vicissitudes of the marketplace, the public is justifiably perturbed." See Rider and Ffrench, fn 8 above 97.

12 Ajayi *Financial and legal implications of the Nigerian capital market* (1984) 1.

13 See HRREP No 85 73d Cong 1st Sess 8 (1933). It should be noted here that unlike company securities, real commodities, goods and other items of property (such as cars, houses, etc) offer buyers the opportunity to inspect. The buyer may carry out the inspection either personally or through an agent. Specifications can also be requested for standardised consumer products. All these are absent in the case of securities. It is submitted that these fundamental differences between securities and other forms of property furnish the answer to the exasperation that certain scholars have shown to the pursuit of the equalisation of informational access by current regimes of insider trading regulation. See eg Fisch "Start making sense: an analysis and proposal for insider trading regulation" 1991 *Georgia LR* 179 221; and Macey *Insider trading: economics, politics and policy* (1991) 22 *et seq*.

provide a continuous description of their businesses and state of affairs, not only to their shareholders, but to the investing public generally.[14] This obligation is discharged through the medium of mandated information filings with regulatory agencies, periodic financial reports, extensive and frequent press releases (best exemplified by "cautionary statements" published by South African companies involved in talks or negotiations likely to have a significant impact on the value of their securities), and meetings with securities analysts and other market intermediaries.[15]

Accordingly, at any particular point, there is available and circulating within the market price-sensitive information about listed securities that is sufficient to enable interested investors (and hence the market) accurately to assess the worth of their securities. As is to be expected, new developments occur which have implications for the current value of those securities. The whole debate about the regulation of insider trading arises out of the question whether persons fortunate enough to gain possession of information regarding those developments (before their disclosure to the public) should be allowed to conclude trades on the securities markets with parties not so informed.

There are two types of information upon which insider trading may be carried out. The first is information which relates to a corporation's expected earnings, prospects or assets. Such information will inevitably come from within that corporation. This information, known technically as *corporate information*, would include news about research breakthroughs, establishment of new plants, a significant discovery of mineral resources, a rush of new orders or a potential merger, anyone of which can be expected to cause a rise in the price of the corporation's stock upon public disclosure.[16] There are other types of information that may have significant implications for the value of a firm's securities and yet emanate from outside that firm. Thus they may be entirely unknown to that firm's insiders. This type of information, technically referred to as *market information*, concerns transactions in a corporation's securities that are certain to have an impact on their future price. Examples are an impending tender offer at a price higher than the current market price, a decision by the holder of a large block of shares to liquidate her holdings, or even an impending decision of a stock exchange to delist a company's shares. It is clear that whether the information on which an "insider trade" is predicated is corporate or market information, it is information that would ordinarily be instrumental to the average investor's decision to buy, sell or hold.

Allusion has been made to the fact that the inequality of legal access theory of insider trading regulation is not predicated simply on asymmetric information but is, rather, founded upon unequal legal access. In this lies the inequality of legal access. With respect to corporate information, it is a truism that this is information emanating from sources inside the firm. That being its source,

---

14 See Brudney fn 10 above 326.

15 *Ibid.* See also ss 285–310 of the Companies Act 61 of 1973 (requiring public corporations to prepare and publish annual financial statements, interim financial reports and provisional annual financial statements); and s 19(1) of the Stock Exchanges Control Act 1 of 1985 (requiring listed companies to disclose available information which, in the opinion of the President of the Stock Exchange, ought to be disclosed in the public interest).

16 To be sure, corporate information can also take the form of bad news, eg a significant fall in expected earnings or a significant decline in a manufacturing company's market share.

corporate information is readily available to corporate insiders who, as a practical matter, labour under the temptation either to trade upon the information or tip someone to do the same. It must be emphasised that corporate information is, by its very nature, *legally inaccessible* to outsiders who must, therefore, patiently wait for the subject information to be made public, usually by top management, subsequent to its decision that public disclosure of that information will not put any of the company's interests in jeopardy.[17] Beyond that, corporate information is, by its legal character, information which knowledgeable insiders are precluded by legal restrictions[18] from disclosing to investors. It follows that prior to a corporation's public disclosure of the inside information, outsiders wishing to trade in the secondary market in the corporation's securities cannot *properly* or *lawfully* obtain the information.

Market information is substantially similar to corporate information both in terms of being available to persons solely because of their profession or regular occupational interests and in the sense of being information which they are legally disentitled from disseminating.[19] Excellent illustrations would be the kinds of information which were the subject of the trading undertaken by the defendant in the famous American case of *Chiarella v United States.*[20]

What emerges from the above discussion of the nature of all price-sensitive information is that it is legally beyond the reach of the average investor acting personally or through a market professional. This is the basis of the inequality of legal access theory's postulate that securities trading upon price-sensitive corporate or market information ought to be the subject of legal prohibition by statute. That proposition of the theory is fortified by the opinion of Professor Victor Brudney that

> "what makes an informational advantage unusable by those who possess it in dealing with those who do not is the inability of the latter to overcome it lawfully, no matter how great may be their diligence or how large their resources".[21]

It must be conceded that the inequality of legal access theory has an aura of egalitarianism that goes with its articulation. However, it should not be mistaken

---

17 See Buckley, Gillen and Yalden *Corporations – principles and policies* (1995) 829 *et seq.*

18 These legal restrictions consist in the fiduciary or contractual obligations of company insiders and persons to whom the price-sensitive information is transmitted in the ordinary course of the company's business to maintain its confidentiality.

19 See Galeno "Drawing the line on insiders and outsiders for rule 10b-5: Chiarella v. United States" 1981 *Harv J Law & Pub Pol* 207–208; Beck "Of securities, analysts and printers: some reflections on insider trading" 1984 *Canadian Bus LJ* 385.

20 445 US 222 (1980). In this case, the defendant, Vincent Chiarella, was an employee of a financial printing press that, *inter alia*, printed tender offer (takeover bid) statements and related documents. Although the names of the tender offer targets were omitted from the various printer's proofs until the very final printing, the defendant was able to determine the identity of some of the tender offer targets on the basis of the information presented in the tender offer statements. The defendant then purchased the shares and stock options of the tender offer targets at a price that did not yet reflect the high probability, or even in some cases the certainty, of a tender offer being made for the shares of those target companies. Although the United States government in the lower courts successfully obtained a criminal conviction of the defendant for violation of the insider trading prohibition contained in the American securities laws, that conviction was set aside by the United States Supreme Court. The latter court was of the view that the mere trading on the basis of information that was unknown to the marketplace could not constitute a violation of the said prohibition.

21 Brudney fn 10 above 354. See also Rider and Ffrench fn 8 above 96–97.

as constituting another case for "market egalitarianism" in the securities marketplace if by that is meant a condemnation and prohibition of all trades based on some information asymmetry.[22] What the inequality of legal access theory suggests is that every regime of insider trading regulation must aspire to ensuring that the securities market is a place where there would be no trade in which one side labours under an informational disadvantage which cannot be overcome by the exercise of any amount of skill or diligence or the expenditure of financial or human resources. It is also apparent that under this theory, it is immaterial who is trading upon the unerodeable informational disadvantage – whether it is a corporate insider, a market insider or the tippees of any of these.

2 3 Efficiency (economic) considerations and the inequality of legal access theory

In the introduction to this article, mention was made of the fact that the inequality of legal access theory does not draw all of its strengths from the realm of ethics and morality. In fact, its derivation of any strength at all from that source is not deliberate but simply inevitable.[23] As will be shown in the discussion following, there are strong efficiency considerations which argue for the prohibition of the kinds of trade contemplated by the inequality of legal access theory, that is, trades founded on information that cannot be legally "accessed" by the informationally disadvantaged parties.

First of all, it is trite that at every point, the securities market has an impression of the value or worth of all company securities trading in it. That impression is no doubt the product of the securities markets' digestion of information disclosed by public companies pursuant to the continuous disclosure obligations imposed on them by both the Companies' Act and the rules of the stock and financial exchanges in which those companies' securities are listed and/or traded.[24] The developments on the basis of which insider trades may be consummated basically consist of information which renders the said impression of the market inaccurate or outdated. Accordingly, information relating to those developments is required by the market in order to review and update its assessment

---

22 Market egalitarianism, so construed, is an ideal that is both undesirable and unattainable. Because of the notorious fact that investors differ in the levels of intelligence and skills possessed, and in the amount of diligence and resources they are willing to bring to bear on their transactions, market egalitarianism is unrealistic. This observation is particularly appropriate if market egalitarianism postulates that parties to the purchase or sale of securities should deal "on a basis of equality and on the basis of market judgment rather than at the mercy of a buyer or seller with price-sensitive information undisclosed to them". See White "Towards a policy basis for the regulation of insider trading" 1974 *LQR* 496. Also instructive here is the observation of Prof Dan Prentice that while the phrase "market egalitarianism" has a reassuring ring to it, it is not particularly illuminating. He argues that if carried to its logical extreme, it would eliminate the use of all "informational advantages" and would require that parties to a transaction must, under all circumstances, inform each other of all material facts which they know or should know are not known by the other party and are not publicly available. See Prentice "Insider trading" 1975 *Current Legal Problems* 92. See also Lawson "The ethics of insider trading" 1988 *Harv J Law & Pub Pol* 727.

23 In this respect, the articulation of the inequality of legal access theory is consistent with the view that any case for the regulation of insider trading must go beyond mere appeals to commercial morality. See Prentice fn 22 above 91 *et seq*.

24 See Brudney fn 10 327.

of the underlying securities. This quality of the species of information in question makes such information indispensable to the continuing efficiency of securities markets' pricing mechanism.

The discovery and acquisition of price-sensitive information ordinarily requires considerable research for which the average investor is not equipped and for which market professionals would want compensation.[25] The necessary constant review and updating of the securities markets' impression of company securities and related investment instruments inevitably involves "search costs" which are least expensively (and, therefore, most efficiently) borne by those who possess the information.[26] A rule of law which, on the basis of the inequality of legal access theory, prohibits securities trading using unerodible informational advantages, will ensure prompt disclosure of new developments by companies that are the least cost furnishers of such information.[27] By the same token, such a rule of law would ensure the non-existence of incentives for outsiders to engage in searches for inside information (with a view to overcoming their informational disadvantages relative to trading insiders) and thereby waste finite financial and human resources.[28]

Secondly, prohibiting securities trading upon information that is legally inaccessible to the average investor is not inconsistent with the promotion of discovery values[29] which the law must also pursue. Exploration for price-sensitive corporate and market information is a service that is now generally recognised as being of value both for the efficient functioning of the securities market[30] and for the attainment of steadily increasing socio-economic prosperity. Accordingly, with due deference to the goal of preserving incentives to investigate and analyse within the market, the inequality of legal access theory does not preclude trading

25 *Ibid.*
26 *Idem* 327–328.
27 *Ibid.*
28 *Ibid.*
29 The phrase "discovery values" appears to have been used for the first time in the context of the insider trading debate by Prof Saul Levmore in his article entitled: "Securities and secrets: insider trading and the law of contracts" 1982 *Virginia LR* 117.
30 The protagonists of deregulation of insider trading would suggest that to the extent that the practice, if allowed, would transmit unpublished price-sensitive information to the market more rapidly (in comparison with mandatory disclosure laws), it is not antithetical to the goal of securing a securities market with an efficient price-setting mechanism. See Carlton and Fischel "The regulation of insider trading" 1983 *Stanford LR* 245; Haddock and Macey, "A coasian model of insider trading" 1986 *Northwestern Univ LR* 1449; and Macey fn 11 above. However, the choice that law and policy makers must make, is between an information-transmission device that is inconsistent with the promotion of discovery values by wiping out incentives for information gathering and analysis and a legal rule, founded on the inequality of legal access theory, which preserves those incentives and at the same time ensures the rapid transmission of relevant information to the market. It is submitted that the latter is preferable not only because of the former's adverse effect on the said incentives, but also because of the doubts that have been cast over the thesis that insider trading is a superior device for the transmission of unpublished material information to the securities marketplace. A further justification for the suggested choice is the fact that during the periods when inside information upon which abnormally profitable trades may be concluded is non-existent, the market's price-setting mechanism must depend on the skill and diligence of investors and their agents to continue the search for information invaluable for the continual evaluation and re-evaluation of securities prices. Hence the need to preserve the incentives for those activities.

on informational advantages derived from the exercise of superior analytical skills and diligence.[31] Stockbrokers, investment analysts and other market professionals are known to bring superior intelligence and analytical skills to bear upon their dealings on the securities markets such that persons trading with them would, more often than not, labour under an informational disadvantage.[32] To be sure, that is not the kind of overreaching which a mandatory statutory insider trading ban, founded on the inequality of legal access theory, must seek to prevent.[33]

The present theory therefore acknowledges that the pursuit of valuable corporate and market information by persons unconnected with issuing corporations requires the expenditure of time and money in research as well as talent and training in analysis.[34] In order to compensate for these costs, every credible financial market system must offer some reward. One such return is the opportunity to capitalise on the value of being the discoverer of the information.[35] Part of this article's thesis, therefore, is that efficiency considerations demand that trading upon such information be allowed. Indeed, even a company insider who,

---

31 It appears that this is what an English scholar had in view when he asserted that it was needful for every regime of insider trading regulation to preserve the gains derivable from legitimate market speculation. By such speculation, he meant the activities of stockbrokers and analysts, investment analysts and other market professionals involving the use of publicly available information to gain special insights into the worth of relevant securities. See Prentice fn 22 above 96.

32 Brudney fn 10 335.

33 A critic of existing regulation of insider trading might suggest that the reason is not obvious why the kind of asymmetric information trading engaged in by market professionals should give other investors more confidence in the securities marketplace than insider trading. It is, however, submitted that two plausible and indeed compelling reasons suggest themselves. The first is that the market professionals' trading advantage is not unerodible in the sense that it cannot be attained by other investors no matter the amount of resources, skill and diligence they are willing to invest. Indeed, the advantage can be readily attained by other investors via trading through such professionals as their agents in consideration for brokerage commissions, etc. In any case, it is well known that market professionals usually trade both for their clients and for their own accounts. The possibility of executing securities' trades with the benefit of the special insights of market professionals has been greatly enhanced by the growth of financial intermediaries and institutional investors who are large enough to afford the services. Secondly, the informational advantage of market professionals, being the product of the expenditure of skill and resources, is considered to be deserving of a reward by investors. This aside from the peculiar contributions that those efforts make to the efficient working of the financial system. There is no evidence or suggestion in the literature that investors expect the professionals to give up this type of trading advantage. Even if they did, such an expectation will not be legitimate, reasonable and justifiable and could be properly ignored by law and policy makers. However, the same cannot be said of the informational advantages enjoyed by traditional company and market insiders whose information is usually received by way of an internal reporting system rather than being the result of a discovery flowing from the exercise of skill and diligence by individual insiders. In this lies the basis of the fundamental difference in investor perceptions of the two forms of informational advantage and their impact on market integrity.

34 See Langevoort, "Investment analysts and the law of insider trading" 1990 *Virginia LR* 1023; Fischel "Insider trading and investment analysts: an economic analysis of Dirks v. Securities Exchange Commission" 1984 *Hofstra LR* 127.

35 Kronman "Mistake, disclosure, information and the law of contracts" 1978 *Journal of Legal Studies* 1; Kitch "The law and Economics of rights in valuable information" 1980 *Journal of Legal Studies* 716–723.

engaging in a securities transaction, enjoys an informational superiority that is a function of her superior analytical skills and familiarity with the securities marketplace ought to be allowed to keep the proceeds of such a transaction. That transaction is not offensive or repugnant to the primary concern that constitutes the foundation of the inequality of legal access theory, namely, the use of "unerodible" informational advantages in securities transactions.

Finally, the securities market is essentially the most important sector of the contemporary capital market. As such, it uses capital as its raw material. The need to ensure the optimal flow of funds into the securities market cannot therefore be overemphasised. In order to lay claims to legitimacy, securities laws and regulation must aspire to create an atmosphere in which there is trust and confidence in the securities markets.[36] The objective of regulation here is unambiguous: it is to ensure that people with surplus or investable funds have no doubts about the wisdom of investing in securities – about owning their respective shares of their country's economy. [37] To the extent that insider trading is inconsistent with investors' legitimate expectations, for the law to permit it would cause participation in the stock markets to suffer to the detriment of the larger economy.[38] Hence, the plausibility of the inequality of legal access theory is greatly enhanced by its postulation of a legal rule that tacitly recognises and honours those expectations critical to preserving and expanding investors' participation in the securities marketplace.

2 4 Insider trading on information acquired by outsiders fortuitously or casually

The prohibition or regulation of trading by outsiders armed with unpublished price-sensitive information which has been obtained fortuitously, accidentally or casually, presents a seemingly difficult task in terms of the enunciation of a theoretical or policy justification upon which such prohibition or regulation may be hinged.[39] The difficulty arises from the peculiar characteristics of the asymmetric

---

36 See "Insider trading: some questions and some answers" 1974 *Securities Regulation LJ* 323 331. (This is a reprint of a comment letter of two subcommittees of the American Bar Association.)

37 This conclusion is supported by the opinion of two leading commentators on the subject of insider trading regulation in common law countries to the effect that integrity in the capital markets is essential to mass capitalism. See Rider and Ffrench, fn 8 above 96. According to these commentators "public confidence is the prime requirement for an effective stock market . . . If the investor loses confidence, he will simply not invest with the result that companies will not get capital". *Idem* 96–97.

38 A Canadian study has found that senior management of the fifteen largest full service investment firms based in Toronto held the opinion that insider trading had the potential of causing investors in the securities markets to invest their money elsewhere. See Rosenbaum, Simmonds, Simpson and Vaidila "Corporate investment attitudes towards insider trading in Canada" 1984 *Canadian Business LJ* 485. Prof Gilbert Warren drives this point home thus: "If investors in securities must look to these kinds of managers (ie managers entitled to, and freely engaging in insider trading), then it is unlikely that these investors and their institutional surrogates will continue to allocate their resources to this market. This is not an abstraction; it is the danger posed by insider trading without regulatory constraints." See Warren III, "A Foreword on insider trading regulation" 1988 *Alabama LR* 347.

39 Examples of traders in this category are individual investors who, while watching a game of sports or dining in a restaurant or using a crowded elevator, overhear the conversation

continued on next page

information trading envisaged here, namely: (i) the traders in this category do not receive their information by virtue of an occupational or career position either within issuing corporations or within the securities marketplace; and (ii) the traders' receipt of price-sensitive information is irregular or unpredictable and may be a once-in-a-lifetime event.[40] These two characteristics make any appeals to the concept of *duty* or to concerns of *market injury* appear, without critical examination, far-fetched, if not totally implausible. Seeking regulation on the basis of a duty owed to trading partners or to the securities marketplace is not appealing essentially because of the absence of any relationships of a *fiduciary* or *quasi-fiduciary character* between the traders here and their partners. In addition, appeals to concerns of injury to the efficient functioning of the securities markets may suffer the same fate because any articulated potential of such injury wears the initial appearance of an abstraction.

However, upon a close and critical examination of the kinds of trading envisaged in the proceeding discussion, it will be found that sound and compelling policy justifications exist why such trading ought to be proscribed on the basis of the "inequality of legal access theory". First of all, allowing securities trading upon casually or fortuitously acquired price-sensitive information may be inimical to the promotion of the values of discovery, market research and analysis which are now generally acknowledged to be of critical value to the efficient functioning of the pricing mechanism of the securities marketplace.[41] This is because of its potential to cause market professionals to abandon or discount the value of their research and analytical roles in preference for carefully designed schemes involving placing themselves and their agents in strategic locations where material corporate developments, such as impending mergers or takeovers or other price-sensitive information, can either be overheard or otherwise perceived. This is especially so given that the returns of the latter activity, relative to the resources and efforts expended, are likely to be far superior to those of traditional market research and analysis. That this concern ought not to be discounted as mere speculation is supported by the results of a fairly recent study undertaken by the astute financial economist, Gregg Jarrell.[42] He found that the noticeable increases in the share prices of corporations in the process of undertaking fundamental restructuring prior to the public announcement of the restructuring was not the result of insiders' trading activity. Rather, the study found that such share price increases resulted from the purchases of market speculators who "scoop" the relevant information by observing the movement of the executive jets and limousines used by senior management of large public corporations.[43] In

---

of two company executives about an impending tender offer or some development likely to impact on the current market prices of the affected corporations' securities.

40 See Galeno fn 19 above 205–206.

41 This has been recognised by the authors of several studies on the subject of insider trading regulation and related issues. See eg the articles cited in fn 34 and 35 above and Brudney "Corporate governance, agency costs and the rhetoric of contract" 1985 *Columbia LR* 1403.

42 Jarrell "Stock trading before the announcement of tender offers: insider trading or market anticipation" Law and Economics Workshop Series No WSX–XII, Faculty of Law, University of Toronto (1987).

43 That the results of this study correspond to scenarios that could, from time to time, be found here on earth, is supported by the details of the kinds of scheme utilised by the now famous Ivan Boesky and his colleagues in the largest insider trading scandal known to the

continued on next page

the absence of any empirical evidence of the gains that the transactions of casually or fortuitously informed traders might produce for the securities markets, it is preferable to include such transactions in any insider trading ban.

Secondly, a meaningful "property rights" approach to the treatment of unpublished "price-sensitive information"[44] would seem to argue against the systematic encouragement of trading upon such information without the express or implied consent of the true owners.[45] This is especially so given that such trading may, in fact, visit tangible harm upon the financial or reputational interests of the corporate owners.[46] It may, in fact, discourage corporations from the pursuit of valuable information through the erosion of the gains and, therefore, the incentives to engage in such activities.[47] This is particularly so given that it is practically impossible for corporations to protect themselves effectively from the kinds of information leakage that give rise to the type of asymmetric information trades envisaged here. Including securities trading upon fortuitously, accidentally or casually acquired information in a statutory prohibition of insider trading is therefore consistent with the legitimate goal of protecting the property rights of corporations and other investors in valuable information.[48]

---

modern world. It was reported that he had an army of informants whom he placed at strategic locations such as airports, the precincts of certain corporate headquarters, etc. It is this scheme that is dramatised in the movie *Wall Street* in which the villain, Gordon Gecko, converted his young and promising stockbroker/analyst into an informant basically sniffing around airports and corporate offices in search of unpublished price-sensitive information.

44 The term "unpublished price-sensitive information" in the context of insider trading regulation in South Africa refers to information which: (1) relates to matters in respect of the internal affairs of a company or its operations, assets, earning power or involvement in takeover or merger negotiations; and (2) is not generally available to the reasonable investor in the relevant market for the underlying security; and (3) would reasonably be expected to materially affect the price of such security if it were generally available. See s 440F(2)(a) of the Companies Act 61 of 1973 as amended.

45 By this approach, the relevant information has a duty attached to it while in the hands of all persons regardless of their status as insiders or outsiders. That duty is to hold the information only for the benefit of the corporate owner or to deal with it only in accordance with the conditions under which it was transmitted. On a principle analogous to that upon which the tort of conversion is founded, the thesis advanced here is that trading upon fortuitously or casually acquired price-sensitive information should result in liability to the corporate owner.

46 The familiar example of insider trading prior to the announcement and consummation of takeover proposals once again comes to mind. It is noteworthy that insider trading in these cases would be particularly injurious to the interests of acquirer-companies, especially when accompanied by "front-running", which is quite common in the securities markets of the United States and Canada. Front running is a practice prohibited by the rules of most securities regulatory commissions, stock exchanges, and organisations of market professionals, by which a broker or other market participant enters into a transaction in order to capitalise on advanced knowledge of a block (or substantial) trade. Its logical result is to multiply the effect of the initial order. Harm to the corporate owner is also likely to result where the underlying information is "bad news" or one that could cause the corporate to lose a competitive advantage. In the face of such a real possibility, the assumption that the trading of these infrequently advantaged traders is unlikely to have the implied consent of issuing corporations is plausible.

47 The value of such a search for valuable information and the need to preserve the incentives for same has been well canvassed by Prof Saul Levmore. See Levmore fn 29 above.

48 For a seemingly opposing view, see Galeno, fn 19 above 220 (arguing that traders armed with information that is acquired fortuitously are not in any definable duty relationship

continued on next page

Finally, the permission to trade upon information acquired in the above circumstances has a real potential to discourage participation in the securities marketplace. This is because it detracts from the protection of the legitimate expectations of investors as to what kinds of informational advantage could properly be the subject of securities transactions permitted by the law. The elaboration of the *inequality of legal access theory* in this article has indicated that investors do not, and cannot properly expect informational superiority obtained as a result of resources, time and effort to go unrewarded. However, it also suggests that this is the only type of trading on asymmetric information that investors are willing to countenance. The investors' objections to trading by securities market participants who merely stumbled upon their informational advantages is certain to wax stronger once the investors realise the potential of such trading to damage the interests of their corporations and that there is no compelling economic basis for rewarding such participants with insider trading profits. It would be hardly important or consoling to investors that it may be their turn to get lucky tomorrow.[49]

3 CONCLUSION[50]

There is little doubt that much of the recent academic hostility towards the current comprehensive ban on the practice of insider trading stems from the failure or inability of regulators to articulate clear and coherent policy justifications for the current stance of the law. In particular, beyond pointing out that the practice is incompatible with the moral sensitivities of some members of the investing public, there has been little success in isolating exactly what is wrong with insider trading, and in determining whether investors and the economy stand to make any tangible and demonstrable gains from a comprehensive and diligently enforced ban. This article is essentially an attempt to re-articulate one of the various rationales which can and ought to provide the much needed policy justifications and guides for regulatory policymaking on the subject of insider trading.

A regulatory regime based on the *inequality of legal access theory* must proceed on the basis that it has three equally important goals, namely: (i) the prevention of all insider trading founded upon unerodible or insurmountable informational advantages; (ii) the prompt and effective dissemination of price-sensitive information to the securities marketplace to the end that the market may function efficiently in the pricing of securities; and (iii) the promotion of "discovery values" by preserving the gains derivable from financial asset analysis and legitimate market speculation.[51]

---

and that any attempt to create an implicit bond of confidentiality would be artificial and unwarranted).

49 *Idem* 225–226 (arguing, on the basis of the "gaming theory" of the stock market, that such trading is consistent with the gaming expectations of investors and would not therefore operate to discourage market participation).

50 In perusing the corpus of this paper and in undertaking the intellectual exercise of deciding which of the author's points and opinions are plausible or valid, the reader should carefully note that not all aspects of American Law governing the regulation of insider trading are necessarily relevant for an understanding and appreciation of the South African law on the same subject.

51 This article's presentation of the said theory demonstrates that in the context of the insider trading debate, the goals of efficiency and equity are not mutually incompatible; nor are

continued on next page

Lastly, it has consistently been suggested by the efficiency theorists that the institution and enforcement of comprehensive restrictions against the practice of insider trading approximates to a "moral obsession".[52] According to Henry Manne, "we (refering to lawyers and legal scholars) must either utilise hard, accurate data or should proceed on the assumptions dictated by the most logical economic doctrines".[53] The assumption in this pro-insider trading view is that neither empirical evidence nor sound economic theory is supportive of any elaborate insider trading prohibition. It is hoped that this article has at least demonstrated that that assumption is devoid of merit.

HUGO DE GROOT-PRYS

Die Hugo de Groot-prys vir die beste bydrae oor die Grondwet is toegeken aan professor AJ van der Walt *vir sy artikel "Roman law, fundamental rights, and land reform in Southern Africa".*

they antithetical to each other. There is, therefore, no basis for the lawyers and economists to choose one over the other and relentlessly to seek the banishment of one or the other from the academic debate on the appropriateness of controlling the practice of insider trading via statutory provisions enforced by public and quasi-public agencies.

52 See eg Manne fn 5 above and Lawson fn 22 above.

53 Manne fn 6 above 568.

Illegal income and remunerative loss – II: Claims by dependants in Southern African law*

Mervyn Dendy
BCom LLB
Associate Professor of Law, University of the Witwatersrand

OPSOMMING

Onwettige inkomste en beloningsverlies – II: Eise deur afhanklikes in die Suider-Afrikaanse reg

Ofskoon die appèlafdeling in *Dhlamini v Protea Assurance Co Ltd* 1974 4 SA 906 (A) 'n onderskeid getref het tussen eise om verlies van verdienste deur broodwinners wat aan onwettige belonende aktiwiteite deelgeneem het en eise om verlies aan onderhoud deur hulle afhanklikes, het die meeste Suider-Afrikaanse howe tot en met die middeltagtigerjare die reël in *Dhlamini* op eise deur afhanklikes toegepas en skadevergoeding geweier indien die kontrakte tussen die oorlede broodwinner en sy kliënte regtens onafdwingbaar is. Slegs in *Shield Insurance Co Ltd v Booysen* 1979 3 SA 953 (A) het die hof 'n ander beginsel geskep, naamlik dat skadevergoeding toegeken kan word vir verlies van die vermoë om inkomste wettig te verdien. In latere beslissings is hierdie benadering egter oor die hoof gesien. Uiteindelik in *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) is die standpunt deur die appèlhof ingeneem dat, hoewel die afhanklikes se eis op die verlies van 'n reg op onderhoud gegrond is, dit "onteenseglik so" is dat die berekening van die quantum van skadevergoeding noodwendig gebaseer moet word op die nie-regmatige inkomste wat die oorledene as broodwinner uit die tersaaklike onwettige aktiwiteit verdien het. Verder is gekonstateer dat indien 'n oortreding deur die broodwinner van 'n statutêre verbod as 'n misdryf strafbaar is, die broodwinner se gedrag nie 'n "kleurlose statutêr verbode aktiwiteit" is nie, met die gevolg dat die eis van sy afhanklikes afgewys sal word. Beide hierdie stellings is vatbaar vir kritiek.

2 2 Claims by dependants

2 2 1 From Dhlamini *to* Mankebe*: the case law*

It has long been settled law in South Africa that the dependants of a person killed by the wrongful conduct of another have a claim for the pecuniary loss they have suffered in consequence of their breadwinner's death.[88] To recover compensation

* See 1998 *THRHR* 564 for the first article of this series. The financial assistance of the University of the Witwatersrand, Johannesburg, the Centre for Science Development (HSRC, South Africa), the Board of Control of the Attorneys Fidelity Fund and the Mellon Foundation towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at are those of the author and are not necessarily to be attributed to the University, the Centre for Science Development, the Board of Control of the Attorneys Fidelity Fund or the Mellon Foundation.

88 *Jameson's Minors v Central South African Railways* 1908 TS 575; *Union Government (Minister of Railways & Harbours) v Warneke* 1911 AD 657; *Union Government*

continued on next page

for loss of support in a dependant's action, the claimant must be able to prove a duty of support on the part of the deceased towards him.[89] In order to do so, the dependant must prove his indigence,[90] the ability of the deceased (had he lived) to support him and a family relationship entitling him to maintenance.[91]

May dependants recover compensation, however, for loss of support that would have been rendered out of illegally earned income? In *Dhlamini* the members of the court refused to take into consideration the judgment in the New Zealand case of *LeBagge v Buses Ltd*:[92] there the court had dealt with a claim by

---

(Minister of Railways) v Lee 1927 AD 202; *Mankebe v AA Mutual Insurance Association Ltd* 1986 2 SA 196 (D) 198G–199G. On the dependant's action generally, see McKerron *The law of delict* (1971) 149–153 157; Boberg *The law of persons and the family* (1977) ("Boberg *Persons*") 302–312; Davel *Skadevergoeding aan afhanklikes by die dood van 'n broodwinner* (1987) ("Davel") *passim*; Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) ("Van der Merwe and Olivier") 332–351 365–369; Burchell *Principles of delict* (1993) ("Burchell") 233–239; Neethling, Potgieter and Visser *Law of delict* (1994) ("Neethling *et al Delict*") 270–277; Neethling, Potgieter and Visser *Deliktereg* (1996) ("Neethling *et al Deliktereg*") 277–283; Van der Walt and Midgley *Delict: principles and cases I Principles* (1997) ("Van der Walt and Midgley") par 11 42 70. Roman law recognised no action under the *lex Aquilia* in favour of the dependants of a free man killed by another: not being subject to ownership, the body of a free person was held incapable of valuation in terms of money, and dependants were sent away empty-handed. But no such difficulty confronted early Germanic tribes, who recognised the life of a free man as having a value capable of assessment in cattle or money, and evolved the custom of paying pecuniary compensation for the benefit of the deceased's relatives when the death was brought about intentionally or in anger *(Union Government (Minister of Railways & Harbours) v Warneke* (above) 671–672; *Union Government (Minister of Railways) v Lee* (above) 225–226; *SA Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 2 SA 467 (A) 471F–*in fine*; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614B–D; *Victor v Constantia Insurance Co Ltd* 1985 1 SA 118 (C) 119C–E). From there the remedy was absorbed into Roman-Dutch law, where it came to be regarded as falling within the scope of the *lex Aquilia*, and was expanded to cover all cases in which death was attributable to fault (Boberg *Persons* 302–303; Davel 46; Van der Merwe and Olivier 332; Burchell 233; Neethling *et al Delict* 271; Neethling *et al Deliktereg* 277; Van der Walt and Midgley par 11 15, par 42 40). For a full account of the history of the development of the dependant's action, see Davel 3–47. On the question whether a dependant is entitled to claim damages for loss of support where the breadwinner is still alive, see fn 1 in the first article of this series: 1998 *THRHR* 564.

89 *Union Government (Minister of Railways & Harbours) v Warneke* 1911 AD 657 666, 672; *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 3 SA 295 (A) 303 *in fine*–304pr; *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 2 SA 467 (A) 472G–H 473C–D; *Nkabinde v SA Motor & General Insurance Co Ltd* 1961 1 SA 302 (D) 304B–E. The support provided may take the form of money or domestic services: *Union Government (Minister of Railways & Harbours) v Warneke supra* 662–663.

90 *Anthony v Cape Town Municipality* 1967 4 SA 445 (A) 456D; *Van Vuuren v Sam* 1972 2 SA 633 (A) 642D.

91 On these requirements generally, see Boberg *Persons* 249ff. If, however, the dependant is a widow or minor child of the deceased, only their relationship need be alleged – a right to support will then be presumed to exist *prima facie* (*Gildenhuys v Transvaal Hindu Educational Council* 1938 WLD 260 262; *Stander v Royal Exchange Assurance Co* 1962 1 SA 454 (SWA) 455C–E).

92 1958 NZLR 630 (CA). There a claim was brought by dependants of the deceased proprietor of a cartage business who, in violation of reg 30(1)(d) of the Transport Licensing Regulations 1950, had driven a delivery vehicle seven days a week and therefore failed

continued on next page

to have 24 consecutive hours available for rest in any period of seven days, as required by the regulation. In the Supreme Court Shorland J directed the jury that it was not obliged to disregard entirely those moneys which the deceased had in the past earned and could reasonably be expected to have continued in the future to earn by driving his delivery truck on the seventh day of every week. It was, however, proper (the judge instructed) for the jury to take into consideration in assessing damages the possibility that the regulation would be enforced by the authorities and that the deceased's income would thereby be diminished (633 lines 30–35, 639 lines 35–44, 646 lines 14–18). (There was evidence to the effect that other cartage contractors in the area who drove their vehicles seven days a week had never been prosecuted for alleged breach of the regulation (633 lines 22–26, 646 lines 8–10). Nor was it probable – even though it was possible – that such a prosecution would have ensued. Accordingly, had the deceased lived, he would probably not have had to pay a substitute to make deliveries in his stead one day a week (648 lines 1–7).) The court expressly rejected the submission of counsel for the defendant that, if part of a deceased's earnings have been derived from contracts tainted with illegality, moneys which the deceased has unlawfully received under those contracts must be disregarded entirely (634 lines 39–42): "What the deceased could in the future be expected to expend upon his dependants if he had lived is the crucial matter of inquiry. . . . If part of his earnings have been by illegal acts, then no doubt that is a matter to be taken into consideration to the extent of recognizing that his illegal earnings may well have been brought to an end by enforcement of the law, with the result that he might well have been obliged in the future to earn his livelihood by lawful means, and the question of whether or not that fact would be likely to affect the provision he could reasonably be expected to provide for his dependants must be considered and a realistic assessment of its probable effects arrived at" (634 lines 25–26, 30–38).

Earlier in his judgment, Shorland J rejected emphatically the line of reasoning upon which the decision of the Appellate Division in *Dhlamini* was later based: a claim by dependants, said the judge, is not in form or substance an action to enforce any contractual rights the deceased may have had or may have claimed to have against any other person for remuneration, charges or other rewards (634 lines 9–14). The jury was therefore directed in the way it was despite the court's willingness to assume that the deceased could not have enforced payment against his clients of the charges he earned on the seventh day of each week (634 lines 43–45). Shorland J's direction to the jury was upheld by the Court of Appeal. The breach of the regulation by the deceased, said Cleary J (Gresson P and North J concurring), occurred only in the performance of the contract, and illegality in performance did not necessarily make a contract unenforceable by the party who had broken the law. The Transport Licensing Regulations could not be construed as impliedly prohibiting contracts of cartage which were valid in their formation but were so performed as to contravene some provision of the regulations (646 line 53–647 line 7). Accordingly, the deceased could have recovered cartage charges under his contract with his customer notwithstanding his breach of the regulations. And if that were so, still less could the breach afford any basis for imputing illegality to the dependants, who sued to enforce a statutory right (under the Deaths by Accidents Compensation Act 1952) distinct from any right possessed by the deceased (647 lines 14–22, 26–30). Since the sole function of the jury was to determine the extent of the pecuniary benefit that the dependants might reasonably have expected to receive from the deceased had he lived, Shorland J had dealt adequatcly with the issue of illegality by instructing the jury to take into account the possibility of the regulation being enforced against the deceased and his income being thereby diminished (648 lines 7–19). Thus, although the outcome was the same in the Supreme Court and the Court of Appeal, Cleary J differed from Shorland J by placing reliance upon the enforceability by the deceased of the underlying contract rather than treating the question as irrelevant. Had the court in *Dhlamini* – or, indeed, in *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) – been called upon to decide *Le-Bagge*, the result would undoubtedly have been different, for the regulations would have had to be classified as falling within the second of the three categories established in *Dhlamini*: reg 30(1)(d) of the Transport Licensing Regulations was manifestly not fiscal

continued on next page

dependants, and its discussion, said Rumpff CJ, was of no use in determining the position where the plaintiff was the breadwinner.[93] This suggests that in dependants' actions, policy considerations different from those applicable to claims by income earners are at work. But while it is true that additional arguments may be invoked against the refusal of relief in claims by dependants who were being supported out of illegally earned income,[94] it would not, in my view, be sound to distinguish between breadwinners' claims and dependants' actions by refusing compensation in the former instance and granting it only in the latter. The principal reason for this is that the rule in *De Vaal v Messing*,[95] if it is still good law, would then give rise to absurdity, or at the very least to an anomaly. In terms of the rule in *De Vaal*, a dependant may not claim damages for loss of support if the breadwinner is still alive: it is for the injured breadwinner to claim compensation for loss of earning capacity from the tortfeasor and to provide for his dependants out of the damages. Since their right to receive support from the breadwinner remains extant, so the argument runs, the dependants must look for support, not to the wrongdoer, but to their breadwinner. If, however, the breadwinner, pursuant to the rule in *Dhlamini*, were to be denied compensation on the ground that the income-earning activities in which he would have engaged but for his incapacitation were illegal, then the dependants (notwithstanding their entire innocence in regard to the source of the breadwinner's income) would also be left uncompensated. On the other hand, if the breadwinner were to die of his injuries, his dependants, then being able to institute an action of their own for loss of support, would *ex hypothesi* recover compensation. The dependants would therefore be placed in a position in which the demise of their breadwinner would be in their financial interests.[96] The spectre that this conjures up of a wife and children to whom the legal position has been explained hoping and praying at a hospital bedside for their devoted husband and father to die is monstrous indeed! And if *De Vaal* no longer reflects the law (with the result that dependants *may* sue for loss of support even though their breadwinner is still alive), it seems anomalous to refuse the breadwinner damages out of which he may

---

legislation, but was aimed at securing the protection of other road-users from the capers of cartage contractors who were insufficiently rested to drive with the degree of safety that reg 30(1)(d) was designed to maintain.

93 1974 4 SA 912G–H. Rumpff CJ added that the legislation in issue in *Dhlamini* was different from that under consideration in *LeBagge* (*ibid*). In *Fortuin v Commercial Union Assurance Co of SA Ltd* 1983 2 SA 444 (C) 445pr–A Comrie AJ remarked that the question whether dependants were precluded from recovering compensation where the breadwinner's income was illegally earned appeared to have been left open by the court in *Dhlamini*. See also *Ferguson v Santam Insurance Ltd* 1985 1 SA 207 (C) 208B–D (where Vos J drew attention to the fact that the claim in *Dhlamini* was not a dependant's action and added that in his view *Dhlamini* was not binding authority for non-suiting a widow), the argument of counsel for the respondent in *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) 846C–E, and the remarks of Wilson J in *Mankebe v AA Mutual Insurance Association Ltd* 1986 2 SA 196 (D) 198D–E.

94 Those arguments will be set out in the next article of this series.

95 1938 TPD 34. See also *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 3 SA 295 (A) 305G–H and *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 839E–F. On criticism of the rule in *De Vaal*, see fn 1 in the first article of this series.

96 For an example drawing attention to a similar absurdity, in the context of contributory negligence prior to the enactment of the Apportionment of Damages Amendment Act 58 of 1971, see Van der Merwe and Olivier 338.

provide for his dependants while permitting the dependants themselves to recover compensation for their loss of support. These anomalies fall away, of course, if an action is granted in both instances – whether the plaintiff is the breadwinner or a dependant.

Be all this as it may, our courts, following the decision in *Dhlamini*, at first decided to extend the operation of the principle established there to cases in which the income-earner had been killed and his dependants claimed compensation for loss of the support that he would have been obliged to render out of his illegal earnings had he lived.

First to consider a dependant's claim for loss of the support that would have been rendered out of illegal earnings was Addleson J in *Booysen v Shield Insurance Co Ltd*,[97] in which the deceased, prior to being killed in a motor collision, had lawfully earned "not less than R30 per week" as an assistant in his father-in-law's shop.[98] In addition, he sold liquor illegally "with considerable success", although the plaintiff (the widow of the deceased, claiming damages for loss of support suffered by herself and by her and the deceased's three minor children) did not rely on this source of income in assessing what the deceased would probably have earned had he not been killed.[99] He also ran a weekly cinema and organised dances at his home on Friday and Saturday nights respectively, without the requisite licences and without having registered these businesses in terms of the relevant licensing ordinance;[100] the deceased's share of the net income from the film shows and dances was found to average at most R50 a week. Although the deceased took the precaution of being on "friendly terms" with the police, it was obvious that these various unlawful activities could at any time have been brought to an abrupt end.[101] Nevertheless, said Addleson J, the evidence of the illegal activities showed that the deceased was an enterprising, energetic man who was on the lookout for means of making money; if he had been forced to cease his activities in connection with the cinemas and dances, it was probable that he would have found some other way of supplementing his income. There was evidence to the effect that, had the deceased not been killed, his father-in-law would some five years later have handed over to the deceased the business (a greengrocery) in which the latter was lawfully employed,[102] and it was probable that the deceased possessed the necessary qualities to run that business with as much success as that achieved by his father-in-law in it.[103] Since the deceased had been earning some R300 a month or more from all his activities (including the illegal ones), it was probable that "he would have jumped at the chance to take over [his father-in-law's] shop and earn the same amount or

97 1980 3 SA 1211 (SE).

98 1213D–E. See also 1213E–F and 1214 *in fine*–1215pr; *Shield Insurance Co Ltd v Booysen* 1979 3 SA 953 (A) 961 *in fine*–962A.

99 1213F–G.

100 Ie the Registration and Licensing of Businesses Ordinance 15 of 1953 (C).

101 1213G–*in fine*. See also 1214D–F and 1218B–D, where mention was made of the detrimental effect that the opening of professional cinemas and dance-halls in the future was likely to have had upon the profitability of the deceased's cinema and dances, and 1215A–B. Evidence of money that the deceased had earned from buying reject shoes and reselling them at a profit was disregarded, as he had given up this source of income by the time of his death (1214F–G; see also 1979 3 SA 953 (A) 962A–B H).

102 1213D–F, 1215A–B. See also 1979 3 SA 953 (A) 962D–E.

103 1215C–D.

more in a legitimate business". The deceased's initiative and energy in pursuing his various activities pointed towards the conclusion that he would, after taking over the greengrocery, lawfully have earned a minimum net income of R300 a month.[104] The illegal cinema and dancehall activities would probably have been abandoned once the deceased took over his father-in-law's business.[105] The loss of support sustained by the plaintiff and her children had accordingly to be assessed on the basis that the deceased would lawfully have earned an income of at least R300 a month from the time when his father-in-law would have handed the greengrocery to him. The question, however, arose whether, in the five-year interval between the time of the deceased's death and the time when the deceased would probably have commenced running that business for his own account, damages for loss of support suffered by the plaintiff and her children had to be assessed on the basis of earnings of R300 a month (thereby including the proceeds of the unlawful activities) or whether damages had to be assessed on the basis of the deceased's lawful earnings of R30 a week only.

From the remarks made by Addleson J up to this point, one might have expected the court to plump for the first option, since, as Addleson J himself recognised in categorising the issues to be determined in *Booysen*, damages are awarded for loss of *earning capacity* (as opposed to loss of earnings *per se*).[106] That capacity was destroyed when the deceased was killed, and it was clear that if the cinema shows and dances had been stopped by the authorities, the deceased (being an enterprising individual) would simply have found some other, equally lucrative income-earning activity to pursue. The deceased's unlawful activities, in other words, indicated that he had the capacity to earn a lawful income of at least R300 a month if it became necessary for him to do so; it was accordingly on that basis that one would have expected the court to assess the damages. But it was not to be. Invoking *Dhlamini*, Addleson J said:

> "It was conceded on behalf of the plaintiff that the 'businesses' of running a cinema and a dancehall were required by law to be licensed and that no such licences had been obtained. A claim by the deceased himself (had he lived after the collision) based on loss of income from those businesses would in my judgment therefore have been unenforceable in view of the decision in [*Dhlamini*]. This, too, was not contested by the plaintiff in the light of the views expressed . . . in *Dhlamini's* case."[107]

The judge proceeded to reject an argument by counsel to the effect that the denial of a remedy to the breadwinner himself did not necessarily entail the refusal of relief to dependants as well. Referring to a statement in one of the authorities[108] to the effect that the dependant's action is an exceptional remedy

---

104 1215D–F.

105 1215F–G.

106 Thus Addleson J said (1213B–D): "The features which have to be established . . . are: (a) The earning capacity and probable future earnings of the deceased. (b) The allowance to be made for contingencies in regard to his earning capacity. (c) . . . (d) The plaintiff's right to include in the deceased's future earning capacity, certain 'illegal' activities of the deceased. (e) . . ."
Other references to earning capacity as the basis upon which damages must be awarded are to be found at 1213D–E 1214E–F 1215B–C.

107 1215 *in fine*–1216A. The reference to *Dhlamini* is to *dicta* appearing in 1974 4 SA 915B–G.

108 The statement relied upon by counsel appeared in Corbett and Buchanan *The quantum of damages in bodily and fatal injury cases* (1964) 61. The passage in question was reproduced in identical language in the third edition (1985) by Gauntlett 82 and has been

continued on next page

because it is based upon the breach of a legal duty owed, not towards the dependants, but towards the deceased, even though the claim accrues to the dependants in their own right and not through the deceased's estate,[109] counsel for

---

repeated verbatim in the fourth edition (1995) of volume I (*General principles*) of Corbett and Buchanan by the same author 63. Its correctness is, however, open to doubt. See fn 109 immediately below.

109 Originally laid down by Innes CJ in the old cases of *Jameson's Minors v Central SA Railways* 1908 TS 575 584–585, *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 664 and *Union Government (Minister of Railways) v Lee* 1927 AD 202 222, and subsequently reaffirmed by the Appellate Division in *SA Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 2 SA 467 (A) 471 *in fine*–472B and *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 837 *in fine*–838A, the notion of dependants relying upon a breach of a legal duty owed, not to themselves, but to the breadwinner is now in disrepute among academic writers. Boberg *The law of delict I Aquilian liability* (1984) 728 described it as a "jurisprudential monstrosity" and had little difficulty in rejecting it in the context of the defence of consent. Burchell 73 states that while consent or voluntary assumption of risk (ie the two branches of the defence comprehended by the maxim *volenti non fit injuria*) may exclude wrongfulness towards the breadwinner himself, the conduct of the tortfeasor "may still be unlawful vis-à-vis the dependants who sue for loss of support in their own right". This view presupposes a legal duty towards the dependants that is entirely separate from the legal duty owed to the breadwinner. Elsewhere, Burchell makes the point still clearer when he writes that "the dependants sue in their own right for unlawful conduct *directed at them*" (*op cit* 130, my emphasis). Davel 49–51 is to similar effect ("[w]aar 'n derde . . . 'n broodwinner onregmatiglik dood, begaan hy daarmee ook 'n onregmatige daad *teenoor die afhanklikes* as gevolg waarvan hulle vermoënsverlies ondervind" (*op cit* 51, my emphasis)). Neethling *et al Delict* 271 state that the view that the dependant's action is based on a delict committed against the breadwinner "cannot be accepted": it is unjustifiable theoretically and can lead to undesirable practical results (eg when a defence of consent or voluntary assumption of risk on the part of the breadwinner is raised by the defendant). The "theoretically correct" view, according to Neethling and his co-authors (*ibid*; Neethling *et al Deliktereg* 277), is that the dependant's claim is based on the wrongful, culpable causing of harm to the dependants themselves, and that wrongfulness lies in the infringement of the dependant's personal right to support from the breadwinner (*Zimnat Insurance Co Ltd v Chawanda* 1991 2 SA 825 (ZS) 830E–F; cf *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376C; *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) 851D–E ("verlies van haar [the dependant's] reg op onderhoud"). Furthermore, they argue, the theoretically correct approach is endorsed by implication in s 2(1B) of the Apportionment of Damages Act 34 of 1956, as amended by the Apportionment of Damages Amendment Act 58 of 1971. In terms of that provision, if it is alleged that the plaintiff has suffered damage as a result, *inter alia*, of the death of another and that the death was caused by the combined negligence of the tortfeasor and the deceased, then the estate of the deceased and the tortfeasor are regarded as joint wrongdoers for the purposes of s 2 of Act 34 of 1956. Both the deceased and the tortfeasor, contend Neethling *et al*, have therefore committed delicts against the dependant, and the latter's claim is "definitely based on a delict committed against himself" (Neethling *et al Delict* 272; Neethling *et al Deliktereg* 278). This approach echoes that adopted in Van der Merwe and Olivier 338, where it is said that the claim by dependants is attributable to "die verweerder se wederregtelike en skuldige optrede *teenoor hulle* waardeur hulle benadeel is" (my emphasis). Van der Merwe and Olivier proceed to condemn the approach of Innes CJ, remarking trenchantly: "Word eenmaal uitgegaan van 'n onregmatige daad teenoor die benadeelde self, kry sy aksie vorm en inhoud, pas dit in by die grondslae van ons reg aangaande die onregmatige daad en verdwyn die twyfelagtige eer wat dié aksie tot dusver te beurt geval het om as *sui generis* bestempel te word – 'n attribuut wat telkens aan 'n regsverskynsel toegedig word as teken dat dit nie begryp word nie" (*op cit* 345). S 2(1B) of the Apportionment of Damages Act, Van der Merwe and

continued on next page

the plaintiff sought to persuade the court that the illegality of the deceased's activities should be regarded as a bar only to the deceased's personal right to sue: it did not negate the existence of the legal duty owed by the tortfeasor to the deceased not to kill him. The argument was, however, brushed aside by Addleson J, who remarked that it did not go to the root of the question before the court, which was not whether the dependants had a right of action against the defendant when the deceased himself might not have, but whether, on grounds of social policy, that right included the right to compensation for loss which arose out of an illegal activity.[110] This was so whether it was the injured party himself or the dependants of such a person who sought to recover compensation based on the earnings from illegal activities.[111] After quoting from an Australian decision, *Meadows v Ferguson*,[112] to the effect that, on grounds of public policy, the court should not recognise earnings derived from an illegal employment or activity as affording a proper basis for the award of damages, Addleson J continued:

> "In principle I can see no grounds for distinguishing, in applying the above approach, between a plaintiff who is himself the injured party and the plaintiff who is a dependant and who 'has been deprived (of) earnings (of the deceased) derived from an illegal employment or activity'. It is true . . . that . . . the dependant does not seek to enforce, or rely on, the illegal activity itself but merely calls it in aid as evidence of what the deceased could have earned; and that it may seem callous to hold that in such circumstances the dependant is entitled to no compensation, or only to such compensation as the Court may hold that the deceased might have been able to earn, had he been engaged in a lawful activity. Nonetheless it seems to me that the overriding consideration in our law where the claim for compensation

---

Olivier argue, shows that the legislature has thrown its weight behind the correct approach: if the deceased estate of the breadwinner can be regarded as a joint wrongdoer towards dependants, it must perforce follow that the dependants sue on the basis of the tortfeasor's violation of legal rights accruing to them (*op cit* 350–351). (For a detailed refutation of the jurisprudential approach in *Jameson's Minors*, see Van der Merwe and Olivier 344–351.) There is much to be said for the criticisms levelled by the academic writers whose views have been canvassed above and, in my view, no possible advantage to be gleaned from continued adherence to Innes CJ's approach. The argument resting upon s 2(1B) is particularly powerful: because a breadwinner cannot owe a legal duty towards himself (Van der Merwe and Olivier 350), and because his deceased estate does not come into existence until the moment after his demise (*Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 3 SA 295 (A) 302D–E) and for this reason alone cannot owe the breadwinner a legal duty not to kill him, it is impossible to reconcile the notion of the breadwinner's deceased estate constituting a joint wrongdoer towards the dependant with the view taken in *Jameson's Minors* and the cases that have followed it. (Of course, the deceased estate itself has committed no breach of legal duty towards the dependants either, since the estate came into being only after the killing of the deceased; hence the need for s 2(1B) to provide for the deceased estate to step into the shoes of the breadwinner for purposes of the action by the dependants.) In short, s 2(1B) can be understood at all only on the basis that the action of dependants for loss of support arising out of the killing of their breadwinner rests upon the breach of a legal duty owed towards the dependants themselves. Indeed, Addleson J in *Booysen* seemed prepared himself to accept that approach, remarking that the issue before him for decision was one of social policy "even though the duty is owed by the defendant directly to the dependants, without regard to the validity of the claim which the injured party himself might have had" (1980 3 SA 1217B–D).

110 1216D–F 1217B–C.

111 1217B–C.

112 1961 VR 594 597 line 55–598 line 3.

> is based on the common law remedy granted by the *lex Aquilia,* must be one of public policy. . . . There may be room for contending that a distinction should be drawn in those cases where the illegality is merely 'technical' and would not have prevented the deceased from continuing with the activity in question, or enforcing payment for the goods he had supplied or the services he had rendered. On the other hand it is difficult to conceive that our Courts would allow the husband or child of a deceased prostitute to recover compensation for loss of support based on the claim that during her lifetime she had maintained them – and would have continued to maintain them – on the proceeds of her prostitution.
>
> "In the present case, as in *Dhlamini's* case, the activities of the deceased were unlicensed and unauthorised by the responsible authorities. I am of the view . . . that the Legislature intended that no such activities could take place without a licence. To do so would not only be punishable but, because of important considerations of public policy, the proceeds of such an activity would not be recoverable. That degree of 'illegality' seems to me to hit the dependant as well as the injured person and to preclude the dependant from relying on the illegal income as a basis for compensation. In addition, in the present case, I have already noted that the illegality of the cinemas and dances was further tainted by the illegal supply of liquor at those entertainments and there seems little doubt that the law should regard the proceeds of such activities as illegal and irrecoverable by any person."[113]

The claim for loss of support based on the deceased's illegal activities accordingly failed, and the loss of support sustained by the plaintiff and her children was assessed by Addleson J on the basis solely of the income (R30 a week) that the deceased would have earned lawfully by working as an assistant in his father-in-law's shop had he not been killed.[114]

Three observations fall to be made about the decision in *Booysen.* First, it is clear from the court's remarks reproduced above that the rule in *Dhlamini* was extended to claims by dependants,[115] the deceased's unlawful activities being regarded as falling within the second of the three categories of illegality recognised in *Dhlamini*,[116] and the irrecoverability of the deceased's "tainted" earnings being held to constitute a bar to a claim by the dependants in so far as they would have been supported out of those earnings. Secondly, the *ratio decidendi* of the judgment in *Booysen* is that compensation will not be awarded if it is calculated on the basis of the deceased's illegal income *per se*, whether the plaintiff is the income-earner himself or a dependant suing for a share of the earnings that would, but for the delict, have been made.[117] Thirdly, despite

---

113 1217D–1218B. See also *Fortuin v Commercial Union Assurance Co of SA Ltd* 1983 2 SA 444 (C) 445A–B.

114 1218B–C, D–E.

115 See *Mba v Southern Insurance Association Ltd* 1981 1 SA 122 (Tk) 124D–E 127B–C, *Ferguson v Santam Insurance Ltd* 1985 1 SA 207 (C) 208B–C, the submission of counsel for the appellant in *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) 845E–F, and *Mankebe v AA Mutual Insurance Association Ltd* 1986 2 SA 196 (D) 200H–J.

116 See the first article of this series: 1998 *THRHR* 564.

117 This is apparent from a number of remarks in the judgment. Thus Addleson J, applying the *ratio decidendi* in *Dhlamini*, stated that a claim by the deceased "based on loss of income from those [ie the unlicensed cinema and dancehall] businesses would . . . have been unenforceable" 1215 *in fine*–1216*pr*. At 1217B–C it was said to be a question of public policy whether the court should award "compensation based on the earnings from illegal activities". At 1218*pr*–B the degree of illegality present in *Booysen* was held to preclude the deceased's dependants from "relying on the illegal income as a basis for

continued on next page

Addleson J's categorisation of the key issues before him as "[t]he earning capacity . . . of the deceased" and the plaintiff's right to include certain of the deceased's illegal activities in "the deceased's future earning capacity",[118] the court treated the deceased as though, in the five-year interval between his death and the time when he would probably have taken over his father-in-law's business, he had no capacity to earn anything other than the R30 a week that he was being paid as an assistant in his father-in-law's shop. That was manifestly incorrect, because, as Addleson J himself remarked, if the deceased had been compelled to terminate his activities in connection with the cinema shows and dances, it was "probable that he would have found some other way of supplementing his income".[119] That being so, there can be no doubt that the dependants were inadequately compensated by the trial court. Only at one point in his judgment did Addleson J expressly allude to an alternative approach which would have yielded a more generous award: that of assessing compensation on the basis of what the deceased could have earned by devoting all of his income-producing energy to lawful activities.[120] The possibility of doing this was, regrettably, not pursued in relation to the five years immediately after his death, even though compensation for the subsequent period was assessed on the basis that the deceased's unlawful activities prior to his death showed that he possessed the capacity to earn R300 a month lawfully.[121]

---

compensation". Finally, at 1218B–C the claim for loss of support was dismissed because it was "based on the illegal activities in question". (Careful analysis of the passage quoted at 1217C–E from *Meadows v Ferguson* 1961 VR 594 likewise reveals an approach that damages are irrecoverable only if they are calculated on the basis of the illegal income itself. See further the next article of this series.) See also the judgment on appeal, reported *sub nom Shield Insurance Co Ltd v Booysen* 1979 3 SA 953 (A) 962H–*in fine*: "As to the R50 per week [derived from the cinema shows and dances] the Court *a quo* held that, since that was derived from illegal activities, no claim for loss of support could be founded thereon [ie on the illegal earnings themselves] on the grounds of public policy." These *dicta* do not altogether preclude the making of an award of damages in a case in which income was earned illegally; rather, they leave open the possibility of an award based on a criterion other than the earnings that the deceased would have made from his unlawful activities, had they continued.

118 1213B–D.

119 1215B–D. See also *Shield Insurance Co Ltd v Booysen* 1979 3 SA 953 (A) 962B–C ("according to the plaintiff, [the deceased] had no difficulty in getting employment when he sought it"), 965C–D (a passage reproduced below) and 966A–C ("the evidence suggests, the Court *a quo* said, that the deceased would probably have tried to increase his income in the future by some activities not necessarily illegitimate, so that it might have risen during his working life").

120 1217F–G.

121 Thus Addleson J said 1215D–F: "But, if he was earning some R300 per month or more from his employment with Samuels [ie his father-in-law], *plus his other activities*, I think that it is probable that he would have jumped at the chance to take over the shop and earn the same amount or more in a legitimate business. Having regard to the whole picture of the deceased's initiative and energy, despite his irregular work record, I do not think therefore that it is unfair to the defendant to assume that the deceased would have earned a minimum net income of R300 per month." Since the words emphasised by the court in this passage refer to the deceased's illegal activities, it is clear that those activities were taken into consideration as evidence of the deceased's lawful earning capacity in respect of the period after he would have taken over his father-in-law's shop. Accordingly, there was, in my view, no good reason for refusing to adopt the same attitude in respect of the period prior to the date on which the greengrocery would have been

continued on next page

The matter then went on appeal to the Appellate Division,[122] where the plaintiff did not challenge the award made by Addleson J for loss of support in respect of the period from the date of the deceased's death until the date on which he would have taken over his father-in-law's business had he not been killed. Consequently, no pronouncement on the correctness of the trial court's judgment in that regard was necessary.[123] The damages awarded by the trial court in respect of the period after the deceased would have taken over his father-in-law's business were attacked by the defendant on the ground that the pleadings precluded an assessment of damages based upon projected earnings of R300 a month: the illegal income having fallen out of consideration, it was argued, the only source of income on which the claim for future loss of support could have been based was the deceased's salary of R30 a week, adjusted upwards from time to time "as a result of inflation and in accordance with normal trends".[124] That approach, said Trollip JA, was "narrow and rigid", and "quite unwarranted".[125] Even though some of the deceased's activities had been found to be illegal, they could be taken into account as affording an indication of the deceased's capacity to earn an income, and hence his ability to support his dependants had he lived:

> "In law a claim for future loss of support is ordinarily based on the deceased's earning capacity and, in so far as the trial Court can determine it on the available information, the income he would have earned in the future. The particulars furnished by the plaintiff . . . relate to all the income the deceased was earning at the time of his death. That is indicative, *inter alia*, of his earning capacity. As to his future 'salary or earnings' . . . plaintiff's reply [ie to a request by the defendant for further particulars for the purpose of pleading[126]] referred only to his salary of R30 per week from Samuels [ie the deceased's father-in-law] – that would have increased, she said, through inflation and normal trends; as to his other future earnings, she was 'unable to furnish the particularity required' at that stage. Hence, there is nothing in those particulars which precluded her at the trial from proving the deceased's earning capacity and the income he would in the future have earned

---

handed over to the deceased: since he had the capacity to earn R300 a month lawfully after that date, he must have had the ability to earn a similar amount lawfully prior to it as well.

122 Reported *sub nom Shield Insurance Co Ltd v Booysen* 1979 3 SA 953 (A).

123 962H–*in fine*. Counsel for the defendant, however, attacked the award of pre-trial loss of support on two grounds: first of all, no allowance had been made for contingencies that might have affected the deceased, and secondly, no allowance had been made for the accelerated receipt of an inheritance by the plaintiff from the deceased. Both objections were, however, dismissed: the trial court's assessment based on earnings of R30 a week was so conservative that no allowance for contingencies need have been made, and the value of the accelerated receipt of the inheritance benefit was so small and difficult to determine that Addleson J had correctly ignored it (1979 3 SA 963*pr*–B).

124 963H–*in fine*, 964*pr*–B.

125 964A–B. Corbett and Trengove JJA and Galgut and Hoexter AJJA concurred.

126 At the time when *Booysen*'s case was pleaded and tried, it was still possible for parties to trial actions in the Supreme Court to request further particulars for the purpose of pleading, in terms of uniform rule 21(1) and (2). Owing to abuse of the procedure by practitioners, those requests were abolished in 1987 by amendments to rule 21 which came into force on 1988-01-01. See the note to the current rule 21(1) in Erasmus and Breitenbach *Superior court practice* (1994). Requests for further particulars for the purpose of pleading have, however, been retained in the magistrates' courts (see the discussion of magistrate's court rule 16 in Erasmus and Van Loggerenberg *Jones and Buckle The civil practice of the magistrates' courts in South Africa II The rules* (1997).)

> in addition to his salary from Samuels. I should add here that, even though some of the activities . . . had ceased before his death and others were found by the Court *a quo* to be illegal, they can nevertheless be relied upon as some indication of his earning capacity."[127]

The defendant's attack upon the trial court's award based on the further particulars furnished by the plaintiff was accordingly dismissed, as was a submission on behalf of the defendant that the pleadings did not cover the evidence to the effect that the deceased would eventually have taken over his father-in-law's green-grocery and thereafter earned at least R300 a month from that business. In regard to the latter submission, Trollip JA remarked that the trial court had correctly taken the contested evidence into account "as part of the general evidence of the deceased's earning capacity or ability to support his dependants".[128] The approach adopted by Addleson J in that connection could not be faulted, except in one respect:

> "I can see no reason why the income derived from [the deceased's] regular work and his side lines mentioned in (1), (2) and (3) above[129] (amounting to about R300 to R400 per month) cannot be used to measure, to some extent at any rate, his future earning capacity. Having regard to his energetic and enterprising personality I agree with the Court *a quo* that he would probably have found other ways of replacing the income from any of those side-lines that could not be continued."[130]

Attacks by the defendant upon the contingency deductions made by the trial court for the vicissitudes of life and for the plaintiff's chances of remarrying were also dismissed, resulting in the award made by Addleson J being confirmed.[131]

The central feature of the decision on appeal in *Booysen* was its express rejection of the view of Addleson J[132] that no valid assessment of the deceased's future earning capacity could be based upon the latter's unlawful activities. Instead, Trollip JA unequivocally held that the income from the unlicensed cinema shows and dances could be taken into account in determining the deceased's earning capacity, and hence the support that he would have been able to provide for his dependants out of lawfully earned income had he lived. The two passages from the judgment reproduced above, and the willingness of the appeal court to take cognisance of *all* the deceased's income-producing activities as part of the evidence of his earning capacity, are clear indications of acceptance by the Appellate Division of the principle that damages in illegal-income cases ought to be assessed on the basis of the breadwinner's capacity to earn income lawfully, regardless of the category of illegality into which the remunerative activity falls.[133] It is therefore likely that, had there been a cross-appeal against the award

---

127 964A–E.

128 964F–H.

129 The reference is to the income-producing activities of the deceased that were adumbrated of the report of the judgment on appeal 961 *in fine*–962B. In item (1) Trollip JA referred to the wage of R30 a week paid to the deceased by his father-in-law, in item (2) to the deceased's net income from his weekly dances and film shows, and in item (3) to the profits earned by the deceased from his sales of reject shoes.

130 965B–D.

131 965F–966F.

132 1980 3 SA 1215A–C.

133 As is pointed out above, Addleson J was of the view that the deceased's film shows and dances fell into the second category recognised in *Dhlamini* – that of statutory illegality rendering the breadwinner's transactions unenforceable at law, and damages for loss of

continued on next page

made by Addleson J in respect of the period from the death of the deceased until the time when he would have taken over his father-in-law's greengrocery, the damages would have been increased. For it was clear that the deceased had the ability to pursue other, legitimate means of earning an income,[134] and that this could have been taken into account on the basis of a loss-of-lawful-earning-capacity approach. The judgment of Trollip JA accordingly shows that, in order to make an award in illegal-income cases, the court need not calculate the damages on the basis of the unlawful earnings themselves. Indeed, nothing in the judgment on appeal repudiates the notion which underpinned the reasoning of Addleson J – that the court ought not to confer approval upon illegal conduct by awarding damages as a substitute for its proceeds. As can be seen from the decision of the Appellate Division in *Booysen*, it does not follow that dependants must be awarded nothing for loss of support merely because their keep was being earned unlawfully.

One might have thought that, with the loss-of-earning-capacity criterion reasserted on appeal in *Booysen*, that would be the end of the *Dhlamini* test, at least in so far as claims by dependants were concerned. But it was not to be, for in a series of subsequent Southern African cases the approach followed by the Appellate Division in *Booysen* was not applied or developed.

The first such decision was *Mba v Southern Insurance Association Ltd.*[135] The plaintiff was the widow of a self-employed taxi driver whose certificate in terms of the Motor Carrier Transportation Act 1930[136] entitling him to convey passengers for reward had lapsed. In consequence, the defendant pleaded, the income derived from the taxi business was "both illegal and contrary to public policy".[137] Since the plaintiff and her children would in the future have been supported out of that income,[138] the plaintiff, it was argued, had no claim in law for the loss of support that she and her minor children had sustained in consequence of the deceased's death. The plaintiff excepted to the portion of the plea in which this defence was raised, and in the alternative applied for it to be struck out,[139] on

---

income derived from them irrecoverable in consequence. Since there was no cross-appeal against the award made by the trial court, the Appellate Division in *Booysen* found it unnecessary to consider how the deceased's activities ought to be classified under the system of categorisation introduced in *Dhlamini*.

134 See fn 119 *supra*.

135 1981 1 SA 122 (Tk).

136 Act 39 of 1930.

137 123G–H. See also 123 *in fine* 124*pr*–A 124B–C 124D.

138 124C–D 125 *in fine*–126*pr*. Although Rose-Innes J at the last-mentioned place in the judgment created the impression that the defendant's plea contained an allegation to this effect, it was in reality the plaintiff's particulars of claim in which the averment in question was made. See the judgment at 126*pr*–A, where Rose-Innes J referred to the possibility of "an appropriate amendment of [the plaintiff's] particulars of claim" to circumvent the obstacle to the success of the plaintiff's action which, the court held, arose from the making of that averment.

139 Although a party may take exception and in the alternative apply to strike out matter from a pleading, it is settled law that when a defence raised in a trial action is bad in law (as was contended in *Mba*), the proper procedure for a plaintiff to adopt is to take exception to it, not to apply for it to be struck out (*Deeley-Barnard v Thambi* 1992 4 SA 404 (D) 405G–406C; Van Winsen, Cilliers and Loots *Herbstein and Van Winsen The civil practice of the Supreme Court of South Africa (now the High Courts and the Supreme Court of Appeal)* (1997) 498). For a detailed exposition of when one should

continued on next page

the basis that it disclosed no defence to the claim. This question, said Rose-Innes J, had been answered by Addleson J in *Booysen*, in which the principles laid down in *Dhlamini* had been applied and extended to dependants' claims for loss of support. The law propounded in those decisions was that in a delictual claim for damages for loss of earnings due to injury, or for a dependant's loss of support resulting from the death of the breadwinner, damages were not recoverable in respect of loss of earnings or loss of support derived from an illegal activity (ie an activity which was prohibited by statute, criminal either at common law or by statute, or categorised as *contra bonos mores* by the common law). In the case of a statutory prohibition or offence, however, the prohibited conduct was not illegal and void where the intention of the legislature was merely to penalise conduct without nullifying it and depriving it of legally enforceable consequences, as in the case of a penalty imposed solely or predominantly for fiscal and revenue-producing reasons, and not in order to protect the public interest "or for other grave considerations of public policy".[140] Expressing agreement with Addleson J in *Booysen*,[141] Rose-Innes J in *Mba* accordingly held that the plaintiff would be precluded from recovering compensation for loss of support for herself and her children if the support and maintenance was, or would in future have been, derived from the deceased's illegally earned income.[142] Pointing out that it was an offence for any person to carry on any motor-carrier transportation unless he was the holder of a certificate or an exemption issued to him under the Motor Carrier Transportation Act, Rose-Innes J concluded that "weighty considerations of the public interest" (such as the necessity or desirability in the general public interest that the transportation in question be provided, and the ability and fitness of the applicant to provide transportation in a manner satisfactory to the public) governed the granting, renewal or withdrawal of certificates.[143] These considerations were fatal to the plaintiff's claim:

> "Unauthorised motor carrier transportation is illegal and income sought to be derived therefrom is unenforceable at the instance of anyone claiming to have earned it or to be entitled to it. It would accordingly be contrary to public policy to allow a claim for damages based upon an alleged loss of such illegal income, or upon an alleged loss of support due to the death of a person who provided such support from such illegal income."[144]

There were, added Rose-Innes J, no circumstances in the present case taking it out of the rule that a claim for loss of support derived from illegal income could not succeed.[145] Although the plaintiff might be able to establish her loss of support by showing that the deceased was potentially able to support her and

---

except and when one should apply to strike out matter as being scandalous, vexatious or irrelevant, see Isaacs *Beck's Theory and principles of pleading in civil actions* (1982) 137–145.

140 124D–H.

141 124G–H 125F–H. See also the remarks of Van Coller J in *Mba* 127B–C and those of Comrie AJ in *Fortuin v Commercial Union Assurance Co of SA Ltd* 1983 2 SA 444 (C) 445A–B.

142 124H–*in fine*.

143 124 *in fine*–125D.

144 125C–E. See also 124 *in fine*, where the court stated that the plaintiff had "properly" conceded that income derived from motor-carrier transportation without a certificate issued pursuant to the Motor Carrier Transportation Act was illegal.

145 125G–H.

their children, and would have done so in a lawful manner had his illegal activities come to a stop, that was not the basis on which the case had been pleaded: it had been averred that the plaintiff's and the children's maintenance was being, and would in the future have been, furnished from income of the deceased derived from his unlawful operation of a taxi. With an appropriate amendment of her particulars of claim, the plaintiff might at trial be able to prove a loss of support unaffected by any illegal earnings of the deceased, but that was not the question before the court on exception, and the court was "unable to make any comment in that regard".[146] The plaintiff's exception and application to strike out were accordingly dismissed.

Rose-Innes J in *Mba*, like Addleson J in *Booysen*, accordingly applied the *Dhlamini* system of categorisation to the plaintiff's claim for loss of support, holding in effect that the operation of a taxi for reward without the requisite motor-carrier transportation certificate fell into the second of the three groups of proscribed activity recognised in *Dhlamini*.[147] In doing so, however, Rose-Innes J overlooked not only the approach laid down in the judgment of the Appellate Division in *Booysen*, which was nowhere referred to in *Mba*,[148] but also the loss-of-earning-capacity approach adopted in a number of Appellate Division decisions prior to *Booysen*.[149] (Thus Rose-Innes J twice[150] spoke of the breadwinner's claim as being for "loss of earnings", and elsewhere in his judgment[151] focused upon the nature of the deceased's "income" rather than upon the extent of the deceased's ability to earn it.) In addition, nowhere did the court in *Mba* distinguish between past and future loss of support, as was done both in the trial court and on appeal in *Booysen*. These criticisms notwithstanding, *Mba* was not all doom and gloom for dependants, for, like *Booysen*, it left open the possibility of damages being recoverable on some basis other than loss of illegal earnings *per se* (or loss of that portion of the deceased's illegal earnings which would have accrued to his dependants had he lived). Although at first blush Rose-Innes J appeared to deny any possibility of a claim when he said that "[p]laintiff would be precluded from recovering compensation . . . if the support and maintenance was, or would in future have been, derived from the deceased's

146 125H–126B.

147 124E–125E 125G–H. See also *Ferguson v Santam Insurance Ltd* 1985 1 SA 207 (C) 208B–C, the submission of counsel for the appellant in *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) 845E–F, and the remarks of Wilson J in *Mankebe v AA Mutual Insurance Association Ltd* 1986 2 SA 196 (D) 200H–201A. On the tripartite classification in *Dhlamini*, see the first article of this series: 1998 *THRHR* 564.

148 This despite the extraordinary efficiency of the court in gleaning (without the assistance of counsel, who (it would seem) argued the exception in *Mba* two and a half years earlier) the existence of the judgment of Addleson J notwithstanding the fact that it was reported in the very month (September 1980) in which the judgment on exception in *Mba* was delivered. The report of the appeal in *Booysen* appeared precisely one year earlier (in September 1979). The (later) report of the judgment of the trial court in *Booysen* referred in two places (1980 3 SA 1211 *in fine* and 1218E–F) to the existence of the report of the judgment on appeal, rendering the omission by Rose-Innes J to refer to it both incomprehensible and, with respect, inexcusable.

149 See fn 72 in the first article of this series: 1998 *THRHR* 564.

150 124E–F. See also 126A–B, where a reference to "illegal earnings" appears.

151 124C–D 124H–*in fine* 125C–E 125G–126*pr*.

illegally earned income",[152] this statement must be read in conjunction with – and, indeed, subject to – the judge's later remark that

> "[i]t would . . . be contrary to public policy to allow a claim for damages based upon an alleged loss of . . . illegal income, or upon an alleged loss of support due to the death of a person who provided such support from such illegal income".[153]

Careful reading of the latter dictum reveals that Rose-Innes J went no further in *Mba* than to deny a claim to dependants when the damages sought are calculated on the basis of the illegal income itself – an impression strongly confirmed by the judge's comment that in the matter before him

> "plaintiff might be able to establish her loss of support by showing that the deceased was potentially able to support her and the children and would have done so in a lawful manner, should his illegal activities have come to a stop".[154]

The next decision in which the question of illegal income arose was *Fortuin v Commercial Union Assurance Co of SA Ltd*.[155] The plaintiff in that case was the widow of one Gert Fortuin who, prior to his death in a motor collision, was a self-employed woodcutter. Some of the wood he cut he sold to residents in his neighbourhood, but most of it he hawked from a bakkie. To hawk wood lawfully, he required a hawker's licence issuable by the Stellenbosch Divisional Council in terms of the Registration and Licensing of Businesses Ordinance 1953.[156] He held no such licence and, indeed, committed a punishable offence by hawking wood without one.[157] His income from hawking was therefore earned illegally. Shortly before his death, however, he became aware that he required a licence to hawk wood, and applied (informally) to the Stellenbosch Divisional Council for one, but died before he could make a formal application for a hawker's licence. Comrie AJ awarded the plaintiff damages in the agreed sum of R1 950 because, as a matter of probability, the deceased would have formally pursued his licence application and would have been granted a hawker's licence had he lived; he would accordingly have earned income lawfully after that.[158] The support for the loss of which damages were awarded would therefore have been rendered out of legally earned income, and *Fortuin*'s case may be treated as being *in pari materia* with cases in which the deceased's income was lawfully earned *ab initio*.[159] There was accordingly no need to explore the possibility suggested by counsel for the plaintiff of awarding damages for loss of lawful earning capacity where income would in fact have been earned illegally.[160] Nevertheless, the decision of Comrie AJ implicitly recognised that the deceased possessed an ability to earn his daily bread in a lawful manner, notwithstanding that he was about 70 years old, illiterate and "basically untrained".[161]

---

152 124H–*in fine*.
153 125D–E.
154 125H–*in fine*. See also 126*pr*–B.
155 1983 2 SA 444 (C).
156 Ordinance 15 of 1953 (C).
157 446A.
158 448E–F 449G–H.
159 See Dendy "Damages for loss of support out of illegally earned income: visiting the sins of the fathers" 1987 *SALJ* 243 244.
160 446E–F. Counsel argued that "the deceased was the type of man who would have earned a living anyway" (*ibid*).
161 446G–H.

Of significance is that damages were awarded in *Fortuin* despite the fact that the deceased had been committing a criminal offence in hawking wood without a licence. The outcome of the case was thus at odds with that in *Dhlamini*, where damages were refused. The obvious explanation for this is that the prospective income which the hawker in *Dhlamini* would have earned had it not been for her injuries was illegal, whereas in *Fortuin* it was lawful.[162] There is, however, a second explanation, less conspicuous but more profound than the first: that in *Dhlamini* the hawker claimed compensation for a loss of future *earnings* (as Comrie AJ recognised in *Fortuin* when he pointed out that the unlicensed hawker in *Dhlamini* had been refused "damages for loss of *income from illegal hawking*", since it would be "contrary to public policy, the court held, to compensate her for *income which she would have earned from illegal trading*"[163]), whereas in *Fortuin* what the plaintiff sought in essence was compensation for the loss of portion of the proceeds of the deceased's prospective *earning capacity*.[164]

Although not bound by the decisions in *Booysen v Shield Insurance Co Ltd* and *Mba*, Comrie AJ commented *obiter* that they "arguably require qualification",[165] leaving little doubt of his disinclination to send dependants away empty-handed because of the fact that their breadwinner earned their keep illegally during his lifetime. The decision of the Appellate Division in *Booysen* was, however, again not referred to.

Matters came to a head in the mid-eighties when the action in *Ferguson v Santam Insurance Ltd*[166] came before our courts. There the deceased breadwinner had until his death carried on an unlicensed business as a panelbeater in an area zoned exclusively for residential purposes. As Vos J pointed out in the court *a quo*,[167] he would probably not have been able to legalise his activities. His widow claimed compensation for loss of the support that he would have been able to render out of money derived from the panelbeating business. Vos J took a view completely at odds with the reasoning of Addleson J in *Booysen* and Rose-Innes J in *Mba*. After stating that in his view the *Dhlamini* decision was

---

162 This fundamental distinction between *Dhlamini* and *Fortuin* appears to have been overlooked in *Ferguson v Santam Insurance Ltd* 1985 1 SA 207 (C) 208C–D, where Vos J, after expressing his agreement with the decision in *Fortuin*, added: "[I]f I understand his reasoning correctly [Comrie AJ] seems to have decided that a widow could recover despite the illegality of her husband's business." This *dictum* creates the misleading impression that damages were awarded in *Fortuin* even though the deceased would have continued to support the plaintiff out of illegal earnings had he not been killed. As has been pointed out in the text above, however, that was neither the factual nor the legal basis of Comrie AJ's decision. See also the argument of counsel for the appellant in *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) 845F–H, where *Fortuin* was distinguished and the reasoning of Vos J on the point criticised.

163 444 *in fine*–445*pr*, my emphasis.

164 Thus Comrie AJ remarked (446C–D) that the issue of fact which emerged from the pleadings was not *whether* but *how* the deceased would have earned a living, and in particular whether he would have earned it lawfully. The agreement between the parties on quantum of damages, said the judge, presupposed that the deceased would have continued to earn a living and would have continued to support the plaintiff (*ibid*). The court thus accepted implicitly that the deceased possessed the capacity to earn an income in a lawful manner.

165 445A–B. See also *Ferguson v Santam Insurance Ltd* 1985 1 SA 207 (C) 208B–D.

166 1985 1 SA 207 (C).

167 209D–E.

not binding authority for non-suiting a widow in a dependant's action,[168] the judge said that there were various forms of illegality, for example criminal conduct which was also *turpis* (such as robbery), criminal conduct which was not *turpis* (such as the sale of a controlled product to a non-authorised buyer) and conduct which was not criminal but merely void for illegality (such as certain betting transactions).[169] To say that the deceased person was carrying on an illegal business, reasoned Vos J, was to beg the question: if his conduct or business was such that he could lawfully have recovered the price of the goods sold or services rendered, then his conduct could not be classified as illegal for the purposes of a claim by his widow for damages for loss of the support that would have been rendered by him out of the proceeds. But if his conduct or business was such that the breadwinner could not in law have recovered the proceeds, for example robbery, it could be called illegal.[170] The *Dhlamini* principle, continued the judge, had been too widely formulated and required review: its application should be confined to cases in which the income of the injured party was not legally recoverable. It followed that a widow could not be non-suited where her deceased husband had carried on illegal activities of such a kind that he could lawfully have recovered the price of the goods sold or services rendered by him.[171] With respect, however, Vos J in making these remarks appears to have placed an unduly wide interpretation upon the rule in *Dhlamini*, for the test of enforceability of the underlying income-producing transactions adopted by him is in essence the same as that applied in the latter case. Other reasons were, however, given by Vos J for refusing to non-suit dependants on the ground that their erstwhile breadwinner's income was illegally earned:

> "In my view the Roman-Dutch law has advanced far beyond the principle that the sins of the fathers are visited upon the next generations.[172] Whereas a plaintiff who personally has lost 'illegal' income may be frowned upon by the Court and non-suited on that account, *non constat* that a plaintiff who has lost earning capacity, ie future loss of income, must be frowned upon. He has been injured and, if the injuries are permanent, his earning capacity is affected."[173]

Although not referring in his judgment to *Shield Insurance Co Ltd v Booysen*, Vos J proceeded to approach the problem of the dependant's claim along the same lines as did Trollip JA in the latter case:[174]

> "[I]t does not follow that in the future he is necessarily going to carry on his illegal business or activities. *A fortiori* his dependants cannot be non-suited for what is their loss after the deceased's 'illegal' activities have ceased.
>
> "To non-suit a widow or child or in the extreme case an unborn child, because the deceased husband or father was making a living out of the sale of lucerne seed [a controlled product] to unauthorised buyers is, in my opinion, unjust and on principle unsound. The widow or child may know nothing about the deceased's

168 208C–D. See also fn 93 above, and the text to it.
169 208D–F.
170 208F–G.
171 209A–C.
172 Cf the argument of counsel for the respondent (plaintiff) in *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) 847D–F.
173 208G–I. As authority for this line of reasoning, the judge referred to *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146 (A) 150C–D, quoted in the first article of this series: 1998 *THRHR* 564.
174 See 1979 3 SA 953 (A) 964D–E, 965B–D.

> activities and, if the illegality was discovered and stopped, it is obvious that the *paterfamilias* [the breadwinner] would have resorted to some other form of livelihood."[175]

The judgment therefore suggests two entirely distinct reasons for a refusal to non-suit dependants: their (possible) innocence of any illegality, and the principle that damages in South African law must be awarded when the breadwinner's earning capacity has been destroyed. Accordingly, Vos J dismissed the defence that the support claimed would have been provided out of illegally earned income, and the widow was awarded an agreed amount in damages. The court did not express a view about whether the deceased breadwinner could lawfully have recovered from his clients the proceeds of his illegal business activities, although mention was made of the considerations that the deceased's panelbeating business offended against local town-planning schemes, constituted a potential fire hazard because the deceased's premises were insufficiently fire-resistant and, "from a health point of view", could not have been licensed on account of defects in the premises.[176]

Of course, the arguments relied upon by Vos J – that the sins of the breadwinner should not be visited upon his dependants, that the dependants may not even know that their keep is being earned unlawfully, and that if the breadwinner's illegal activities had been stopped he might have turned to lawful means of making a living – are of equal force into whichever category of illegality, including criminal conduct which is also *turpis*, the deceased breadwinner's activities fell. The last of these arguments applies, in addition, where it is the breadwinner himself who sues.[177] And, as has already been pointed out,[178] it is in any event dubious to suggest, as did Vos J in *Ferguson*, that an earner of illegal income might legitimately be "frowned upon by the Court", and thus precluded from claiming damages, whereas his dependants might be permitted to claim,[179] since dependants (according to *De Vaal v Messing*[180]) cannot sue for loss of support while their breadwinner is still alive.

Unsurprisingly, *Ferguson* was taken on appeal to the Appellate Division.[181] When the case got there the judges had no hesitation in overruling Vos J. Delivering the judgment on appeal, Joubert JA first examined the provisions of the statute[182] which prohibited unlicensed panelbeating in the area in which the deceased carried on business. The law in question, said the judge, was not purely fiscal legislation and the conduct of the deceased was not a "colourless statutorily prohibited activity"[183] since it was punishable as a criminal offence. It was also apparent that very important considerations of public interest with reference to health, safety, the danger of fire and residential amenities in the surrounding

---

175 208H–209B. See also 209E–F. Cf *Mba* 1981 1 SA 125H–*in fine* 126*pr*–B (discussed above).

176 209D–E.

177 See my fourth criticism of *Dhlamini* above, in the first article of this series.

178 See above.

179 208G–H.

180 1938 TPD 34. See fn 1 in the first article of this series: 1998 *THRHR* 564.

181 Reported sub nom *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A).

182 Ie the Registration and Licensing of Businesses Ordinance 15 of 1953 (C).

183 850B–C, in translation. Rabie CJ and Jansen, Cillié and Grosskopf JJA concurred. The phrase cited here was, of course, the one coined by Rumpff CJ in *Dhlamini* 1974 4 SA 915C.

area played an important role in the issue of a licence to a panelbeater. From this it followed that without a licence the transactions entered into by the deceased were unenforceable and the income he earned was therefore illegal on the *Dhlamini* test.[184] Agreeing with Vos J that the deceased could not have hoped to obtain a licence which would legalise his business,[185] Joubert JA held, on the test formulated in *Dhlamini*, that the deceased's conduct of his panelbeating business was unlawful and the income derived from it was illegal income ("nie-regmatige inkomste"). In addition, the local authority could at any time have closed the business down.[186] At all material times prior to his death, the deceased had maintained the plaintiff out of the profits of his panelbeating business, and the question accordingly arose whether the loss by the plaintiff of her right to support was affected by the illegality of the income earned by the deceased. It was undoubtedly so ("onteenseglik so"), continued Joubert JA, that the computation of the plaintiff's damages had necessarily to be based upon the unlawful earnings derived by the deceased as breadwinner from the illegal operation of his panelbeating business.[187] Addleson J had been correct in holding, in *Booysen*'s case, that not only the breadwinner but also the dependant was precluded from relying on the illegal income as a basis for compensation. Vos J had accordingly erred in awarding the plaintiff damages for loss of support, since the compensation had been based upon the illegal earnings of the deceased as breadwinner.[188] The approach in *Dhlamini* was thus applied, the conduct of the panelbeating business being treated as falling within the second category in *Dhlamini*. The decision on appeal in *Booysen* was again ignored.

Aside from the general criticisms that will be adumbrated in the next article of this series, the judgment of the Appellate Division in *Ferguson* is open to attack in three respects. First, contrary to the view expressed by Joubert JA,[189] the statutory imposition of a criminal penalty does not *per se* remove a prohibited activity from the category of "colourless statutorily prohibited activity", since legislation which, for purely fiscal reasons, imposes an obligation to procure a licence or a permit invariably declares that the unlicensed pursuit of the targeted activity constitutes an offence carrying a fine, a sentence of imprisonment or both. If the view of Joubert JA is correct, an activity could fall into the third category recognised in *Dhlamini*[190] only if it was prohibited without being criminalised and punished. Declaration of an unlicensed activity as an offence and the provision of a criminal sanction for it are, however, the standard means of enforcement of licensing provisions. In the absence of criminalisation, the only measures that the state could take in order to compel recalcitrants to pay the prescribed licence fees would be, in the last resort, the launching of civil proceedings aimed at the procurement of an interdict prohibiting the conduct of the activity in question without the requisite licence, or civil proceedings in which the relevant governmental authority sued unlicensed individuals for payment of licence fees. Such proceedings are not, however, commonly encountered: it is, as

184 850B–E. See also the summary of *Santam Insurance Ltd v Ferguson* in *Mankebe v AA Mutual Insurance Association Ltd* 1986 2 SA 196 (D) 201C–E.
185 850I–851C.
186 851B–D.
187 851E–F.
188 851F–H.
189 850B–C.
190 See the first article of this series: 1998 *THRHR* 564.

a rule, through the medium of criminal prosecution that the objective of collecting licence fees is accomplished in practice.[191] And there is a weighty body of authority – most of it antedating *Ferguson* – which shows that the mere imposition of a criminal penalty in a licensing statute will not *per se* invalidate unlicensed transactions;[192] all of it was overlooked on appeal in *Ferguson*. Secondly, although the judges in *Ferguson* acknowledged that the plaintiff had suffered the loss of her right to support ("verlies van haar reg op onderhoud") by the deceased,[193] in denying relief the court created the jurisprudential oddity of a right without a legal remedy for its infringement – in violation of the principle *ubi ius ibi remedium*. Adoption of a loss-of-lawful-earning-capacity criterion avoids this problem: on that approach, the dependant has a right to be supported out of the proceeds of the lawful application by the breadwinner of his income-earning ability and, on infringement of that right by the wrongful killing of the breadwinner, the dependant receives damages equivalent to her (estimated) share of those proceeds. Thirdly, in commenting that the quantum of damages had necessarily to be based upon the illegal earnings that the deceased would have made,[194] Joubert JA overlooked the possibility (alluded to in *Booysen v Shield Insurance Co Ltd*,[195] *Shield Insurance Co Ltd v Booysen*,[196] *Mba*,[197] *Fortuin*[198] and *Ferguson v Santam Insurance Ltd*[199]) of awarding compensation for loss of the proceeds that would have accrued to the plaintiff from lawful utilisation by the deceased of his earning capacity.[200]

Next to pronounce upon the question was Wilson J in *Mankebe v AA Mutual Insurance Association Ltd*.[201] There the plaintiff claimed damages for loss of support in her capacity as mother and natural guardian of her minor child, whose father had been killed. During his lifetime the father had contributed R60 a month towards the child's support out of his income as an unlicensed and hence illegal hawker. Prior to the leading of evidence the parties placed before the court a special case which called upon Wilson J to decide

---

191 See *McLoughlin v Turner* 1921 AD 537 542 544–545 550 551. (*McLoughlin* itself, unusually, was a case in which the Commissioner for Inland Revenue sued to recover an unpaid licence fee despite the imposition of a criminal penalty for non-payment of it.)

192 See *McLoughlin v Turner* 1921 AD 537 544 545 549 550 560. This is so, said Innes CJ, despite the fact that the legislature may prohibit or invalidate the transaction even where the sole object is to protect the revenue (544). See also Voet 1 3 16; *Standard Bank v Estate Van Rhyn* 1925 AD 266 274–275 276–277; *Pottie v Kotze* 1954 3 SA 719 (A) 726C–728A; *Swart v Smuts* 1971 1 SA 819 (A) 829E–830D. For a decision to the same effect subsequent to *Ferguson*, see *Metro Western Cape (Pty) Ltd v Ross* 1986 3 SA 181 (A) 188F–189C 191G–192J. Further on this aspect of the decision in *Ferguson*, see the first article of this series: 1998 *THRHR* 564.

193 851D–E. This remark reflects the approach adopted in *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376C and *Groenewald v Snyders* 1966 3 SA 237 (A) 247B–C. See also the argument of counsel for the respondent (plaintiff) on appeal in *Ferguson* 846E–G and 846H–847C, and the allusion by Wilson J in *Mankebe v AA Mutual Insurance Association Ltd* 1986 2 SA 196 (D) 199C–D to "deprivation of the right to maintenance which is a right of property".

194 851E–F.

195 1980 3 SA 1211 (SE) 1217F–G.

196 1979 3 SA 953 (A) 964A–E 965B–D.

197 1981 1 SA 122 (Tk) 125H–126B.

198 1983 2 SA 444 (C) 446E–F.

199 1985 1 SA 207 (C) 208H–209B.

200 Cf the argument of counsel for the respondent (plaintiff) on appeal in *Ferguson* 847I–J.

201 1986 2 SA 196 (D).

> "whether a Court should refuse to entertain an action for damages brought by an innocent claimant whose claim for damages is based on a loss of support where the deceased's income from which the support was derived was acquired or derived from an illegal source".[202]

This, said the judge, had to be decided.

> "as a matter of principle; the question is, however, closely connected with the question as to whether the plaintiff can prove that such earnings would have continued in the future. In my opinion, the difficulty of assessing what such earnings would have been in the future does not in any way assist a Court in deciding, in principle, whether such a claim is recoverable in law. The difficulties referred to arise only in assessing the *quantum* of such damages after the right to recover such damages has been decided. Dealing with the question of *quantum*, I am of the view that where the deceased was carrying on a trade which, although technically illegal, did not expose him to criminal sanctions other than a nominal fine, a Court, in assessing patrimonial loss, is entitled to have regard to prospective earnings from other, legal, sources".[203]

The last sentence of this passage implies that where the dependant was supported partly out of lawfully earned income and partly out of the proceeds of an activity which was *turpis* or which carried a heavier criminal sanction than a "nominal fine", he or she would have no claim at all for the loss of such support. This view is insupportable in principle, for none of the policy considerations which militate against awarding damages where the breadwinner's income was illegally earned warrants denying damages for the loss of support that would have been provided out of lawful income. No support is to be found for such a view in any of the earlier South African decisions; indeed, in Booysen, neither the trial court nor the Appellate Division hesitated to award damages based on what the deceased would probably have earned lawfully by working in his father-in-law's greengrocery merely because, at the time of his death, he was organising illegal film shows and dances as sidelines.

After surveying the relevant South African decisions (but not mentioning the loss-of-lawful-earning-capacity approach adopted on appeal in *Booysen*[204]) and decisions in England and Australia,[205] Wilson J concluded:

> "The law relating to this question in Australia would thus appear to be in accordance with the *ratio decidendi* in *Dhlamini's* case. The Court must have regard to the legislation [prohibiting the deceased's illegal income-earning activity] and from that decide whether the plaintiff is entitled to recover or whether the claim must be disallowed on the grounds of public policy."[206]

---

202 199G–H.

203 199H–200A.

204 See 1979 3 SA 964A–E 965B–D. The judgment of Trollip JA in *Booysen* was alluded to only in passing by Wilson J, who noted simply that there was no challenge on appeal to the view of Addleson J in the trial court that pre-trial damages for remunerative loss had to be based purely upon the income which the deceased would have made from working for R30 a week in his father-in-law's shop (1986 2 SA 200I–J).

205 The court referred to *Beresford v Royal Insurance Co Ltd* 1937 2 KB 197 (CA) (also reported in 1937 2 All ER 243) and 1938 AC 586 (HL) (also reported in 1938 2 All ER 602), *St John Shipping Corporation v Joseph Rank Ltd* 1956 3 All ER 683, *Pigney v Pointers Transport Services Ltd* 1957 2 All ER 807, *Burns v Edman* 1970 2 QB 541 (also reported in 1970 1 All ER 886), *Meadows v Ferguson* 1961 VR 594 and *Mills v Baitis* 1968 VR 583.

206 202F–G. See also 201E–F: "It is clear from [the judgment in *Dhlamini*] that the question to be decided is not only whether the activity carried on was illegal but, in addition, whether, on the basis of important questions of public policy, the consequences of the

continued on next page

The judge elaborated as follows:

> "The right of a dependant to recover damages resulting from the death of the deceased who derived his or her income from carrying on an illegal trade or business will, in my view, depend on the nature of the trade or business carried on and the nature of the prohibition against such trade or business and the reason therefor. In my opinion, a Court will not readily deprive a dependant of his right to recover damages resulting from the death of the deceased, a right which has long been recognised by the common law, unless the prohibition against his activities of necessity indicates that it was the intention of the legislation to regard such activities as being both illegal and invalid.
>
> "In coming to this conclusion I have regard to the fact that many of the otherwise lawful activities of citizens of this country are rendered unlawful by their failure to obtain a permit or similar authorisation. Where such failure does not constitute a danger or potential danger to the public, as it did in the cases of *Dhlamini* and *Ferguson*, I do not think that public policy demands that the activities carried on by such persons be declared to be invalid or 'nie regsgeldig nie'."[207]

The doctrine of public policy, added Wilson J, ought not to be stretched beyond what is necessary for the protection of the public.[208] In certain circumstances, therefore, a plaintiff may recover damages for loss of support even where the maintenance was derived illegally or from an illegal source. Where the illegality was such that it constituted a danger to the public or even, perhaps, of such a nature as to cause general public opprobrium, public policy would demand that the plaintiff be deprived of the right to recover damages where the maintenance lost was obtained from such sources. That is a question of fact and can be decided only after hearing evidence as to the nature and degree of the illegality and of its effect on the transactions entered into by the deceased.[209] The matter was accordingly set down for further hearing (after the parties had waited for judgment for over a year since the initial hearing!) about the nature of the trade carried on by the deceased.

It is apparent, therefore, that the courts in *Mba*, *Santam Insurance Ltd v Ferguson* and *Mankebe* adopted the test for recoverability of damages formulated in *Dhlamini* and extended for the first time to dependants' claims by Addleson J in *Booysen*. In all of those decisions the success of the dependants' actions was made contingent upon the enforceability of claims for payment for the deceased's wares or services against the people with whom he transacted – or would have transacted – illegally. If those claims were legally enforceable, the dependants recovered damages; if not, the dependants were sent away empty-handed. In short, by the mid-1980s the *Dhlamini* principle reigned supreme, both in claims by earners of illegal income and in actions by dependants.

to be continued

---

carrying on of such an activity ought to be invalid." This is a clear application of the test of the enforceability of the underlying income-producing transactions concluded by the breadwinner.

207 203B–F.

208 203F–G.

209 203H–J.

Similar company names: A comparative analysis and suggested approach – Part 2*

JB Cilliers
BA LLB HDip Co Law LLM
Lecturer, University of Western Australia

OPSOMMING

Soortgelyke maatskappyname: 'n Vergelykende analise en voorgestelde benadering – Deel 2

'n Historiese oorsig van die wetgewing rakende maatskappyname soos geïnterpreteer deur die howe openbaar die redes vir die bewoording van die wetsbepalings wat soortgelyke maatskappyname reël. Alhoewel sommige tekortkominge wat vroeër bestaan het op aanbeveling van die Van Wyk De Vries-kommissie uit die weg geruim is, behoort die bestaande bepalings verder gewysig te word.

Die kriterium vir die verbod op soortgelyke name in artikel 41 en 44 van die Maatskappywet is "onwenslik". Indien die registrateur die verbod nie behoorlik toepas nie, tree die beskerming wat verleen word deur artikel 45 in werking. Dan is die kriteria vir beskerming die begrip "bereken is om skade te berokken" tesame met "onwenslik". Die Registrateur kan die maatskappy *mero motu* beveel om sy naam te verander indien dit na sy mening onwenslik is (a 45(1)) of enigeen kan die Registrateur versoek om die maatskappy te beveel om sy naam te verander indien dit onwenslik is of bereken is om skade te berokken (a 45(2)). Enigeen wat beskerming verlang mag die hof direk nader, op dieselfde gronde as in artikel 45(2), vir 'n bevel dat die maatskappy sy naam verander (a 45(2A)).

Die wysiging wat aan die hand gedoen word is om die woorde "bereken is om . . . skade te berokken" in artikel 45(2) en (2A) weg te laat. In die lig van die groot trefwydte van "onwenslik", en aangesien dit die enigste kriterium is om te besluit of 'n naam geregistreer behoort te word of nie, is hierdie woorde niksseggend. Dit verdoesel die doel van die statutêre beskerming teen soortgelyke maatskappyname (primêr die beskerming van die publiek teen misleiding en, sekondêr, die beskerming van die reg van eksklusiewe gebruik) en bestendig die verwarring met aanklamping.

5 SOUTH AFRICA[1]

5 1 Historical overview

Prior to unification in 1910, all the colonies in South Africa had their own company legislation, but only the Transvaal and the Cape had legislation providing protection for company names,[2] whereby no company could be registered under a name identical with that by which an existing company had already been

---

* See 1998 *THRHR* 582 for Part 1 of this article.

1 See Cilliers *Dissertation* 252–345.

2 The Transvaal Act 31 of 1909 and the Cape of Good Hope Act 25 of 1892 were based on the Companies Act 1908 (Eng) and the Companies Act 1862 (Eng) respectively. See Cilliers *Dissertation* 253.

registered, or so nearly resembling it as to be calculated to deceive.[3] This was the case except where the existing company was in the process of being dissolved and consented to the registration. If a company was registered in contravention of the abovementioned, it could change its name with the sanction of the Registrar.

In 1926 the company laws of the different provinces of the Union were amended and consolidated into one Act.[4] Section 10 of the Companies Act 1926 (SA) regulated company names and, in its original form, basically followed the wording of the Transvaal Act of 1909. However, the ambit of section 10(1) of the Companies Act 1926 (SA) was wider in that it extended the prohibition against identical names or names which were so similar as to be calculated to deceive, to foreign companies registered in South Africa pursuant to this Act. Furthermore, section 10(2) of the Companies Act 1926 (SA) introduced the provision that, unless the court ordered otherwise, the Registrar could not register a name which was, *in his opinion*, calculated to mislead the public. It is apparent from the South African textbooks on the interpretation of section 10 of the Companies Act 1926 (SA) that the English case law on the pre-1948 English company legislation regarding the similarity of company names was basically taken over without further ado.[5]

In *Slabbert v Airways Booking Office (Pty) Ltd*[6] the court held that the phrase "calculated to deceive" in section 10(1) of the Companies Act 1926 (SA) meant calculated to make the public think that a particular company was carrying on the business of another company. To establish this, the same principles had to be applied as one would apply in dealing with trade marks. For example, the likelihood that the ordinary prospective customer would be deceived, must be taken into account, and a distinction should be made between ordinary and "fancy" words.[7]

When the court was faced with the interpretation of both subsections (1) and (2) of section 10 of the Companies Act 1926 (SA) in *Charmfit of Hollywood Inc v Registrar of Companies*,[8] it became clear that a great deal of uncertainty existed in this regard.[9] After dismissing the two preliminary points raised,[10] Trollip J found in the court *a quo* that it was not part of the Registrar's function

---

3 In considering whether the name of a company was so nearly resembling that of another company already in existence as to be calculated to deceive, frequent use was made of English case law: see eg, *Union Steel Corporation Ltd v Registrar of Companies* 1920 TPD 266. See Cilliers *Dissertion* 254–257.

4 Act 46 of 1926 ("Companies Act 1926 (SA)").

5 See eg the commentary of Nathan *The company law of South Africa* (1939) 70 *et seq*.

6 1933 WLD 204 212. See Cilliers *Dissertation* 263–267.

7 *Supra* 209–210.

8 This case was initially reported in 1963 4 SA 351 (T), thereafter more fully in *Charmfit of Hollywood Inc v Registrar of Companies and Charmfit (Pty) Ltd (1)* 1963 2 PH, E9 (T), and subsequently in 1964 2 SA 765 (T). References to the judgment of the court *a quo* are to the latter citation, also referred to as "*Charmfit of Hollywood v Registrar of Companies* (court *a quo*)". It should be noted that the judgment of Trollip J on the merits of the application was not reported in the SALR and that, where necessary, reference has been made to the Prentice Hall Reports ("*Charmfit of Hollywood v Registrar of Companies* (PH) "). The subsequent appeal to the Appellate Division has been reported as *Charmfit of Hollywood v Registrar of Companies* 1964 2 SA 739 (A) ("*Charmfit of Hollywood v Registrar of Companies* (appeal case)"). See Cilliers *Dissertation* 274–289.

9 For a discussion of the interpretation given to s 10(4) by the Appellate Division, see Cilliers *Dissertation* 283–288.

10 *Charmfit of Hollywood v Registrar of Companies* (court *a quo*) *supra* 769. These points were not raised on appeal.

to hold an inquiry into and to decide any dispute between competing parties about a company name.[11] His duty was confined to scrutinising the company's constitution submitted for registration and, in the case of section 10(1), comparing the name with the names by which other companies or foreign companies had already been registered.[12] Where the applicant was not a registered foreign company, the registration of the respondent's name would not contravene section 10(1).[13] Trollip J's judgment on section 10(1) was upheld unanimously on appeal.

However, there was a difference of opinion among the various judges about the interpretation of section 10(2). Trollip J had found in the court *a quo* that section 10(2) dealt with a proposed company name that *ex facie* offended because of its own content and not by reason of its comparison with any other name.[14] He held that,[15] as in the case of section 10(1), the Registrar's duties were administrative and not judicial or quasi-judicial.[16] There was no obligation upon him to hear evidence before reaching a conclusion on section 10(2).[17] By contrast, Van Wyk JA took the view on appeal that section 10(2) related not only to a name which misled the public about the company's activities, but also to a name calculated to mislead the public because of its resemblance to the name of another company.[18] This was so because the words "calculated to mislead the public" were unqualified.[19] There was no reason why the name of a body corporate not registered under the Companies Act 1926 (SA) should not be protected by section 10(2).[20] Van Wyk JA also held that the Registrar, in applying section 10(2), was entitled to have regard to extraneous facts.[21] Although section 10(2) was couched in permissive terms, it impliedly directed the Registrar not to register a name until he had given due consideration to the matters specified in it, or if, having formed the opinion mentioned in the provision, he had concluded that registration should be refused.[22] Although Ogilvie Thompson JA concurred with the majority on appeal as far as section 10(2) was concerned, it was on different grounds.[23]

---

11 *Ibid.* The Registrar was neither equipped nor intended to carry out such activities. His function in registering company names was simply administrative, as he was concerned mainly with maintaining the accuracy of the register. This was similar to the position in England after the coming into force of the Companies Act 1948 (Eng).

12 *Charmfit of Hollywood v Registrar of Companies* (PH) *supra* 29–30. A foreign company could reply on s 10(1) only if it had established a place of business in South Africa.

13 *Ibid* 31. S 10(1) dealt with a proposed name that offended by reason of its comparison with other *registered* names.

14 *Ibid.* See also Suzman 1963 *Annual Survey of SA Law* 349.

15 Trollip J relied on the English case of *Rex v The Registrar of Companies: Ex parte Bowen* [1914] 3 KB 1161 1167.

16 *Charmfit of Hollywood v Registrar of Companies* (PH) *supra* 31.

17 If there was nothing *ex facie* the content of the name of the respondent itself that was calculated to mislead the public, it was not in conflict with s 10(2).

18 Van Wyk JA delivered the principal judgment on appeal, Steyn CJ and Wessels JA concurring.

19 *Charmfit of Hollywood v Registrar of Companies* (appeal case) *supra* 762.

20 *Ibid.*

21 *Idem* 762–763. Cf the minority judgment of Rumpff JA in *Charmfit of Hollywood v Registrar of Companies* (appeal case) *supra* 757.

22 *Charmfit of Hollywood v Registrar of Companies* (appeal case) *supra* 763. Cf the conclusion reached by Trollip J in the court *a quo.*

23 Ogilvie Thompson JA gave a separate concurring judgment which, it is submitted, is the correct interpretation of s 10(2). Ogilvie Thompson JA (749) was of the view that, if one took into account the history of this legislation and its context, the words "calculated to mislead" had to be interpreted as relating to a name which misled the public concerning

continued on next page

5 2 Current position[24]

The divergent views in *Charmfit of Hollywood v Registrar of Companies*[25] exposed the shortcomings of section 10 of the Companies Act 1926 (SA).[26] This, coupled with the fact that the number of applications for the registration of companies increased drastically, caused the Van Wyk de Vries Commission to recommend sweeping changes to section 10. The legislature adopted these recommendations in the Companies Act of 1973[27] which, together with all its amendments, currently regulates the issue of company names.[28]

The Companies Act 1973 (SA) makes a clear distinction between the prohibition of[29] and protection against[30] similar company names. The prohibition is enforced *mero motu* by the Registrar by applying section 41. In terms of section 41[31] of the Companies Act 1973 (SA), no company may be registered with a name which is, in the opinion of the Registrar, undesirable.[32] If, however, for whatever reason, the prohibition of similar company names is not effectively applied by the Registrar at the time of registration, the protection afforded by section 45 becomes relevant. The Registrar may either, within a year after registration of the similar name, *mero motu* order the company to change its name in terms of section 45(1) if he is of the opinion that the name is undesirable,[33] or he may be requested in terms of section 45(2) by any person[34] to order the company to change its name on the ground that the name is undesirable or calculated to cause damage.[35] A person who has not lodged an objection in terms of section 45(2) may apply to court within two years for an order directing a change of name on the ground that the name is undesirable or calculated to cause damage in terms of section 45(2A).[36] In terms of

---

the company's *activities*, as distinct from a name which was calculated to mislead the public by reason of its *resemblance* to the name of another company.

24 See Cilliers *Dissertation* 291–340.

25 *Supra*.

26 This was also pointed out by the "Aanvullende Verslag en Konsepwetsontwerp (Pretoria, 18 2 1972)" ("Van Wyk de Vries Report") of the "Kommissie van Ondersoek na die Maatskappyewet" ("Van Wyk de Vries Commission") ch 22 3.

27 Act 61 of 1973 ("Companies Act 1973 (SA)").

28 No fewer than eleven sections (s 41 to 51 inclusive) have been dedicated to this topic.

29 S 41 of the Companies Act 1973 (SA) in respect of new names and s 44 of this Act in respect of changed names.

30 S 45 of the Companies Act 1973 (SA).

31 This may result in indirect protection against similar company names being registered or used since, if a similar name is not registered, the existing company's right to exclusive use of its name is protected.

32 The concept "undesirable" is not defined in this Act.

33 Or, for purposes of this discussion, similar.

34 Including a company, by virtue of the operation of s 2 of the Interpretation Act 33 of 1957.

35 For a discussion of the overlap between "undesirable" and "calculated to cause damage", see Cilliers *Dissertation* 335–340.

36 If, at any time, the Registrar is of the opinion that the name gives so misleading an indication of the nature of the company's activities as to be calculated to deceive the public, he may order a change of name in terms of s 45(3) of the Companies Act 1973 (SA). See also Hambidge "A tale of two names: the protection of a company name with specific reference to the Companies Amendment Act 18 of 1990" 1990 *SA Merc LJ* 333.

section 48, any company or person aggrieved by a decision or order of the Registrar under sections 41 to 45 may apply to court for relief. The court may hear further evidence and make any order it deems fit.[37]

5 2 1 Meaning of "undesirable"[38]

The most recent South African decision to deal with undesirability in this context is *Deutsche Babcock SA (Pty) Ltd v Babcock Africa (Pty) Ltd.*[39] Here Deutsche Babcock brought an application in terms of section 48 of the Companies Act 1973 (SA) for an order, first, declaring that its name was not undesirable and, secondly, instructing the Registrar to enter its name in the register of companies.[40] The court found that, since the legislature had not defined the concept of undesirability, other factors had to be taken into account to determine whether or not the name was undesirable in terms of section 45(1) or (2) of the Companies Act 1973 (SA).[41] Relying on *Allied Technologies Ltd v Altechno (SA) (Pty) Ltd*,[42] Mynhardt J stated that it was clear that the Registrar had been given a key role in deciding the undesirability of a name, and that his opinion was largely subjective.[43] The judge also relied on *Kredietbank van Suid-Afrika Bpk v Registrateur van Maatskappye*[44] in finding, that the Registrar had a wide discretion in this regard.[45]

Mynhardt J held that a convenient starting point when ascertaining whether a name was undesirable in terms of section 45(1) and (2), would be the Registrar's Directive on Names of Companies published in 1973, from which it appeared that similarity of names was a factor to which the Registrar would most probably have regard when considering the undesirability of a name.[46] The judge pointed

37 S 48 does not contemplate an appeal, but a review in the sense of a re-hearing. See the third example mentioned in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 116–117.

38 See Cilliers *Dissertation* 300–322.

39 1995 4 SA 1016 (T) ("*Deutsche Babcock v Babcock Africa*"). Both the application of Deutsche Babcock to obtain leave to appeal against the decision of Mynhardt J and a subsequent petition to the Chief Justice were refused. See Cilliers *Dissertation* 317–322.

40 *Deutsche Babcock v Babcock Africa supra* 1017.

41 *Idem* 1021.

42 1995 CLD 843 (T) ("*Allied Technologies v Altechno*"). The court in *Allied Technologies v Altechno* 847 held that, in contrast to the position under s 10 of the Companies Act 1926 (SA), the Registrar could reconsider his opinion whether or not a name was undesirable, and, in reaching his decision, could even take appropriate new material into account. See Cilliers *Dissertation* 305–309.

43 *Deutsche Babcock v Babcock Africa supra* 1021. Although the remarks by Spoelstra J in *Allied Technologies v Altechno* related to s 45(2) of the Companies Act 1973 (SA) before the amendments effected by s 1 of Act 18 of 1990 (whereby the words "or is undesirable" in s 45(2) were inserted after the words "calculated to cause damage"), Mynhardt J still found them to be in point.

44 1978 2 SA 644 (W) ("*Kredietbank v Registrateur van Maatskappye*"). In *Kredietbank v Registrateur van Maatskappye* the court was of the view that, by using the concept "undesirable", the legislature intended the Registrar to have a much wider discretion in disapproving a company name than under s 10 of the Companies Act 1926 (SA) (651). See Cilliers *Dissertation* 300–304.

45 *Deutsche Babcock v Babcock Africa supra* 1022. The judge also confirmed the view that the proceedings before the court in terms of s 48 of the Companies Act 1973 (SA) were in the nature of a re-trial, where the court had to reach its own conclusion on the issue which had been before the Registrar.

46 *Deutsche Babcock v Babcock Africa supra.* It should be noted that, during the course of 1995, subsequent to judment being delivered in this case, the Registrar issued a new directive.

continued on next page

out that, in accordance with this guideline, the courts have held that it would be undesirable to register a particular name[47] if a likelihood of confusion existed by reason of the similarity of the names in question.[48] In the light of his review of *Allied Technologies v Altecno*,[49] *Kredietbank v Registrateur van Maatskappye*,[50] *Computer Training College BK v Registrateur van Beslote Korporasies*,[51] and the New Zealand cases of *South Pacific Airlines of New Zealand Ltd v Registrar of Companies*,[52] *Abacus Finance Ltd v Registrar of Companies*,[53] and *Vicom New Zealand Ltd v Vicomm Systems Ltd*,[54] Mynhardt J found that a name should be held to be undesirable "when there is a likelihood that the public, or a section thereof, might be misled by the similarity of names under consideration, or . . . there is 'a serious risk of confusion of the public'".[55]

The judge also found that it was unnecessary for the company registered first ("Babcock Africa") to prove that it had suffered pecuniary damages.[56] What should be taken into account, is that it had suffered inconvenience over a fairly long period of time because of the confusion. Babcock Africa showed that it had suffered a "not so insignificant degree of inconvenience" and that it would in all probability continue to do so if the company registered subsequently ("Deutsche Babcock") were allowed to use its changed name.[57] The factors to be taken into account in determining this question are the areas of operation and the kind of business carried on by the parties, the nature of the names in question, the evidence adduced by the objecting party regarding the confusion that had already occurred in practice and the probable continuation of confusion in the future, as well as the inconvenience suffered by the objecting party.[58] Mynhardt J found it

---

See fn 101 *infra*. See also Klopper "Sekere aspekte van maatskappyname" 1983 *DR* 76; Salmon "A precedent created in company name objections" 1986 *DR* 337.

47 See *Deutsche Babcock v Babcock Africa supra* 1022 and the cases relied on there.

48 Where there is a reasonable likelihood of confusion, the absence of a common field of activity does not in itself make the name unobjectionable: *Capital Estate & General Agencies (Pty) Ltd v Holiday Inns Inc* 1977 2 SA 916 (A) 928–929 ("*Capital Estate v Holiday Inns*"); *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd* 1981 3 SA 1129 (T) 1140–1141 ("*Lorimar v Sterling*"); *Allied Technologies v Altechno supra* 848–849. See also *Philip Morris Inc v Marlboro Shirt Co SA Ltd* 1991 2 SA 720 (A) ("*Philip Morris v Marlboro Shirt*"); Webster and Page *Chowles and Webster's South African law of trademarks, company names and trading styles* (1972) 500 ("Webster and Page *op cit* (1972)").

49 *Supra*.

50 *Supra*.

51 1996 1 SA 1122 (T) ("*Computer Training v Registrateur van Beslote Korporasies*"). This case was decided in the context of s 20 of the Close Corporations Act 1984, which is basically the same as s 45(1) of the Companies Act 1973 (SA). See Cilliers *Dissertation* 309–316.

52 [1964] NZLR 1 ("*South Pacific Airlines of NZ v Registrar of Companies*").

53 [1985] 2 NZLR 607 ("*Abacus Finance v Registrar of Companies*").

54 [1987] 2 NZLR 600 (CA) ("*Vicom NZ v Vicomm Systems*").

55 *Deutsche Babcock v Babcock Africa supra* 1024.

56 1027.

57 *Ibid.*

58 *Ibid.* Mynhardt J referred to the New Zealand cases of *Trade Consultants Ltd v Registrar of Companies* [1986] 1 NZIPR 706 ("*Trade Consultants v Registrar of Companies*") and *Sika (NZ) Ltd v Sika Technology Ltd* [1992] MCLR 264 ("*Sika v Sika Technology* (1992)") on this point.

undesirable that Deutsche Babcock should be allowed to continue to trade under its changed name and dismissed the application.[59]

5 2 2 Meaning of "calculated to cause damage"[60]

The phrase "calculated to cause damage" in section 45(2) fell to be interpreted in *Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd*.[61] Howie AJ held that this phrase approximated the common law requirement for passing off more closely than the phrases "calculated to deceive" or "mislead" which had appeared in sections 10(1) and (2) of the Companies Act 1926 (SA).[62] These words were intended to emphasise that, before relief would be afforded under section 45(2), the objector had to show not only that confusion or deception was likely,[63] but that, if either ensued, it would probably cause him damage.[64] Whether such confusion was likely to arise, was a factual question which had to be answered in accordance with the standard of care, intelligence and perception of the ordinary reasonably careful man.[65]

Subsequently, in *Hollywood Curl (Pty) Ltd v Twins Products (Pty) Ltd (2)*,[66] the majority of the court held that the right of a third party to object to the name under which a company had been registered, conferred by section 45(2) of the Companies Act 1973 (SA), was no longer linked to the requirement that the registration objected to was in conflict with the statutory provisions governing registration.[67] Section 45(2) referred to the name objected to being "calculated to cause damage

---

59 *Deutsche Babcock v Babcock Africa supra* 1028.

60 See Cilliers *Dissertation* 323–334.

61 1979 2 SA 276 (E) ("*Link Estates v Rink Estates*"). See Cilliers *Dissertation* 323–325.

62 It is submitted that there is no real difference between the words "deceive" and "mislead" in this context: *Link Estates v Rink Estates supra* 280; Meskin (ed) *Henochsberg on the Companies Act* (Vol 1) (1994) 93; Klopper 1983 *DR* 76 77.

63 "Calculated", for purposes of s 45(2), meant "likely": *Link Estates v Rink Estates supra* 278. See also *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 2 SA 930 (A) 942. In an action for passing off, the court has to decide on the likelihood of confusion or deception and "the judgement of the court must not be surrendered to any witness": *Reckitt and Colman SA (Pty) Ltd v SC Johnson and Son (Pty) Ltd* 1993 2 SA 307 (A) ("*Reckitt & Colman v SC Johnson*") 315. This should be distinguished from the position under s 45(1), where it is not necessary for all the elements of the delict passing off to be proved: *Kredietbank v Registrateur van Maatskappye supra* 654; *Computer Training v Registrateur van Beslote Korporasies supra* 1127.

64 *Link Estates v Rink Estates supra* 280; Webster and Page *op cit* (1972) 500–502. Cf Meskin *op cit* 93.

65 Ie neither the very careful man nor the very careless man: *Link Estates v Rink Estates supra* 280 and the cases cited there. See also *Miriam Glick Trading (Pty) Ltd v Clicks Stores (Transvaal) (Pty) Ltd* 1979 2 SA 290 (T) ("*Miriam Glick v Clicks Stores*") 295; *International Power Marketing (Pty) Ltd v Searles Industrials (Pty) Ltd* 1983 4 SA 163 (T) 169; *Hollywood Curl (Pty) Ltd v Twins Products (Pty) Ltd (1)* 1989 1 SA 236 (A) ("*Hollywood Curl v Twins Products (1)*") 247; *Allied Technologies v Altechno supra* 848; Webster and Page *op cit* (1972) 500.

66 1989 1 SA 255 (A) ("*Hollywood Curl v Twins Products (2)*"). *Hollywood Curl v Twins Products (1) supra* was the first of two appeals by Hollywood Curl argued before the Appellate Division and dealt with the questions of trade mark infringement and passing off, which do not fall within the scope of this article. See Cilliers *Dissertation* 328–333.

67 This was the position under s 10(4)(b) of the Companies Act 1926 (SA): *Hollywood Curl v Twins Products (2) supra* 262.

to the objector".[68] There was "no warrant for limiting the ambit of section 45(2) to a comparison between the company name of the objector and that of the company to whose name objection [was] taken".[69] This conclusion was reached taking into account the legislative history of the relevant statutory provisions[70] and the fact that the registration of a company name could not *per se* be calculated to cause damage. What was calculated to cause damage, was the anticipated or actual use by the company of that name in its trading or business activities.[71] A dormant company would, for example, cause no damage to another; nor could a dormant company complain of the likelihood of its suffering damage at the hands of another.[72]

It appears from *Allied Technologies v Altechno*[73] that actual damage need not be proved when relying on section 45(2) of the Companies Act 1973 (SA). In this case, Spoelstra J stated *obiter* that, when considering whether a name was "calculated to cause damage" in terms of section 45(2), potential damage would be sufficient.[74]

Finally, in *Deutsche Babcock v Babcock Africa*[75] Mynhardt J discussed the question whether the name of Deutsche Babcock was calculated to cause damage to Babcock Africa in an *obiter dictum*. On a comparison of the two names, the judge found that it was clear that the word "Babcock" was dominant in both of them.[76] There existed at least a "reasonable likelihood" that this would cause members of the public to believe that the business of Deutsche Babcock was connected with that of Babcock Africa.[77] Although Mynhardt J accepted that the products of the two companies were not interchangeable, he stated that the court was concerned, not with the products sold by the parties *per se*, but rather with the wrong impression that could be created in the minds of the customers or potential customers, by virtue of the similarity between the two names.[78] He found that there was a reasonable likelihood that, if Deutsche Babcock were allowed to continue with its activities under its new name, it would be able to pass off its business as that of Babcock Africa, resulting in a loss to the latter.[79] Accordingly, the name "Deutsche Babcock" was found to be "calculated to cause damage" in terms of section 45(2).[80]

---

68 It should be noted again that s 45(2) of the Companies Act 1973 (SA) now refers to the criterion of undesirability as well.

69 *Hollywood Curl v Twins Products (2) supra* 263.

70 For a useful summary of the legislative history, see the majority judgment 258 *et seq*.

71 *Hollywood Curl v Twins Products (2) supra* 262.

72 *Pivot Point (SA) (Pty) Ltd v Registrar of Companies* 1980 4 SA 74 (T) 80 ("*Pivot Point v Registrar of Companies*"); *Hollywood Curl v Twins Products (2) supra* 262. On *Pivot Point v Registrar of Companies,* see Cilliers *Dissertation* 326–327.

73 *Supra.* This case has already been discussed in the context of "undesirable".

74 *Allied Technologies v Altechno supra* 849. This could exist in the confusion of business connection or business association between an applicant and a respondent in the following ways, viz where any ill-repute of a respondent was visited upon an applicant's goods, or where a serious attrition of the advertising function of an applicant's trade mark was caused with a consequential impairment of goodwill, or where the confusion led to an exploitation of an applicant's commercial magnetism and advertising value embodied in its trade mark.

75 *Supra* 1028–1029.

76 1028.

77 *Ibid.* This was borne out by the evidence showing actual occurrence of confusion or deception.

78 1029.

79 1028–1029.

80 1029.

6 CRITICAL ANALYSIS OF THE POSITION IN SOUTH AFRICA[81]

6 1 The foundation of the law governing the registration and use of company names[82]

Despite the fact that the prohibition of and protection against identical and similar company names are extensively regulated by legislation, there has been no conceptual or theoretical analysis of the company law provisions. This has resulted in the courts dealing with the matter on an ad hoc basis, which has led to unstructured development and uncertainty. Indeed, some commentators have questioned the need for company law provisions regulating the prohibition of and protection against the registration and use of similar company names.[83] A critical analysis of the law and its development in South Africa is therefore necessary.

The origins of the South African company law can be found in England. Prior to 1856, there was no English statute dealing with company names, and there was no statutory prohibition against the adoption of any company name. The only protection against the use of a similar trade name[84] was the common-law action based on passing off.[85] This formed the foundation for the various statutory means by which trade names were regulated. There are basically three elements necessary to found an action for passing off, namely:

(i) there must be sufficient reputation or goodwill in the business, services, goods or other *indicia* in question so that the plaintiff has acquired a reputation with the public associated with its business, services or goods, or has become distinctive in relation to them;[86]

(ii) there must be a representation by the defendant which is likely to or has actually caused deception or has confused members of the public into believing that its business or services or goods are, or are connected with, those of another;[87]

(iii) the defendant's trade name or get-up must be calculated or likely to deceive or confuse the ordinary customer or member of the public, and must therefore be likely to cause damage to the goodwill of the plaintiff's business.[88]

Two important principles can be gleaned from these basic elements of passing off: first, that the action for passing off is aimed at the protection of a proprietary interest; and secondly that in protecting the proprietary interest, it recognises the right of the public not to be deceived or confused.

---

81 Identical names never seemed to cause any problems and, accordingly, reference will be made only to similar names. See Cilliers *Dissertation* 364–365.

82 See Cilliers *Dissertation* 346–349.

83 See eg Welling *Corporate law in Canada: the governing principles* (1984) 260.

84 Company names were viewed as part of the broader concept of trade or business names.

85 The essence of an action for passing off is that it is wrong for a person or company to misrepresent his or its goods or services or business as that of another. See, in general, Webster and Page *South African law of trade marks, unlawful competition, company names and trading styles* (1986) 405 *et seq.*

86 See *Lorimar v Sterling supra* 1139; *Adcock Ingram Products Ltd v Beecham SA (Pty) Ltd* 1977 4 SA 434 (W) ("*Acdock Ingram v Beecham*"); *Pepsico Inc v United Tobacco Co Ltd* 1988 2 SA 334 (W).

87 *Capital Estate v Holiday Inns supra.*

88 *Adcock Ingram v Beecham supra*; *Capital Estate v Holiday Inns supra.*

6 2 The initial statutory provisions[89]

The main object of section 10 of the Companies Act 1926 (SA) was the protection of the public against confusion and deception; in other words, it was concerned with the second principle extracted from the three basic elements of passing off.[90] The secondary object was the creation of exclusivity of use of a particular company name: by registering its name, a company did not obtain a proprietary right, but merely a right to use it to the exclusion of others. Although exclusivity of use appeared very similar to the proprietary right accorded a plaintiff in a passing off-action in respect of its goodwill, this was not the case.[91]

Although the courts in South Africa were diligent in their endeavours to resolve conflicts between company names in a conceptually sound and consistent manner, their efforts were complicated by certain inherent defects in section 10 of the Companies Act 1926 (SA).[92] Furthermore, little guidance could be obtained from the English judgments because the statutory provisions on company names in England had similar defects. When the House of Lords held in *Manchester Brewery Co Ltd v North Cheshire and Manchester Brewery Co Ltd*[93] that, whether the question of the similarity of company names had arisen under section 20 of the Companies Act 1862 (Eng) or under the common law of passing off, the issue to be decided by the court was the same,[94] the South African courts followed suit, thereby obscuring the true object of section 10 of the Companies Act 1926 (SA). The cumulative effect of the deficiencies in section 10 and the failure of the courts to state clearly that the object of the statutory provision was to give effect to the second principle of passing off only,[95] led to uncertainty and confusion, culminating in the divergent judgments in *Charmfit of Hollywood Inc v Registrar of Companies*.[96]

6 3 A new start: The Companies Act 1973 (SA)[97]

The Van Wyk de Vries Commission clearly recognised that the primary object of a company name provision should be to give effect to the second principle of passing off.[98] Unfortunately it went further, identifying the first principle of passing off as the secondary object of a company name provision,[99] and recommended that an existing company should be able to request the Registrar to order

89 See Cilliers *Dissertation* 349–355.
90 It did not reflect any notion of proprietary interest in a company name: see *Volkskas Beperk v Barclays Bank (DC&O)* 1952 3 SA 343 (A) 348.
91 While the company could attract goodwill to its name through the exclusivity of use, the proprietary right of the company was not in its name, but in the goodwill which attached to its name.
92 Eg in its original form s 10 designated neither a tribunal to receive an application pursuant to it nor a remedy to restrain its breach. Moreover, s 10 did not specify to whom a right of action, if any, lay in a situation where there was a similarity of names. See further Cilliers *Dissertation* 353.
93 [1899] AC 83 86.
94 In other words, both the principles relating to passing off, and not just the second principle, were applicable in interpreting the statutory prohibition against the similarity of company names.
95 Ie to protect the public against confusion and deception.
96 *Supra*.
97 See Cilliers *Dissertation* 355–360.
98 Van Wyk de Vries Report ch 22 6.
99 *Ibid*.

a subsequent company to change its name if the latter's name was calculated to cause damage to it.[100] This recommendation, which was followed by the legislature in enacting the current section 45(2) of the Companies Act 1973 (SA), is clearly aimed at protecting the goodwill of an existing company and not only the company's right to use its name to the exclusion of other companies.

Section 41 of the Companies Act 1973 (SA) prohibits the registration of company names which are undesirable in the opinion of the Registrar. Although similar company names are not expressly prohibited, the Registrar, like his English counterpart, has indicated by way of directives issued by him that similar company names could be regarded as undesirable.[101] Section 41 of the Companies Act 1973 (SA) allows for the registration of a company name as part of the process of incorporation. By prohibiting the registration of undesirable company names, this provision in effect (in so far as similar company names are concerned) reflects the second principle of passing off, namely the protection of the public against deception and confusion resulting from similar company names.

6 4 The need for the prohibition of and protection against similar company names in company law[102]

Although the application to court under section 48 (or section 45(2A)) of the Companies Act 1973 (SA) to claim protection against a similar company name appears to be akin to passing-off proceedings, or to be a kind of "statutory passing-off application", it is submitted that it is not.[103] The object of the statutory protection is, first, to protect the public against confusion and deception and, secondly, to protect the right of exclusivity of use which flows from having duly registered a company name first, regardless of whether or not any goodwill attaches to the name. In contrast to this, the object of passing off is to protect a company's proprietary right in the goodwill which attaches to its name as a result of its utilisation of the right to exclusivity of use of its name. Any person, including the company which has the right of exclusivity of use of a particular name, may invoke the statutory protection, while only the company whose goodwill is affected by the registration and use of a similar company name will have *locus standi* to institute passing-off proceedings. Also, to invoke the statutory protection successfully, the applicant need only show that the newly registered name is undesirable, while there are specific requirements to be satisfied before a company with *locus standi* can rely on passing off. Moreover, the statutory protection must be invoked by motion proceedings, while passing-off claims are almost always brought before the court by way of action. The remedy

---

100 *Idem* 20–21.

101 Although there is no direct provision prohibiting similarity as such under the Companies Act 1973 (SA), it is one of the factors to be taken into account when considering whether a name is undesirable. The latest Directive published by the Registrar of Companies: Practice Note No 2 in *Government Gazette* 16665/95 (GN 978 of 1995) provides (in par 1.1) that a name will be considered undesirable if it is, *inter alia*, "very similar to a name already registered" but, unlike the previous directive issued in 1973, it does not require that the similarity of the company names should be likely to mislead the public. See also Ribbens "What's in a name? an analysis of the Registrar's directive on names of companies, close corporations and defensive names" 1995 *De Rebus* 709.

102 See Cilliers *Dissertation* 361–365.

103 S 45(2) and (2A) appears in effect to introduce a statutory form of passing off into the Companies Act 1973 (SA). See eg *Link Estates v Rink Estates supra* 280.

granted subsequent to successful reliance on the statutory protection is an order that the defendant company change its name, failing which the defaulting company will incur a continuous penalty on a daily basis until the company has done so. This is different from the remedy pursuant to a successful passing-off action, being damages or an interdict prohibiting the company from using its name, or both.

The regulation of company names in South Africa is primarily entrusted to a prediction by a public official, the Registrar, that a particular company name is so similar to that of another that it is likely to confuse or mislead the public. It could be argued that the public does not need such protection and that, by regulating the registration of company names, a benefit is conferred on other traders, who have sufficient remedies at common law to protect their interests, at public expense.[104] At first glance, this argument seems convincing, but it is exposed as unsound if one has regard to the differences in object, requirements, and result between the proceedings under the Companies Act 1973 (SA) and passing off, set out above. The prohibition of and protection against similar company names in terms of sections 41 and 45 operates on a different level, supplementary to the private law remedy of passing off, and can be utilised even in a situation where a passing-off action would not be successful.[105]

The prohibition of and protection against the registration and use of similar company names in terms of the Companies Act 1973 (SA) serves the public interest. Amongst other things, it prevents public confusion and deception (albeit sometimes in an indirect way), an issue which would most probably otherwise have to be addressed by specific consumer protection legislation. In the absence of such legislation, foreign companies may be reluctant to establish branches in South Africa and to register local companies, with a resultant loss of economic benefits to South Africa as a whole. Furthermore, the courts are not being swamped with protracted passing-off litigation, and statutory rights of exclusivity of use resulting from registration under the Companies Act 1973 (SA) are protected. In the premises, it is submitted that there is still a need for statutory provisions such as sections 41 to 45 regarding the prohibition of and protection against the registration and use of identical or similar company names.

7 SUGGESTED APPROACH[106]

In terms of sections 45(2A) and 48 of the Companies Act 1973 (SA), the court must decide the matter *de novo*, unfettered by the decision reached or opinion formed by the Registrar.[107] The merits to be considered by the courts are

104 Welling *op cit* 260.

105 Ie in cases where the company name has not yet acquired goodwill. If a company's goodwill is also incidentally protected as a result of the prohibition or protection under the Companies Act 1973 (SA), it will not detract from the primary object served, namely the protection of the public against confusion or deception, or the secondary object, namely the protection of the right of exclusivity of use resulting from duly registering a company name first.

106 See Cilliers *Dissertation* 369–385.

107 *Kredietbank v Registrateur van Maatskappye supra* 650; *Twins Products (Pty) Ltd v Hollywood Curl (Pty) Ltd* 1986 4 SA 392 (T) 394; *Deutsche Babcock v Babcock Africa supra* 1022.

whether, on a balance of probability[108] and on the evidence before it, the existing company has such vested rights in its name or particular words in its name that the registration of the new company or the amended name of another company is undesirable,[109] or whether the existing company has shown not only that confusion or deception is likely, but that if either ensues it will probably cause it damage.[110] This distinction clearly delineates the two pillars of the protection against the registration of similar company names under the Companies Act 1973 (SA).

7 1 Undesirability[111]

The first pillar of the protection against the similarity of company names is based on the concept of "undesirability". By introducing this concept into the Companies Act 1973 (SA), the legislature intended that the Registrar, and also the court, should have a much wider discretion to disapprove a company name than under section 10 of the Companies Act 1926 (SA). As a result, the decisions which discuss the registration of company names in terms of section 10 of the Companies Act 1926 (SA) are relevant to what is "undesirable" only in so far as they deal with certain particular and limited forms of undesirability.[112] Undesirability should be considered by applying the principles discussed directly below.[113]

Although the opinion formed by the Registrar as to whether a company name is undesirable, is primarily subjective,[114] the court should, when considering the question of similarity, take into account the Registrar's opinion and attach proper weight to it in view of the fact that he is an expert and experienced in the field.[115] The similarity with which the Registrar – and the court – is concerned, is the visual and phonetic similarity of the name of the existing company and the new or changed name of another company.[116] The addition of a prefix to the name of an existing company is not sufficient to distinguish the new or changed name of the company from the name of the existing company.[117] Furthermore, a person has no right to have a company registered by a specific name, even if it is his own name, since the right to incorporate a company by a particular name is

---

108 It should be noted that in New Zealand the new company bears the onus of satisfying the court that its name is not undesirable, ie the new company has to prove that the Registrar was correct in registering its name: *Toyota Motors (NZ) Ltd v Registrar of Companies* [1979] 1 BCR 212 217, 219 ("*Toyota Motors v Registrar of Companies*").

109 *Kredietbank v Registrateur van Maatskappye supra* 650.

110 *Link Estates v Rink Estates supra* 280; *Pivot Point v Registrar of Companies supra* 79.

111 See Cilliers *Dissertation* 370–380.

112 *Kredietbank v Registrateur van Maatskappye supra* 651; *Allied Technologies v Altechno supra* 847–848; *Deutsche Babcock v Babcock Africa supra* 1022. See also Schoeman "Company names" 1968 *THRHR* 346 *et seq*.

113 This should not be read as a *numerus clausus* of principles.

114 *Allied Technologies v Altechno supra* 847; *Deutsche Babcock v Babcock Africa supra* 1021.

115 See *New Zealand Trophy Hunting Ltd v Registrar of Companies* [1990] 5 NZCLC 66, 346 ("*NZ Trophy Hunting v Registrar of Companies*"); *Toyota Motors v Registrar of Companies supra* 219; *Sika (NZ) v Sika Technology Ltd* [1991] MCLR 344, 348–349; *Sika v Sika Technology* (1992) *supra* 267; *Vicom NZ v Vicomm Systems supra* 604.

116 *Allied Technologies v Altechno supra* 848–849; *Simatul Chemical Industries Pvt Ltd v Cibatul Ltd* AIR 1978 Gujarat 216 219.

117 *Brian Boswell Circus (Pty) Ltd v Boswell-Wilkie Circus (Pty) Ltd* 1985 4 SA 466 (A) 468.

limited by section 41.[118] The court should more readily grant relief if the existing company attempts to *protect* its right of exclusivity of use of its registered name, than where it merely wishes to *prevent* another company from using the name without the existing company itself making use of it.[119]

It is undesirable to register the new or amended name, if there is a likelihood of confusion or deception.[120] It is a question of fact and degree whether or not a likelihood of sufficient confusion has been established to justify a change of name.[121] Thus where the deception or confusion of the public is not manifest, the court must determine the likelihood of confusion or deception, not by looking at the names in isolation, but by considering all the circumstances.[122] The following should be taken into account in determining whether a company name is undesirable because of its similarity to another company name: the likelihood of the names being abbreviated and the form of abbreviation;[123] evidence of actual confusion or deception;[124] the degree of confusion and its consequences, including inconvenience caused;[125] whether a name could or might itself mislead the public or a recognised section of the public in any particular locality, or would be likely to cause confusion in the sense that the public would think that there is some actual connection or association between the companies;[126] whether avoidable confusion has been created by the similarity of company names, which is undesirable;[127] the Registrar's Directive on company names;[128] the commercial

---

118 *KG Khosla Compressors Ltd v Khosla Extraktions Ltd* AIR 1986 Delhi 181 ("*KG Khosla v Khosla Extraktions*") 194; *Fine Cotton Spinners and Doublers' Association Ltd & John Cash and Sons Ltd v Harwood Cash and Co Ltd* [1907] 2 Ch 184 190; Diemont *Pyemont's company law of South Africa* (1953) 18; cf *Policansky Bros Ltd v L&H Policansky* 1935 AD 89 102.

119 *Dollar Rent A Car Ltd v Dollar Save Car Hire (NZ) Ltd* [1992] MCLR 396 398–399; *Toyota Motors v Registrar of Companies supra* 220.

120 *Allied Technologies v Altechno supra* 849; *Deutsche Babcock v Babcock Africa supra* 1022.

121 *Sika v Sika Technology* (1992) *supra* 267, 269; *The Mount Cook Group Ltd v Mt Cook Marketing Ltd* [1993] MCLR 322 325 ("*Mount Cook Group v Mt Cook Marketing*"); *First National Brokers Ltd v Registrar of Companies* [1986] 3 NZCLC 99, 863 ("*First National Brokers v Registrar of Companies*") 99, 866.

122 *Trade Consultants v Registrar of Companies supra* 709; *Sika v Sika Technology* (1992) *supra* 267; *Finbanco International Ltd v Registrar of Companies*, unreported judgment of Quilliam J in the High Court of New Zealand, Wellington Registry (case no 384/77) dated 1980-10-14 3–4.

123 *Pacific Life Ltd v First Pacific Life Insurances Ltd* [1988] 4 NZCLC 64, 670 ("*Pacific Life v First Pacific Life*") 64, 673; *National Timber Co Ltd v National Hardware, Timber and Machinery Co Ltd* [1923] NZLR 1258 1271.

124 *Pacific Life v First Pacific Life supra* 64, 637; *Trade Consultants v Registrar of Companies supra* 709; *Sika v Sika Technology* (1992) *supra* 267.

125 *Asia Pacific Trading Corporation Ltd v Registrar of Companies* [1989] 4 NZCLC 65, 173, 65, 177; *Sika v Sika Technology* (1992) *supra* 267; *Mount Cook Group v Mt Cook Marketing supra* 325; *First National Brokers v Registrar of Companies supra* 99, 866; *Deutsche Babcock v Babcock Africa supra* 1027.

126 *Edwin Fox Condominiums Ltd v Registrar of Companies* [1989] 4 NZCLC 64, 798 ("*Edwin Fox v Registrar of Companies*") 64, 802; *NZ Trophy Hunting v Registrar of Companies supra* 66, 348.

127 *Abacus Finance v Registrar of Companies supra* 610; *First National Brokers v Registrar of Companies supra* 99, 867; *Drilex Systems Pte Ltd v Registrar of Companies* [1991] 1 MLJ 473 ("*Drilex v Registrar of Companies*") 478.

environment in which the companies compete;[129] the geographical environment in which the companies operate;[130] whether the companies compete in the same market place;[131] the importance of first impressions;[132] the specialist nature of the companies' goods or services and the correlative ability of the customers to differentiate;[133] whether the market place can arguably deal with any confusion;[134] whether the name resembles a trade mark;[135] and the nature of the names.[136]

Any form of confusion should be diminished as far as possible.[137] Each company name must be considered in the light of its individual merits or demerits.[138] The court should assess the similarity and likelihood of confusion and should not surrender its opinion to that of witnesses.[139] In doing the assessment, the courts use the reasonable man test, namely that of an average person with average memory and imperfect recollection,[140] not of one with an extraordinary or photographic memory.[141]

---

128 See GG No 16665 of 1995-09-15 (GN 978 of 1995) discussed in fn 101 *supra*. Although it clearly states that it was published for guidance of the public and professions, that it should not be regarded as exhaustive, that the Registrar is not bound to follow it in the exercise of his discretion and that it has no statutory effect, the courts have usually referred to it with approval in the interpretation of the concept of undesirability: see eg *Deutsche Babcock v Babcock Africa supra* 1022.

129 *Trade Consultants v Registrar of Companies supra* 709; *Edwin Fox v Registrar of Companies supra* 64, 800.

130 *NZ Trophy Hunting v Registrar of Companies supra* 66, 348.

131 *Ibid; Mount Cook Group v Mt Cook Marketing supra* 325; *First National Brokers v Registrar of Companies supra* 99, 867; *Trade Consultants v Registrar of Companies supra* 709; *Drilex v Registrar of Companies supra* 478; *Sika v Sika Technology* (1992) *supra* 267.

132 *NZ Trophy Hunting v Registrar of Companies supra* 66, 350.

133 *Ibid.*

134 *Idem* 66, 351

135 In such a case, even pending the trade mark application, the company name must be undesirable: *Sika v Sika Technology* (1992) *supra* 269; *Vicomm Systems Ltd v Registrar of Companies* [1985] 2 NZCLC 99, 291 (*Vicomm v Registrar of Companies*") 99, 296; *Vicom NZ v Vicomm Systems supra* 605.

136 *Sika v Sika Technology* (1992) *supra* 267; *Trade Consultants v Registrar of Companies supra* 709. The attention of the courts has shifted from a general analysis of the similarity of the relevant company names to the more particular consideration of the use of the same word or words in these names. It is submitted that, the courts should apply the traditional English test in terms of which no company is allowed to obtain a monopoly in descriptive words (except if it has achieved a secondary meaning, in which case the courts will more readily afford protection: *NZ Trophy Hunting v Registrar of Companies supra* 66, 350) or in geographical names (*Mount Cook Group v Mt Cook Marketing supra* 325; *NZ Trophy Hunting v Registrar of Companies supra* 66, 350). Sometimes the use of a distinctive or coined word in both names will be likely to contribute towards confusion: *Sika v Sika Technology* (1992) *supra*; *Simatul v Cibatul supra.* A degree of discrimination can be expected from the public where the names of the companies consist wholly or partly of words descriptive of the services rendered by the companies: *Trade Consultants v Registrar of Companies supra* 712.

137 *Allied Technologies v Altechno supra* 848.

138 *Sika v Sika Technology* (1992) *supra* 267; *Abacus Finance v Registrar of Companies supra* 610; *South Pacific Airlines of NZ v Registrar of Companies supra* 5.

139 *Simatul v Cibatul supra* 218.

140 *Idem* 219.

141 *Idem* 220. This is even more so when it is borne in mind that in a country such as South Africa the members of the public speak different languages and with different accents and cannot be expected to notice minor differences in names or their spelling. The

continued on next page

The court should weigh up the inconvenience which will be caused to an existing company by the continued registration of a similar name and the inconvenience which will be caused to a subsequently registered company if it is ordered to change its name.[142] In other words, it is a question of relative inconvenience to the parties concerned.[143] A balance of convenience test similar to that employed in deciding whether or not to grant an interim interdict should be used.[144]

In determining the question of undesirability of a company name, reference to other cases may prove valuable to the extent that general principles can be gleaned from them and the application of such principles to different factual scenarios can be observed.[145] When looking at other cases, however, one should bear in mind that it is not necessary that the requirements of the delict of passing off, must be satisfied.[146] It is a salutory development that the South African courts are seeking guidance from the decisions of courts in other jurisdictions which have interpreted the concept of undesirability in the context of company legislation.[147]

7 2 "Calculated to cause damage"[148]

The second pillar[149] of the prohibition of or protection against the registration of another company with an identical or similar name is based on the undefined concept "calculated to cause damage" and is found only in section 45(2) and 45(2A) of the Companies Act 1973 (SA).[150] It is submitted that there is no need for this concept[151] and that it should be deleted from both section 45(2) and

---

problem may be exacerbated and complicated if, as in Hong Kong, one has to deal with the transliteration of Chinese characters: *Re an application by Hong Kong Factory Owners Association Ltd for Judicial Review* [1986] HKLR 384.

142 *Deutsche Babcock v Babcock Africa supra* 673; *Sika v Sika Technology* (1992) *supra* 268; *Abacus Finance v Registrar of Companies supra* 610; *Charisma Waterbeds Company Ltd v Registrar of Companies* [1987] 3 NZCLC 99, 922 99, 926; *Drilex v Registrar of Companies supra* 477; *KG Khosla v Khosla Extraktions supra* 195.

143 *Drilex v Registrar of Companies supra* 479.

144 See Prest *Interlocutory interdicts* (1993) 73–83; Meyer *Interdicts and related orders* (1993) 76–79.

145 *Pacific Life v First Pacific Life supra* 64, 675.

146 *Kredietbank v Registrateur van Maatskappye supra* 654; *Computer Training v Registrateur van Beslote Korporasies supra* 1127; *Deutsche Babcock v Babcock Africa supra* 1023.

147 Mynhardt J in *Deutsche Babcock v Babcock Africa supra* 1023–1024 referred extensively to the New Zealand decisions of *Abacus Finance v Registrar of Companies supra, Vicom New Zealand v Vicomm Systems supra, South Pacific Airlines v Registrar of Companies supra* and *George v Registrar of Companies* [1981] 2 NZLR 237.

148 See Cilliers *Dissertation* 380–385.

149 Although the legislature did not intend to regulate the same matter in s 45(2) and 45(2A), there is a measure of overlap: *Allied Technologies v Altechno supra.* A name which is calculated to deceive or cause damage will be undesirable but not *vice versa: Vicomm v Registrar of Companies supra* 99, 296.

150 It is curious that it was not deemed necessary to include this concept in ss 41 and 44, which contain the primary prohibition against the registration of new names and changed names respectively, but that it was deemed necessary in the section which provides for the objection against a name which had been registered.

151 In view of the very wide ambit of "undesirable", and the fact that undesirability is now the only criterion used to decide whether or not a name should be registered, the words "calculated to cause damage" serve no purpose at all.

(2A).[152] The presence of the concept "calculated to cause damage" obscures the object of the Act, because it may appear as though the legislature intended to create a statutory passing-off action. It is clear[153] that after the amendment of section 45(2),[154] the similarity of company names under the Companies Act 1973 (SA) will be determined by the courts primarily with regard to the first pillar of the protection (undesirability) rather than the second pillar (calculated to cause damage).[155] Only a few general suggestions are therefore made, in case it should become necessary for a court to review the protection against similar company names under the second pillar.[156]

The two critical questions for the purposes of the second pillar of the protection under the Companies Act 1973 (SA) are[157] whether the new or changed name of another company is such that there is a reasonable likelihood of the public being confused or deceived into believing that the new company's business is, or is connected with, the existing company's business,[158] and, if so, whether the confusion or deception is calculated to cause damage to the existing company.[159]

These questions must be answered with reference to the reasonable man test.[160] There will be a reasonable likelihood of the public being confused or deceived if the similarity in the new or changed name of another company and the name of the existing company is so striking and the difference so unimportant that a member of the public would not only associate them, either as a branch or subsidiary of the existing company, but would also confuse them, especially with a time lapse in between, having regard to the likelihood of imperfect recollection and the surrounding circumstances.[161] The similarity with which the Registrar,

---

152 See *Deutsche Babcock v Babcock Africa supra,* where it was not necessary to decide whether the similar names were likely to cause damage in view of the finding that the name was undesirable.

153 See *Deutsche Babcock v Babcock Africa supra.*

154 Until 1990, the concept of undesirability was not used in this section and an objection by an existing company had to be based on the second pillar.

155 A name that is calculated to cause damage is undesirable, but a name that is undesirable is not necessarily calculated to cause damage.

156 The protection afforded under the second pillar as set out in s 45(2) is discretionary, but the court must be satisfied that the objection is sound, based on an objective assessment of the facts of each case: *Allied Technologies v Altechno supra* 845; *Deutsche Babcock v Babcock Africa supra* 1024–1025. What has to be established is essentially the same as that which has to be established in an action for passing off at common law: *Link Estates v Rink Estates supra* 280; *Deutsche Babcock v Babcock Africa supra* 1028. Thus the likelihood of confusion or deception is a matter for the court and the judgment of the court is not surrendered to any witness: *Reckitt & Colman v SC Johnson supra* 315; *Deutsche Babcock v Babcock Africa supra* 667.

157 *Link Estates v Rink Estates supra* 280; *Hollywood Curl v Twins Products (2) supra* 262; *Deutsche Babcock v Babcock Africa supra* 1028–1029. See also Webster and Page *op cit* (1972) 500–502.

158 Fault, in the sense of negligence or "objective foresight of a reasonable likelihood of deception or confusion with consequent impairment" of the existing company's goodwill, will suffice: *Link Estates v Rink Estates supra* 281.

159 "Calculated" in this context means "likely": *Link Estates v Rink Estates supra* 278; *Hollywood Curl v Twins Products (2) supra* 262.

160 *Link Estates v Rink Estates supra* 280. See the discussion of the reasonable man *supra.*

161 *Allied Technologies v Altechno supra* 848; *Hollywood Curl v Twins Products (1) supra* 247; *Miriam Glick v Clicks Stores* 295; *Deutsche Babcock v Babcock Africa supra* 764. See also Webster and Page *op cit* (1972) 500.

and the court, is concerned, is the visual and phonetic similarity of the name of the existing company and the new or changed name of another company.[162] If there is a reasonable likelihood of confusion, it is not necessary to establish a common field of activity, as in the case of passing off, before the protection or prohibition of the second pillar can be invoked.[163] Regard should be had, not only to the actual use of the new or changed name of the other company in its trading or business activities, but also to the anticipated use of the name.[164] The confusion and deception will be regarded as calculated to cause damage to the existing company even if only potential damage can be proved.[165]

8 CONCLUSION

It appears to be even more important today, 140 years after the introduction of the first general company legislation prohibiting similarity of company names in England, that the public should be protected against deception and confusion arising from the similarity of company names. Moreover, a duly incorporated company's right to exclusivity of use of its registered name should be protected by the statute governing its incorporation, since its name is an integral and constituent part of its incorporation. Indeed, the provisions of the Companies Act 1973 (SA) governing company names and, more specifically, similarity of names, if properly interpreted and applied by the Registrar and the courts,[166] will adequately serve as protection against public confusion and deceit and will further, where the protection of the exclusivity of use of a duly registered company name is concerned, achieve through prophylaxis what the common law of unfair competition can only remedy after the fact.

It is unrealistic to interpret any instrument, whether it be a constitution, a statute, or a contract, by reference to words alone, without any regard to fundamental values. By values I mean those that are accepted by the community rather than those personal to the judge. When the judge takes values into account, he should acknowledge and identify them.

Sir Anthony Mason "Future directions in Australian law" 1987 Monash Univ LR *149 158-159.*

162 *Allied Technologies v Altechno supra* 848.

163 *Idem* 848–849; Webster and Page *op cit* (1972) 500. For passing-off cases, see *Capital Estate v Holiday Inns supra; Lorimar v Sterling supra; Philip Morris v Marlboro Shirt supra.*

164 *Hollywood Curl v Twins Products (2) supra* 262; *Allied Technologies v Altechno supra* 849.

165 *Allied Technologies v Altechno supra* 849; *Deutsche Babcock v Babcock Africa supra* 1029.

166 As Mynhardt J did in the seminal case of *Deutsche Babcock v Babcock Africa supra.*

New trends regarding the maintenance of spouses upon divorce*

Madelene de Jong
BLC LLB
Senior lecturer, University of South Africa

OPSOMMING

Nuwe tendense rakende die onderhoud van gades na egskeiding

In hierdie artikel word aangetoon dat die gerapporteerde beslissings oor die onderhoud van gades na egskeiding twee verskillende benaderings propageer. Aan die een kant is daar die neiging om gades so gou as moontlik na egskeiding van die verpligting te bevry om mekaar te onderhou. Aan die ander kant is daar die bereidwilligheid om op grond van billikheid verlengde onderhoudsaansprake na egskeiding toe te staan. Daar word verder aangetoon dat die eerste benadering voorrang in die praktyk geniet en in ooreenstemming met tendense in ander Westerse jurisdiksies is.

Vervolgens word die redes vir die moderne tendens oor die onderhoud van gades na egskeiding asook die uitwerking daarvan op vrouens en kinders ondersoek. Die gevolgtrekking word gemaak dat die moderne tendens in die algemeen onbehoorlik teen vrouens (en kinders) diskrimineer en dat dit gevolglik in stryd met die Grondwet van die Republiek van Suid-Afrika 108 van 1996 is.

Die wyses waarop die onbevredigende situasie aangespreek kan word, word daarop ontleed. In hierdie verband word voorgestel dat die probleme wat veral vrouens en kinders na egskeiding ervaar langs die weg van permanente onderhoudsbevele oorbrug kan word. So 'n interpretasie is in ooreenstemming met die uitdruklike bepalings van artikel 7 van die Wet op Egskeiding 70 van 1979.

Ten slotte word die probleme rondom die afdwinging van onderhoudsbevele geïdentifiseer en enkele voorstelle gemaak om die probleme op te los.

1 THE CURRENT LEGAL POSITION

Our reported case law clearly advocates two different approaches to the maintenance of spouses upon divorce. There may therefore be uncertainty among family law lawyers about the current legal position in this regard.

On the one hand, in cases like *Beaumont v Beaumont*,[1] *Katz v Katz*[2] and *Archer v Archer*,[3] it was accepted that an order for financial provision which achieves a "clean break" between the parties – implying no ongoing duty of support – is desirable, if circumstances permit. Further, in *Kroon v Kroon*[4] the

---

* This article is based on a lecture delivered to family law lecturers on 1997-10-11 at an update session on family law presented by the Department of Private Law, Unisa.

1 1987 1 SA 967 (A) 992–993.

2 1989 3 SA 1 (A) 11.

3 1989 2 SA 885 (E) 894–895.

4 1986 4 SA 616 (E) 632.

court held that maintenance will not be awarded to a woman who is able to support herself, but that rehabilitative maintenance may be awarded to a woman who has devoted herself to full-time management of the household and care of the children for years. Such maintenance will be awarded for a period sufficient to enable her to be trained or retrained for employment. *Claassens v Claassens*[5] also belongs under the first group of cases, which propagates the view that the financial obligations between the spouses should be terminated as soon as possible after divorce. In the *Claassens* case[6] it was stressed that the number of women who are able to support themselves through their own efforts is growing, and it was held that women should no longer be seen as dependent upon their husbands. Lastly, the courts' present attitude towards nominal maintenance awards, as expressed in *Portinho v Portinho*[7] and *Qoza v Qoza*,[8] is also proof of the reduced willingness on the part of our judiciary to award maintenance to ex-spouses upon divorce.

On the other hand, there are a number of cases that seem to run counter to the trend that maintenance should be available only in extraordinary circumstances and should then be limited to a period sufficient to "rehabilitate" the recipient's market prospects. In *Grasso v Grasso*[9] Berman J doubted whether it is correct to say that in South Africa a divorced wife who has not worked during the marriage is entitled only to rehabilitative maintenance. He said that where the divorced husband can easily afford to have his ex-wife not go out to work and where she did not work prior to divorce, but devoted herself instead to her home and the upbringing of her children, the husband should be compelled to pay her permanent maintenance. Similar negative responses to the idea that a divorced woman should be expected to enter the labour market and support herself after divorce, were expressed in *Pommerel v Pommerel*[10] and even in *Kroon v Kroon*.[11] Other cases, such as *Nilsson v Nilsson*[12] and *Rousalis v Rousalis*,[13] also stress the fact that post-divorce maintenance in terms of section 7 of the Divorce Act is not solely dependent on the common law requirements for maintenance, namely need on the one hand and ability to pay on the other, but also on other factors such as one spouse's contribution to the household and the upbringing of children. In *Nilsson*[14] it was suggested that section 7 of the Divorce Act[15] could and should be used by the courts to ensure fairness between the parties, and in *Rousalis*[16] the court stated that a wife of long standing who had by working helped her husband to build up his separate estate, would be entitled to far more maintenance in terms of section 7(2) than one who had merely shared his bed and kept his house for a few years. The courts therefore acknowledged that post-divorce maintenance awards under section 7 may include a compensatory element – a wife must be compensated for her contribution by means of a maintenance

5 1981 1 SA 360 (N).
6 1981 1 SA 360 (N) 369.
7 1981 2 SA 595 (T).
8 1989 4 SA 838 (C).
9 1987 1 SA 48 (C) 58.
10 1990 1 SA 998 (E) 1001–1004.
11 1986 4 SA 616 (E) 631.
12 1984 2 SA 294 (C).
13 1980 3 SA 446 (C).
14 1984 2 SA 294 (C) 297.
15 Act 70 of 1979.
16 1980 3 SA 446 (C) 450.

order.[17] In the second group of cases the reasonableness of continued support after divorce is therefore underlined.

From a very superficial perusal of divorce court files in the Transvaal Provincial Division of the High Court,[18] it appears that the approach adopted in the first group of cases,[19] namely to free ex-spouses as soon as possible after divorce from the obligation to support each other, predominates in practice. This approach is also in accordance with the trend which has long been apparent in other Western jurisdictions. (In this regard it is interesting to note that we are usually a decade or so behind other Western jurisdictions.[20]) In the United Kingdom, for example, the Matrimonial and Family Proceedings Act of 1984 reduced the liability for maintenance of ex-husbands to their former wives and emphasised the clean break principle by means of property redistributions on divorce. In Germany, too, the entitlement to maintenance after divorce has been restricted to exceptional cases by the Marriage Law Reform Act of 1976.[21] The worldwide trend therefore seems to be in support of the abolition of post-divorce maintenance.

2 REASONS FOR THE NEW TREND

The most obvious reason for this new trend is that legislation has started to place women on an equal footing with men – gradually at first, but very rapidly from the end of 1993 onwards. For example, the General Law Fourth Amendment Act of 1993[22] finally abolished the marital power *in toto*[23] and achieved formal equality between men and women in a number of spheres. Similarly, the Guardianship Act of 1993[24] accorded equal status to mothers in regard to guardianship of their children. And in the employment sphere, labour legislation such as the

---

17 This viewpoint has been the subject of considerable criticism from academics. See inter *alia* Van Schalkwyk *Huweliksreg Bronnebundel* (1992) 375; Sinclair "Financial provision on divorce – need, compensation or entitlement?" 1981 *SALJ* 469 476; Sonnekus "Onderhoud na egskeiding" 1988 *TSAR* 440 446 and "Statutêre begrensing van versorgingsaansprake na egskeiding – die Nederlandse en Duitse voorbeelde" 1994 *THRHR* 607 613–614; Van Zyl "Post – divorce support – theory and practice" 1989 *De Jure* 71 74–75. In my opinion these authors all lose sight of the fact that the factors set out in s 7 of the Divorce Act make it clear that post-divorce maintenance awards are not solely dependent on the common-law requirements of need and ability.

18 Court files from February 1997 to July 1997 were examined. Maintenance was awarded to women in only a relatively small percentage of cases.

19 Ie *Beaumont* 1987 1 SA 967 (A); *Katz* 1989 3 SA 1 (A); *Archer* 1989 2 SA 885 (E); *Kroon* 1986 4 SA 616 (E); *Claassens* 1981 1 SA 360 (N); *Portinho* 1981 2 SA 595 (T); *Qoza* 1989 4 SA 838 (C).

20 See Sinclair *The law of marriage* vol 1 (1996) 150; Van Zyl 1989 *De Jure supra* 71.

21 The Act provides for maintenance in cases where one spouse cannot find adequate employment because of career prejudice occasioned by the marriage or cannot be expected to work after the divorce.

22 Act 132 of 1993, which came into operation on 1993-12-01.

23 Act 132 of 1993 was, however, not applicable to the former self-governing territories and the TBVC states. Major conflicts existed between the laws of these territories and states, on the one hand, and the national law of South Africa on the other. In the erstwhile KwaZulu and Transkei, eg, the marital power still operated after the coming into operation of Act 132 of 1993. However, the Justice Laws Rationalisation Act 18 of 1996, which came into operation on 1997-04-01, eliminated most of these differences. It provides *inter alia* that the marital power now applies nowhere in South Africa.

24 Act 192 of 1993.

Wage Act,[25] the Basic Conditions of Employment Act[26] and the Labour Relations Act[27] has outlawed unfair discrimination based on sex. Of course, the interim Constitution of 1993[28] and the final Constitution of 1996 are also of great significance in this regard.[29]

Another reason for the reduced willingness to award maintenance to women on divorce is the increasing economic activity of women outside the home.[30] According to the Central Statistical Service, women constituted 47,6% of the economically active population in 1996.[31] The perception has developed that women are fully equal members of, and are fully integrated into, the South African labour force.

Furthermore, the fact that marriage is no longer viewed as an indissoluble bond,[32] the fact that liberal legal feminists have pressed for equal treatment of men and women,[33] and the fact that ex-wives have progressively been seen as "alimony drones" who live off their poor, hardworking husbands,[34] have all contributed to the new trend regarding the maintenance of spouses after divorce. It is now commonly expected that women must be financially independent on, or soon after, divorce and that wives are no longer in need of maintenance from their husbands.[35]

It is, however, questionable whether women can be expected to be financially independent on divorce, if they were allowed or rather, indirectly forced, to be financially dependent on their husbands during the marriage. In other words, is this new trend regarding the maintenance of spouses upon divorce justifiable in a new constitutional dispensation which is committed to ensuring real equality between men and women?

3 THE IMPACT OF THE NEW TREND

When the impact of the new trend on women is examined, it will soon be evident that equality in theory has resulted in injustice in practice.[36] June Sinclair[37] remarks that arguments for the abolition of maintenance "ignore the fact that the

---

25 Act 5 of 1957 as amended by Act 48 of 1981.
26 Act 3 of 1983.
27 Act 66 of 1995 which came into operation on 1996-11-11.
28 Constitution of the Republic of South Africa Act 200 of 1993.
29 Constitution of the Republic of South Africa Act 108 of 1996.
30 See Clark "History of the Roman-Dutch law of marriage from a socio-economic perspective" in Visser (ed) *Essays on the history of law* (1989) 159 201; Sonnekus 1998 *TSAR supra* 610–611; Van Zyl "The disappearing meal-ticket" 1984 *Codicillus* 13 14.
31 See 10.2 of *Statistics in brief 1996*.
32 See Van Zyl 1984 *Codicillus* 14; Sonnekus 1988 *TSAR* 444.
33 See Regan "Divorce reform and the legacy of gender" 1990 *MLR* 1452 1455.
34 See Smart "Marriage, divorce, and women's economic dependency: a discussion of the politics of private maintenance" in Freeman (ed) *The state, the law, and the family – critical perspectives* (1984) 9 10–11; Southwell "A meal ticket for life – myth or reality?" 1985 *Fam L* 332.
35 See Kaganas and Murray "Law and women's rights in South Africa: An overview" in Murray (ed) *Gender and the new South African legal order* (1994) 1 14; O'Donovan "Should all maintenance of spouses be abolished?" 1982 *MLR* 424 425.
36 See Kaganas and Murray 14; Sinclair *The law of marriage* 29.
37 "Marriage: is it still a commitment for life entailing a duty of support?" 1983 *Acta Juridica* 75 81.

ideology of equality has not been followed by material equality".[38] In *The law of marriage*[39] she points out that, despite formal equality, women are on the whole still subordinate to men, mainly because of their child-care commitments and their inability to achieve economic equality with men in employment.

Despite the fact that more and more women are entering the labour market, the premise still is that a man with no child-care responsibilities is the ideal worker.[40] It is said that "[w]omen are workers just like men but they are also expected to be mothers, wives and home-makers. Their experience is therefore that of a double role in a divided workplace".[41] Sinclair[42] states:

> "While men are raised to believe that they have the right and the responsibility to perform as ideal workers, women are raised to believe that their commitment to work must be defined to accommodate their child-care responsibilities. They therefore have a tendency to select jobs that will allow them to fulfil their responsibilities, even if such jobs pay less and offer less opportunity for advancement."

This is also proved by statistics. According to the *Manpower survey 1994 – Occupational information*, which was released only in February 1997, women constitute 30,4% of the total number of people in occupations in South Africa,[43] but occupy only 16% of managerial positions.[44] It is further interesting to note that a recent survey in the United States has indicated that only 35% of women in managerial positions have children, compared with 95% of their male counterparts.[45]

It is, however, certain that even where a young woman chooses a more demanding, high-level career and a two-breadwinner model is followed in her marriage, it will inevitably be her job that is sacrificed when curtailment of the career of one spouse is demanded by child-care commitments. This is so because women worldwide still overwhelmingly assume primary responsibility for the care of children and the household.[46] Many women believe, perhaps subconsciously, that a mother who is seriously committed to her career is failing her child. In the United States a recent study of college students revealed that more than 60% of the women, but fewer than 10% of the men said that they would substantially reduce working hours or quit work altogether if they had young children.[47] Similarly, a survey of law students there indicated that 50% of the women, but virtually none of the men, intimated that they expected to have half or more of the child-care responsibility if they had children.[48]

---

38 This seems to be the problem all over the world. Glendon *The transformation of family law: state, law, and family in the United States and Western Europe* (1989) examined, *inter alia*, the economics of divorce in the US, England, Germany and France and came to the conclusion (307) that in none of these countries is formal equality mirrored by the way average people live. See also O'Donovan 428; Smart 11.

39 28.

40 Sinclair 54; Regan 1460.

41 Campanella "Some aspects of gender discrimination" in Benjamin, Campanella and De Villiers *Trends in South African labour law* 1991 67.

42 54.

43 1 637 713 of a total of 5 396 054 jobs were occupied by women: *Manpower survey 1994 – occupational information* 82.

44 35 691 of a total of 221 319 managerial positions were occupied by women: *Manpower survey 1994 – occupational information* 39.

45 See Regan 1460.

46 *Idem* 1459; Sinclair 45.

47 Regan 1459.

48 *Idem* 1459–1460.

This unequal distribution of the domestic burden, which has the effect of channelling married women into lower-paid, part-time jobs or into unemployment, inhibits the development of a stable career, with the result that women cannot be financially independent on divorce.[49] However, because it is nowadays presumed that men and women are equal and that women are independent on divorce, a large number of women suffer large-scale economic hardship after divorce. It is generally only young women with no children who suffer no economic hardship after divorce.[50] Because women, as the primary caretakers of children, are usually awarded the custody of their children, it often happens that they have to leave their jobs or at least reduce their working hours upon divorce in order to carry the burden of their increased parenting responsibilities during the week.[51] It is therefore not suprising that many women experience a decrease in their post-divorce income coupled with a drastic drop in their standard of living.[52] On the other hand, research has shown that men generally improve their standard of living after divorce. Secure in their pre-divorce jobs and suddenly free from any major parenting responsibilities, they are able to concentrate on and further their careers.[53] Research in the United States, for example, has shown that one year after divorce, men's post-divorce standard of living increases by 42%, while that of women declines by 73%.[54] Inflation and the increase in the expense of child-rearing as children grow older, widen this gap between men and women.[55] Even if there are no longer any dependent children on divorce and the wife can devote herself to her career once again, she cannot make up lost ground, whether because of her long absence from the labour market or because of her advanced age.

It is therefore clear that in reality men and women are not yet economic equals and that the modern trend regarding the maintenance of spouses upon divorce discriminates unfairly against women because they are women.[56] Ex-wives are definitely not "alimony drones".[57] In fact, the phrase "the feminisation of poverty" has increasingly been used to describe their situation.[58]

The problem is, however, made worse by the fact that it is not only women who suffer. Van Zyl[59] points out that when a parent and a child share a home, the standard of living of the parent is also that of the child; and, in particular, the poverty of the custodial parent is that of the child. Besides that, children receive less attention from their fathers after divorce – because fathers usually do not

---

49 *Idem* 1461; Sinclair 139–140.

50 See MacLindon "Separate but unequal: The economic disaster of divorce for women and children" 1987 *Fam LQ* 351; Van Zyl 1989 *De Jure* 82 and the authority cited there.

51 Typical settlement arrangements in respect of children are that the father would have them only every other weekend and alternate school holidays.

52 See MacLindon 302 with regard to the position in the US and Parker "Rights and utility in Anglo-Australian family law" 1992 *Modern LR* 311 314 with regard to the position in Australia and the UK.

53 MacLindon 393.

54 See Kay "Equality and difference: a perspective on no-fault divorce and its aftermath" 1987 *Cincinatti LR* 1 79 and the authority cited there.

55 See MacLindon 394.

56 See Kaganas and Murray 14.

57 Clark 210; Van Zyl 1989 *De Jure* 82; Southwell 332.

58 See Sinclair 140; Van Zyl 1989 *De Jure* 82 and "Spousal support – an update" 1992 *THRHR* 299.

59 1992 *THRHR* 297.

share in the child-care responsibilities of children of whom they do not have custody – and they receive less attention from their mothers – because mothers are often engaged in an exhausting struggle simply to keep the family financially afloat. Children may well become embittered towards their fathers. Economically, the father's standard of living increases dramatically after the divorce, in sharp contrast to the new hardships the child and mother experience. Although courts may fail to see this injustice, a child will not.[60] Barbara Woodhouse[61] calls the children of divorce modern day Oliver Twists who grow up with their noses pressed against the glass, looking at a way of life that by all rights should have been theirs. It seems therefore that the coined phrase should go further and rather refer to "the feminisation and paedonisation of poverty".

It is therefore apparent from the above discussion that there is a vast difference between the modern trend regarding the maintenance of spouses upon divorce and social and economic reality.[62] It is also in conflict with the Constitution which goes beyond formal guarantees of equality.[63] The disadvantages suffered by women, purely because they are women, must therefore be eliminated. The next question is how this should be done.

4 WAYS IN WHICH THE CRISIS OF THE FAMILY CAN BE ADDRESSED

Sinclair[64] points out that there are basically three ways in which the crisis of the family can be addressed, namely:

- the modification of matrimonial property law to ensure that, on divorce, women share assets built up during the marriage;
- the refinement of the law compelling private maintenance; and
- the development of sophisticated social security systems to alleviate the poverty and hardship occasioned by divorce.

Other Western legal systems[65] have been whittling away at the maintenance concept and have opted to modify their matrimonial property law by making provision for lump sum payments and property redistributions on divorce and also for ex-wives to receive some pension and insurance benefits. This has also been the case in South Africa. Besides the fact that our common law is based on universal community of property and of profit and loss, several developments in matrimonial property law have mitigated some of the harsh consequences of divorce. First, there was the introduction of the accrual system in 1984, which amounts to a deferred sharing of profits of spouses married out of community of property. Secondly, there is the provision for judicial interference with the consequences of complete separation of goods via redistribution orders in terms of section 7(3) of the Divorce Act,[66] and lastly, the introduction of the concept of pension-sharing in terms of section 7(7)(a) of the Divorce Act. The problem is, however, that the application of redistribution orders and the provisions governing

60 See MacLindon 1987 *Family Law Quarterley* 394–395.
61 "Towards a revitalization of family law" 1990 *Texas LR* 245 268–269.
62 See Van Zyl 1989 *De Jure* 73; MacLindon *supra* 396.
63 See Kaganas and Murray 35–36.
64 141–150.
65 Eg England and Germany.
66 See Sinclair 142.

pension-sharing are very limited[67] and that the accrual system is often excluded in antenuptial contracts at the insistence of the financially stronger party, normally the husband.

Another serious problem with the accrual system and the redistribution of assets in terms of section 7(3) is that most couples have relatively few assets available for distribution or redistribution at the time of divorce. The most important asset of most households is the stream of future income that represents a return on career investment.[68] This asset, which is often termed the "career asset",[69] is not taken into consideration on accrual sharing or when a redistribution order is made. For most divorcing spouses, the accrual system or the judicial discretion of the courts in terms of section 7(3) of the Divorce Act will therefore make no substantial difference in economic well-being after divorce.[70]

This brings us to the second way in which the crisis of the family can be addressed, namely private maintenance. Because of the modern trend regarding the maintenance of spouses upon divorce, continued spousal support does not play an important role in countering the crisis of the family in South Africa today. Liberal legal feminists have welcomed this trend as the payment of maintenance to ex-wives is considered to be psychologically undesirable in that it encourages or reinforces attitudes of dependency.[71] Other legal writers have also welcomed the trend as it is felt that, in principle, every healthy adult should be responsible for his or her own livelihood.[72] These writers acknowledge, however, that wives who have taken the burden of child rearing from their husbands and who have been withdrawn from the labour market, should be compensated.[73] They do, however, feel that since fault no longer plays a part in divorce and marriage breakdown is simply a misfortune that may strike anybody, the state should be the one to compensate these wives.[74]

The development of social security systems is then the third device Sinclair mentions which can be used to cushion the effect of divorce on women. South Africa, however, is determinedly not a welfare state[75] and lacks the means to

---

67 In terms of s 7(3) of Act 70 of 1979, the court's discretion to redistribute assets on divorce applies only in some marriages, namely
(1) marriages of whites, coloureds and Asians concluded before 1 November 1984 and marriages of Africans before 2 December 1988
(2) which are out of community of property without the accrual system
(3) and in which the spouses have reached no agreement about the division of their assets.
In terms of s 7(7)(c) of Act 70 of 1979 the provisions of s 7(7)(a) regarding pension-sharing are not applicable to parties married out of community of property with exclusion of the accrual system after 1 November 1984.

68 See MacLindon 398; Regan 1466–1467; Van Zyl 1989 *De Jure* 76.

69 See Sinclair 140 fn 374. Other authors use the term "human capital". See Van Zyl 1989 *De Jure* 76.

70 See Sinclair 148.

71 See O'Donovan 427; Regan 1468; Van Zyl 1989 *De Jure* 73.

72 See Sonnekus 1988 *TSAR* 440 and 1994 *THRHR* 609–610.

73 See Sonnekus 1988 *TSAR* 448–449.

74 See Sonnekus 1998 *TSAR* 449–450 and 1994 *THRHR* 617 where he says: "Die staat as georganiseerde breë gemeenskap behoort aanspreeklik te wees vir die onderhoudsversorging van sy werklik onderhoudsbehoewende burgers en kan nie sy verantwoordelikhede ontduik deur dit af te wentel op die persoon wat toevallig met die beweerde onderhoudsbehoewende eens getroud was nie." See also Van Zyl 1989 *De Jure* 77.

75 See Sinclair 151; Van Zyl 1984 *Codicillus* 16.

carry the full burden of support.[76] This option, which would increase the burden on the taxpayer, would definitely not be very popular if it were to be introduced here.

It therefore seems that none of the three approaches mentioned by Sinclair offers a solution to present problems experienced mostly by women and children upon divorce. It is, however, my opinion that maintenance orders have the greatest potential to redress the disadvantanges suffered by divorcing women and their children.

I agree with those who say that every person should carry the responsibility for his or her own livelihood.[77] In this regard women should be educated and encouraged to be self-sufficient. They should come to realise that housewife-marriage has become a luxury which few can afford and which the law cannot encourage.[78] At the moment, the way our courts treat the maintenance of spouses upon divorce does, however, send out a message that encourages women not to be self-sufficient. If women are qualified workers who can support themselves, they will not qualify for maintenance, even though they performed a disproportionate amount of housework and child care during the marriage and though they will most probably get custody of the children after divorce. And if they can be trained or retrained for a job or occupation, they will qualify only for rehabilitative maintenance until they are self-sufficient. But, on the other hand, if they are helpless, unskilled persons who will never be able to support themselves, they will be entitled to permanent maintenance. Thus if a wife wants to qualify for maintenance upon divorce, she should just make sure that she cannot do anything.

But that is only one side of the problem. Just as women are expected to be self-sufficient, men are expected to assume their half share of the responsibility for housework and care of the children.[79] Although women, in general, have started to come up to expectations, most men are still not prepared to do their share of the housework and care of the children. It has been shown that most women would indeed prefer to be independent, but that in practice this is not possible.[80] As most married couples do have children,[81] and as most men still refrain from taking their responsibility for child care and housework, women in general cannot be totally independent upon divorce. It is therefore not surprising that the reform of the reforms has already started.[82] For example, in the United States, statutes in Pennsylvania, California and Florida, which were modelled on the clean break principle and the notion that support is supposed to be essentially rehabilitative in nature, have been amended to the effect that permanent maintenance should be awarded in the light of factors such as one spouse's contribution to the household and the upbringing of children, one spouse's contribution to the other spouse's career or education, whether a spouse's earning capacity is enough to maintain the standard of living of the marriage and the disparity between the two spouses' earning power.[83] In my opinion, this should also be the approach to maintenance orders in South Africa. May the reform of the reforms in South Africa, this time, not lag ten years behind other Western jurisdictions!

---

76 In other countries, too, suggestions for guaranteed maintenance funds have not been implemented, primarily because the state lacks the means to carry the burden of support. See Van Zyl 1989 *De Jure* 83.

77 See fn 71 above.

78 See Sinclair 152.

79 *Idem* 89; O'Donovan 433; Woodhouse 271.

80 Van Zyl 1989 *De Jure* 82.

81 See Regan 1459; Sonnekus 1994 *THRHR* 614.

82 See Van Zyl 1992 *THRHR* 299.

83 See Woodhouse 278–279.

The Divorce Act clearly makes provision for this kind of approach to maintenance orders. In terms of section 7(2), the court may make an order which it finds just in respect of the payment of maintenance by one party to the other, taking into account the following factors:

- the existing or prospective means of the parties;
- the respective earning capacity of each spouse;
- the financial needs and obligations of the spouses;
- the standard of living of the spouses prior to the divorce;
- the conduct of each spouse in so far as it may be relevant to the breakdown of the marriage;
- whether a redistribution order in terms of section 7(3) will be made; and
- any other factor which, in the court's opinion, should be taken into account.

It is clear that the common-law requirements for maintenance, namely, need on the one hand and ability to pay on the other, are not the only requirements when post-divorce spousal support is considered. This viewpoint was also expressed in cases like *Nilsson v Nilsson*[84] and *Rousalis v Rousalis*[85] referred to above. These cases have, however, been criticised by a number of academics,[86] who are of the opinion that the whole tenor of section 7(2) is to emphasise need and not contribution or compensation. That, clearly, is not the case. Surely, factors such as the standard of living of the spouses prior to the divorce,[87] the conduct of the parties in so far as it may be relevant to the breakdown of the marriage, whether a redistribution order is going to be made or not,[88] and any other factor which should be taken into account to arrive at a just decision, have nothing to do with need.

Since a just decision must be made in terms of section 7(2), and since the Constitution of the Republic of South Africa[89] guarantees real equality, our courts are in my opinion compelled to consider under "any other factor", issues such as the disparity between the economic position of husband and wife and the extent to which this disparity has resulted from the marriage. The objective of post-divorce spousal support should be to adjust the economic advantages and disadvantages arising from the marriage equitably, in so far as the adjustment is not made by means of the parties' matrimonial property system or a redistribution order in terms of section 7(3) of the Divorce Act. In this way outcomes will be equalised[90] and a woman will have access to the marital asset which has the most

---

84 *Supra*.

85 *Supra*.

86 See fn 17 above.

87 There is no definite interrelationship between the spouses' pre-divorce standard of living and one spouse's objective need for maintenance after divorce.

88 A redistribution order deals with compensation for one spouse's contribution to the growth of the other spouse's estate and has, as such, nothing to do with need. In this regard, the argument that post-divorce spousal support is not solely dependent on need and ability to pay is further supported by *Beaumont v Beaumont* 1987 1 SA 967 (A), *Archer v Archer* 1989 2 SA 885 (E), *Kretschmer v Kretschmer* 1989 1 SA 566 (W), *Kroon v Kroon* 1986 4 SA 616 (E), *Kritzinger v Kritzinger* 1989 1 SA 67 (A) and *Katz v Katz* 1989 3 SA 1 (A) in which it was held that there is an interrelationship between redistribution orders in terms of section 7(3) and maintenance orders in terms of section 7(2). It therefore follows that maintenance orders cannot be wholly unrelated to compensation.

89 Act 108 of 1996.

90 See Kaganas and Murray 30.

potential to redress gendered economic disadvantage, namely, her husband's future income.[91] Such an approach will also be in the best interest of children who too often suffer the most, as a result of their parents' divorce.

I am therefore convinced that spouses should, in principle, not be entitled to maintenance on divorce, since every healthy adult may be expected to be responsible for his or her own livelihood.[92] If, however, a spouse has contributed more than his or her share to the household and the upbringing of children and has thereby been economically denied the same opportunity as the other spouse to reach his or her full potential, he or she should be entitled to a permanent maintenance order. The fact that the spouse who made the sacrifice is working or can be trained or retrained for employment, should make no difference. It should merely mean that that spouse will be able to supplement the maintenance he or she receives from the other spouse and to maintain a decent standard of living after divorce. In this way the law would actively encourage mothers into employment and fathers into assuming their share of the responsibility for housework and care of children. If a wife or mother has no marketable skills, she would be solely dependent on maintenance from her husband and run the risk of impoverishment upon divorce. And if a husband or father does not take responsibility for his rightful share of the housework and the upbringing of children, he would be left with an unwanted, ongoing duty of support towards his ex-wife upon divorce.

If this new approach to maintenance orders were to be consistently applied in South Africa, society would come to realise that the traditional allocation of family roles based on sex has disadvantages for both men and women. Maintenance awards following this approach would also have the effect of enforcing social equality – something we all strive for! And there is enough South African authority to support this approach – there are cases like *Grasso*,[93] *Pommerel*,[94] *Nilsson*,[95] and *Rousalis*,[96] and last, but not least, the express provisions of section 7(2) of the Divorce Act.

5 PROBLEMS RELATING TO THE ENFORCEMENT OF MAINTENANCE ORDERS

Unfortunately the most equitable maintenance awards count for nothing if they are not paid. In terms of the Maintenance Act[97] and the newly promulgated Maintenance Act of 1998[98] a person who fails to make "any particular payment in accordance with a maintenance order" is guilty of an offence.[99] This offence is punishable with a fine of R4 000 or imprisonment for a period of one year.[100] Apart from these criminal penalties a court convicting a defaulter may also make certain other orders, namely:

---

91 See Regan 1467.
92 See fn 72 above.
93 *Supra.*
94 *Supra.*
95 *Supra.*
96 *Supra.*
97 Act 23 of 1963.
98 Act 99 of1998. However, at the time of revising this article the Act had not yet come into operation.
99 S 11(1) of Act 23 of 1963 and s 31(1) of Act 99 of 1998.
100 S 11(1) of Act 23 of 1963.

- an order for the recovery of unpaid maintenance together with any interest thereon;[101]
- an authorisation for a warrant of execution against the movable or immovable property of the offender;[102] and
- a garnishee order against the offender's employer.[103]

Furthermore, section 14C, which was inserted into the Maintenance Act in 1991,[104] provides that any maintenance order has the effect of an order made in a civil action. Therefore, even if the maintenance defaulter is not convicted, a warrant of execution may be issued out of a magistrate's court in respect of any arrears in terms of a maintenance order. In Chapter 5 of the new Maintenance Act of 1998 this sanction is set out in detail. Further, an existing high court order for the payment of maintenance may, of course, also be executed by a writ of execution issued out of the high court or by means of contempt proceedings.[105]

But despite the above sanctions of our law, there is a social attitude current today that there is no responsibility upon persons to support their dependants.[106] Furthermore, the Lund Committee on Child and Family Support, which was established to investigate the present maintenance system in South Africa, pointed out in its report[107] that "[a]ttorneys, prosecutors and magistrates alike, are of the belief that they are wasting their talents and time in the Maintenance Court". It is therefore not surprising that a recent study of 2 248 maintenance cases in the Johannesburg maintenance court, in which the defaulters were convicted of failure to comply with a maintenance order, shows that almost none of the above sanctions of the Maintenance Act is strictly applied in practice.[108] Sentences for failure to comply with maintenance orders, whether the sentence is one of a fine or of a term of imprisonment, are routinely suspended by the courts.[109] This happens even where the defaulter has already been convicted a few times.[110] Defaulters are therefore thoroughly aware of the fact that nothing will ever happen to them upon conviction. Further, it appears that defaulters are never ordered to pay any interest on arrears, despite the fact that section 11(2) of the Act makes provision for this.[111] It is also unclear to me why the provisions of section 14C of the Act, relating to the enforcement of maintenance orders as

---

101 S 11(2)(a) (s 40(1) of the 1998 Act).

102 S 11(2)(b) (s 40(2)(b) of the 1998 Act). In terms of s 11(2)(d) any pension, annuity, gratuity or compassionate allowance is liable to be attached or subjected to such execution (s 40(4) of the 1998 Act).

103 S 12.

104 By s 11 of the Maintenance Amendment Act 2 of 1991.

105 See *inter alia Butchart v Butchart* 1996 2 SA 581 (W) and 1997 4 SA 108 (W).

106 See *Issue Paper 5 – Project 100* of the South African Law Commission ("Review of the maintenance system") 5; Clark "The new Maintenance Bill – some incremental reform to judicial maintenance procedure" 1998 *De Rebus* 63 64.

107 *The Lund Committee Report* (August 1996) 50–51.

108 See Lotriet "Die effektiwiteit van onderhoudbevele in familieregtelike konteks (Deel 1)" 1996 *Die Landdros* 123.

109 See Lotriet 128–130, Burman and Berger "When family support fails: the problems of maintenance payments in apartheid South Africa" 1988 *SAJHR* 334 344.

110 See *S v Botha* 1988 4 SA 402 (C); *S v Dadabhai* 1969 3 SA 520 (N); *S v Petersen* 1966 4 SA 475 (C); *S v Fernandes* 1973 3 SA 136 (RA).

111 See Lotriet 135–136.

other civil judgments, are not applied in practice.[112] Lastly, it is evident that writs of execution to enforce existing high court orders for the payment of maintenance are not often issued out of the high courts.[113]

I am accordingly of the opinion that the time has come for family law lawyers to change their attitude towards maintenance cases after divorce. It is their duty to accompany their clients to the maintenance courts and to ensure that sentences against defaulters are not continually suspended. Remember, these defaulters are convicted, not because they cannot afford to pay,[114] but because they do not want to pay. If a defaulter ignores a maintenance order time after time, I think he or she should serve his or her prison sentence, be it ordinary imprisonment or periodical imprisonment.[115] Further, family law lawyers should ensure that all the other available remedies are employed,[116] since it is time society realised that our legal system is serious about the enforcement of maintenance orders. Hopefully, the new Maintenance Act of 1998 will be the spark to ignite this approach once it comes into operation.

> *Staatsveiligheid wat daarop gemik is om 'n wankelrige staatskap te beskerm, word al hoe meer onderdrukkend. Derhalwe is een van die belangrikste voorwaardes om staatsbeskerming te verseker dat die staatskap van die besondere staat ook gelegitimeerd, regmatig en bo verdenking moet wees . . . 'n Staat wat dus nie algemene erkenning en legitimiteit geniet nie is in wese onbeskermd en so 'n staatsbestaan kan maklik deur antistaatsmagte bedreig word.*
>
> *Marinus Wiechers "Die beskerming van die staat" in (Wiechers en Bredenkamp reds)* Die staat.

112 Lotriet does not mention this option as one of the ways to enforce maintenance orders. Nor is it mentioned in the South African Law Commission's *Issue Paper 5 – Project 100* on the review of the maintenance system. Hopefully, now that the new Maintenance Act clearly explains in chapter 5 how this should be done, lawyers will utilize this important sanction in future.

113 Van Zyl 1989 *De Jure* 80.

114 In terms of s 11(3) of Act 23 of 1963, a defaulter who can prove that his or her failure to pay was due to lack of means which was not due to unwillingness to work or misconduct on his or her part, will not be convicted.

115 Lotriet 132 is of the opinion that periodic imprisonment is a sentence option well-suited to maintenance-related matters. See also the SA Law Commission's *Issue Paper 5 – Project 100* ("Review of the maintenance system") par 4.35 for other advantages of periodic imprisonment as a sentencing option.

116 In this regard special note should be taken of the amendments to Act 23 of 1963 brought about by the Maintenance Amendment Act 2 of 1991, which makes provision for more effective enforcement of maintenance orders.

The prevention and control of money laundering in South Africa*

Angela Itzikowitz
BA LLB
Professor of Law, University of the Witwatersrand, South Africa

OPSOMMING

Die voorkoming en beheer van geldwassery in Suid-Afrika

Suid-Afrika se hertoelating tot die internasionale arena, die deregulasie van internasionale markte, die vooruitgang in kommunikasietegnologie en elektroniese oorplasing van fondse het 'n dramatiese eskalasie in georganiseerde misdaad in Suid-Afrika tot gevolg gehad.

In teenstelling met die posisie in die res van die internasionale gemeenskap het geldwassery in Suid-Afrika nog min aandag geniet. Tans word aspekte van geldwassery deur twee wette aangespreek, naamlik:

1 Die Wet op Dwelmmiddels en Dwelmsmokkelary 140 van 1992 ingevolge waarvan dit 'n misdryf is om eiendom te verkry of om te skakel terwyl die persoon kennis het, of op redelike gronde vermoed, dat daardie eiendom die opbrengs van 'n dwelmmisdryf is. Artikel 10 van die wet handel met die verpligting om voormelde vermoede te rapporteer. Die bepalings van die wet is egter beperk tot die opbrengs van misdaad waar die misdryf 'n dwelmoortreding is.

2 Die Wet op die Opbrengs van Misdaad 76 van 1996 maak voorsiening vir beslaglegging op die opbrengs van misdaad in die algemeen, kriminaliseer geldwassery as sodanig en maak *inter alia* voorsiening vir die rapportering van enige vermoede dat goedere die opbrengs van misdaad verteenwoordig. Die algemene geldwasserybepaling is te verwelkom.

In April 1996 het die Minister van Justisie 'n "Money Laundering Project Committee" ("Committee") aangestel om te fokus op *inter alia* administratiewe metodes om geldwassery te beveg. Die "Committee" het 'n verslag gelewer waarvan die "Proposed Money Laundering Bill" ("PMLB") deel uitgemaak het. Die "PMLB" stel 'n administratiewe raamwerk daar ten einde die voorkoming, identifikasie, ondersoek en vervolging van geldwassery-aktiwiteite te fasiliteer. Die "PMLB" is grootliks gebaseer op die Australiese "Financial Transactions Reports Act, 1988" en lê bepaalde verpligtinge op 'n wye reeks "Accountable Institutions", welke verpligtinge *inter alia* insluit kliënt-identifikasie, die hou van rekords, rapportering van inligting asook administratiewe reëlings rakende finansiële intelligensiesentra waaraan rapportering moet plaasvind, toegang tot inligting, vertroulikheid, afdwinging van die verpligtinge en 'n beleidsraad.

Die beleidsoorwegings wat die bestaande wetgewing en die "PMLB" onderlê, is prysenswaardig. Dit is egter die implementering daarvan waaroor deeglik besin moet word. Duplisering moet uitgeskakel word en die duur en beperkende vereistes ten opsigte van "Accountable Institutions" moet gereeld hersien word om te bepaal of dit steeds geregverdig is.

---

* The author thanks Andrew Paizes and Angelo Pantazis for their comments.

1 INTRODUCTION

In broad terms, money laundering is the manipulation of illegally acquired wealth in order to obscure its true source or nature. Typically, money is laundered through a three-step process: first, the placement stage, where cash is introduced into the banking system or into the retail economy, or often smuggled out of the country; secondly, the layering stage, where money is separated from its origins by passing it through several financial transactions in order to disguise the audit trail; and thirdly the integration stage where funds are aggregated with legitimately obtained money. Integration is the final macro-stage which places laundered proceeds back into the economy in such a way as to make them appear as ordinary earnings. Money-laundering methodology is a study in itself and is limited only by the imagination of the launderer.[1]

Sustained international interest in money laundering and the closely related issue of the confiscation of the proceeds of crime arose in the 1980s primarily within a drug-trafficking context. During the early nineties, the prevention of money laundering evolved into an important foreign-policy and financial-management priority in both the major and minor financial centres throughout the world. Many governments have already put controls in place or are in the process of strengthening controls to counter a potential threat to both the integrity and stability of their financial systems, and increasingly for certain countries, the threat to political and social stability in that particular country.[2]

In contrast to the position abroad, money laundering in South Africa has received little attention hitherto. It is therefore very difficult to provide any statistics on the extent of money laundering or to identify the forms of criminal activity that generate the most substantial amount of dirty money.[3] The return of South Africa to the international arena, the deregulation of financial markets and the advances in communications technology and electronic funds transfers have, however, brought a dramatic increase in organised crime. The Minister of Justice, Mr Dullah Omar, stated at a money-laundering seminar held in 1995 that there were some three hundred international crime syndicates operating in South Africa, involved mainly in drug trafficking and money laundering. The minister also said that controls over money invested in South Africa were inadequate and that banks were being used to launder illicit profits.[4]

In South Africa two statutes currently deal with money laundering: the Drugs and Drug Trafficking Act[5] and the Proceeds of Crime Act.[6] The South African Law Commission has proposed a Money Laundering Control Bill which provides an administrative framework for the control of money laundering. This article provides a critical analysis of the main provisions in the Proceeds of Crime Act and the proposed Bill and highlights the differences between the two measures.

---

1 See generally Hill "Money laundering methodology" in *Butterworth international guide to money laundering and practice* (1995) 1.

2 See Harte "The role of banks" in *Butterworths international guide to money laundering law and practice* (1995) 243.

3 As in other jurisdictions, drug trafficking would probably take centre stage. Prior to the relaxation of exchange controls in 1996, capital flight would have accounted for large sums of money leaving South Africa.

4 Unpublished paper read at a seminar in Pretoria organised by the South African Reserve Bank, July 1995.

5 140 of 1992.

6 76 of 1996.

2 THE DRUGS AND DRUG TRAFFICKING ACT

The Drugs and Drug Trafficking Act ("the Drugs Act") was the first South African statute to deal with money laundering. The Drugs Act makes it an offence for a person to acquire any property knowing it to be the proceeds of a defined crime or to convert property "while he knows or has reasonable grounds to suspect" that it is the proceeds of a defined crime.[7] A "defined crime" is a drug offence or the conversion of property derived as a result of the commission of a drug offence.[8] These provisions are fortified by the imposition of a duty on directors, managers and executive officers of financial institutions, stockbrokers and dealers in financial instruments to report to the authorities if they have reason to suspect that any property they have acquired is the proceeds of a drug offence.[9] Failure to do so is an offence.[10] This obligation overrides a financial institution's obligation to treat the client's affairs as confidential. Compliance with the statutory obligation will serve as a defence against a claim based on a breach of confidentiality.[11] But it is only in cases of suspicion that the property is the proceeds of a *drug* offence that protection against a breach of confidentiality is given. In the past financial institutions therefore tended not to report suspicions unless they were sure that the property formed the proceeds of a drug offence.

The Act also provides for the confiscation of property derived from drug trafficking,[12] and for international mutual legal assistance,[13] including the provision of any financial information of a normally confidential nature to other governments.

While the Drugs Act was the only statute which dealt with money laundering, South African law did not recognise the manipulation of the proceeds of crime in general as an offence. Where the Drugs Act did not apply, no offence would be committed unless the methods used to bring about the misrepresentation about the origin or nature of the illegal proceeds constituted another offence, such as fraud. Nor did the law provide for a procedure whereby the proceeds of crime in general could be confiscated.

3 THE PROCEEDS OF CRIME ACT

The Proceeds of Crime Act, which came into effect on 16 May 1997,[14] emanated from the recommendations of the South African Law Commission.[15] It provides, *inter alia*, for the confiscation of the proceeds of crime in general once a person has been convicted of an offence[16] and criminalises money laundering.[17] Chapter V

---

7 Ss 6 and 7.
8 S 1.
9 S 10.
10 S 15.
11 S 10 (3).
12 S 35–40.
13 See ch VI.
14 Proclamation R35 *GG* 17996 1997-05-09 (*RG* 5927).
15 *Report on international co-operation in criminal prosecutions* (Project 98) December 1995. The International Co-operation in Criminal Matters Act 75 of 1996 and the Extradition Amendment Act 77 of 1996 also emanated from this report.
16 See s 8. The order made is additional to any punishment the court has imposed or may impose. S 13 provides that a confiscation order will have the effect of a civil judgment. Failure to comply with this order constitutes a separate offence (s 32(2)).
17 S 28.

of the Drugs Act, which empowered the courts to attach property or money only if such property was derived from drug trafficking, has accordingly been repealed.[18]

The South African Law Commission was of the view that money laundering is a reaction to measures to confiscate the proceeds of crime and that it was logical that any attempt to regulate the confiscation of the proceeds of crime should go hand in hand with measures to combat money laundering.[19] The offence of money laundering is committed if a person, knowing or having reasonable grounds to believe that property is or forms part of the proceeds of crime,[20] enters into any agreement or performs any act in connection with such property, which has, or is likely to have, the effect of concealing or disguising the nature, source, location or ownership of the property, or any interest which a person may have in it, or the effect of enabling or assisting anyone who has committed an offence in the Republic or elsewhere to avoid prosecution or to remove or diminish any property acquired as a result of the commission of an offence.

This general money-laundering provision is to be welcomed. The criminalising of money laundering beyond the narcotics predicate is now an international trend – several countries have introduced measures making it an offence to launder the proceeds of any serious crime or crime which generates significant proceeds.[21] Such developments in national legislation have in turn found reflection in, and been reinforced by, international instruments and political declarations.[22] The decoupling of money laundering from drug trafficking also removes the difficulty of proving that particular proceeds are attributable to particular predicate offences. Furthermore, there seems to be little justification for the proscription of money laundering arising from some profit-yielding criminal activities and not others.

To support the criminalisation of money laundering, the further offences of assisting another to benefit from the proceeds of crime and the acquisition, possession or use of the proceeds of crime have been introduced by the Act.[23] The misuse of information (which would include "tipping someone off" that an investigation is pending or that a report has been made), a failure to comply with an order of court made in terms of this Act and hindering a person in the performance of his functions under the Act have also been criminalised.[24]

---

18 By s 37 of the Proceeds of Crime Act.

19 See Project 98 98.

20 "[P]roceeds of crime" is defined in s 3 to mean "any payment or other reward received or held by the defendant or over which the defendant has effective control at any time, whether before or after the commencement of this Act, in connection with any criminal activity carried on by him or her or by any other person". "[P]roceeds" in relation to an offence means any property or part thereof which was derived directly or indirectly as a result of the commission of an offence in the Republic or outside the Republic which, if it had occurred in the Republic, would have constituted such an offence, and includes all property representing property so derived (s 1). It would seem that tax evasion is not covered by these definitions. (This is a view expressed by J Scholtz of Webber Wentzel Bowens in an opinion written for Standard Bank ("opinion"). Permission was given by the bank and Mr Scholtz to refer to this opinion.)

21 See the *Report of the financial action task force* (FATF) (1993) 6.

22 See eg the definition of "laundering" in a 1 of the European Union Council Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering (Council Directive 91/308/EEC of June 1991) ("the EU directive on money laundering"), which relates to "criminal activity" as opposed to drug-trafficking offences.

23 Ss 29 and 30.

24 S 32.

Section 31 of the Act provides:

> "Any person who carries on a business or is in charge of a business undertaking who has reason to suspect that any property which comes into his or her possession or the possession of the business undertaking forms the proceeds of crime shall be obliged to report his or her suspicion and the grounds on which it rests,[25] within a reasonable time to a person designated by the Minister and shall take all reasonable steps to discharge such obligation."

The Minister of Justice has designated the Commander of the Subcomponent: Commercial Crime Investigations of the South African Police Service ("the SAPS") as the person to whom reports must be made.[26] Failure to report constitutes a criminal offence.[27] A proviso makes it clear that nothing in the section is to be construed as an infringement on the common-law right of privilege between an attorney and his client in respect of information given to the attorney.[28] The duty to report overrides any duty of secrecy or confidentiality which may exist between the person and his client or customer whether imposed by any law, the common law or any agreement.[29] Furthermore, no liability based on a breach of an obligation as to secrecy will arise from the disclosure of a suspicion.[30]

Section 31 is a far-reaching provision. The terms "business" and "business undertaking" are not defined in the legislation, so that "businessmen", professionals and even hawkers would be caught in the net. It would seem that tellers or frontline staff of banks are not persons "who carry on the business of a bank" or "who are in charge of the business of a bank", and would thus not be obliged to report their suspicions in terms of this section.[31]

But, it is the frontline staff who deal with depositors or customers on a day-to-day basis and who first come into contact with the physical disposal of the proceeds derived from illegal activities – the placement stage in the money-laundering process. While this may be just one part of a sophisticated web of complex transactions, the fact remains that the key stage for the detection of money-laundering operations is where the cash first enters the financial system.[32]

The practice in most of the larger banks is to require frontline staff to report irregular, unusual or suspicious transactions to a more senior person within the bank for review before these suspicions are reported to the authorities. This practice mirrors that of the United Kingdom where reports are made to a designated money-laundering officer within the institution. Reporting in this way can work only if personnel are trained in the recognition and handling of suspicious

---

25 Reporting in this way would violate a person's right not to have the privacy of his or her communications infringed in terms of s 14 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution"). A court may well find that s 31 passes constitutional muster in so far as the limitation is reasonable and justifiable in an open and democratic society (s 36 of the Constitution).

26 Par 3 of the Schedule in GN R684 *GG* 17996 of 1997-05-09 (*RG* 5927).

27 S 31(2).

28 S 31(1).

29 S 31(3)(a).

30 S 31(3)(b).

31 Banks or bank-controlling companies registered in terms of the Banks Act 94 of 1990 "carry on the business of a bank". Persons who are in charge of the business of a bank may differ from one institution to another, but would include directors, and perhaps managers of banks or bank-controlling companies.

32 *Money laundering guidance notes for banks and building societies* (1990) 2.

transactions. Training will have to be updated on a continuous basis to keep abreast of new developments in money-laundering methodology.

Unlike in other jurisdictions, there is no express obligation in terms of the Act on banks (or on any business) to establish internal controls or systems for reporting suspicious transactions or to train staff,[33] but the duty to take these steps may be implicit in the obligation "to take reasonable steps" in the case of banks.

A further problem with section 31 is the meaning of the phrase "has reason to suspect". First, does the suspicion have to exist in the mind of the person obliged to report, or is it enough that it would exist in the mind of a reasonable person in his position? Secondly, if there has to be an actual suspicion, what is the quality of the suspicion? Must it be reasonable or will any reason suffice?

The objective standard may be reflected in the formulation of the provision. The words "shall take reasonable steps" fit with the conduct enquiry into negligence. The first part of the enquiry into negligence – into the reasonable person's state of mind – may be suggested by the words "reason to suspect". That standard would be appropriate if one takes the view that the provision requires a high degree of care on the part of the person obliged to report and that the object of the Act, which is the tracing of the proceeds of crime and the combating of money laundering, may be defeated unless a higher degree of circumspection is required.[34]

Alternatively, "the words any person who has reason to suspect . . . shall be obliged to report his or her suspicion and the grounds on which it rests" may be indicative of a subjective standard. A person cannot report a suspicion unless he subjectively entertains it. As to the quality of the suspicion, if there must merely be some reason for it, people might report all suspicions, however groundless. This defensive reporting will in turn result in the police being inundated with reports of insignificant transactions.

The approach that the person must formulate a suspicion *and* that the suspicion must be reasonable would make special sense of the words "reason to" in the phrase "reason to suspect" and is the approach adopted in the Australian legislation.[35] It would also avoid the deleterious effect of defensive reporting.

---

33 See cl 20 of the proposed Money Laundering Control Bill and a 11 of the EU Directive on Money Laundering, which requires the establishment of procedures of internal control by credit and financial institutions and the creation by them of appropriate training programs to help employees "recognise operations which may be related to money laundering, as well as to instruct them as to how to proceed" in terms of the Annunzio Wylie Anti-Money Laundering Act 1992. In the United States, financial institutions are obliged to have compliance procedures to train their staff. Bank charters may be revoked on their coverage by Federal Deposit. Insurance can be terminated for non-compliance.

34 See *S v Burger* 1975 4 SA 877 (A) and *Kruger v Coetzee* 1976 2 SA 428 (A). In cases involving the use of some special skill or competence, negligence is not determined by the test of the reasonable man as the ordinary man but by the stricter test of the "standard of the ordinary skilled man exercising and professing to have that skill": *Bolam v Friern Barnet Hospital Management Committee* 1957 1 WLR 582 referred to in *Durr v ABSA Bank Ltd* 1996 CLD 472 (C) 482, and *Van Wyk v Lewis* 1924 AD 438.

35 S 16 of the Financial Transactions Reports Act 1988 requires a cash dealer to report to the Director of the Australian Transaction Reports and Analysis Centre each transaction where the cash dealer has reasonable grounds to suspect that information which he or she possesses may be relevant to tax evasion, or attempted evasion, of a taxation law, or an investigation or prosecution of a person for an offence against a law of the Commonwealth

continued on next page

When would a person have reason to suspect? In *R v Van Heerden*[36] Galgut AJ stated that "suspect" and "suspicion" are words which are vague and difficult to define. Nevertheless, he did say that "suspicion is apprehension without clear proof". The types of transaction which could be used by a launderer are almost unlimited and it would be very difficult to define a suspicious transaction. However, it may well involve a situation where a person, who is familiar with the normal course of transactions of a particular client, discovers a transaction which is substantially unusual, given the client's normal manner of conducting business. Of course, if that person knows nothing about his client's normal course of transactions, he would have "less reason to suspect". Other jurisdictions[37] have adopted a "know your customer policy"[38] in that they specifically require persons who are obliged to report, to verify the identity of their customers and that of the beneficial owners. Closely allied to the requirements concerning identification is the obligation to retain records for a period of time for use as evidence in any investigation into money laundering.[39] A person in these jurisdictions would, in the nature of things, be exposed to situations where he would tend to have far greater reasons to suspect wrongdoings on the part of his client. In the Proceeds of Crime Act, there is no express obligation to "know your customer" or to keep records, but this duty might be implied in the phrase "shall take all reasonable steps" in section 31 of the Act, at least in so far as banks are concerned. But record-keeping is essential to the investigating of money-laundering schemes. The only way to identifying a transaction through which the proceeds of crime have been laundered, and those involved in it, is to follow the audit trail. Of course, record-keeping cannot be expected of hawkers, or shop-keepers; however, without records the value of reporting is minimised.

The Act also fails adequately to deal with the question whether the person who has reported his suspicion in compliance with the Act may continue with or conclude the suspect transaction.[40] If he does continue with the transaction, he could find himself criminally liable for assisting another to benefit from the

---

or of a territory, or may be of assistance in the enforcement of the Proceeds of Crimes Act 1987 or regulations made under that Act. The approach that the person must formulate a suspicion and that the suspicion be reasonable is adopted in *Opinion* 17. See also *S v Rubenstein* 1964 3 SA 480 (A).

36 1958 3 SA 150 (T) 152. This decision was referred to in *Opinion* 18.

37 Such as Australia, New Zealand, the United Kingdom and the European Union Member States. See a 3 of the EU Directive on Money Laundering, which requires the identification of customers and beneficial owners when entering into business relations and particularly when opening an account or savings accounts, or when offering safe-custody facilities. See also cls 2 and 3 of the proposed Money Laundering Control Bill which oblige accountable institutions to verify customer-identification and to keep records. Clause 18 of the bill obliges accountable institutions to formulate and implement internal policies on procedures to establish and verify the identity of a person whom the institution is required to identify under cls 2 and 3.

38 This concept entails being able to identify the customer and to recognise trends in the manner in which a customer conducts his or her business.

39 In terms of a 4 of the EU Directive on Money Laundering, records of identification and of individual transactions must be retained for a period of five years. In terms of the proposed Money Laundering Control Bill, accountable institutions must keep records relating to customer identification and all transactions concluded for a period of five years (cls 4 and 5).

40 See cls 2(3) and 3(3) of the proposed Money Laundering Control Bill.

proceeds of crime in terms of section 29 of the Act.[41] To avoid liability, the person must report the suspicion and not deal or continue to deal with the property in question. The reality, however, is that most reports will only be made *after* the transaction is concluded.

In so far as the Proceeds of Crime Act leaves the Drugs Act (other than ch V) intact, it would seem that directors, executive officers, and managers of a financial institution are still obliged to report drug-related suspicions in terms of that Act. To avoid duplication in the reporting procedures, the relevant section in the Drugs Act[42] should have been repealed. "[P]roceeds of crime"[43] covers all "criminal activity", which would include drug offences.

4 THE PROPOSED MONEY LAUNDERING CONTROL BILL

Although the criminalisation of money laundering is imperative in the fight against organised or white-collar crime, the Law Commission[44] did not believe that it would be effective in combating the problem on its own. The Minister of Justice accordingly appointed a money-laundering Project Committee ("the project committee" or "committee") in April 1996 to investigate, *inter alia*, administrative measures to combat money laundering.[45]

The committee produced two documents for discussion, an Issue Paper and a Discussion Paper,[46] which included a draft bill. The responses to the Discussion Paper enabled the Committee to formulate its report on Money Laundering and Related Matters[47] ("Report") and to revise the draft bill, the Money Laundering Control Bill ("the bill").

The bill establishes an administrative framework to facilitate the prevention, identification, investigation and prosecution of money-laundering activities. In the main, it is modelled on the Australian Financial Transaction Reports Act 1988 ("the FTR Act"), and to a lesser degree on the American Banks Secrecy Act 31 USC. Certain of the United Kingdom's money-laundering regulations[48] have also been adopted by the bill.

4 1 The scope of the proposed bill – institutions covered

The scope of application of the bill's framework goes beyond the banking sector and applies to all "accountable institutions". An "accountable institution", as defined in the bill,[49] includes attorneys, persons who carry on insurance business

---

41 S 29 provides that "any person who knowing, or having reasonable grounds to believe, that another person obtained the proceeds of crime, enters into any agreement with anyone or engages in any arrangement whereby –
(a) the retention or the control by or on behalf of the said other person of the proceeds of crime is facilitated; or
(b) the said proceeds of crime are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way, shall be guilty of an offence".

42 S 10.

43 See fn 20 *supra*.

44 Project 98.

45 Project 104 *Money laundering and related matters*.

46 Discussion Paper 64.

47 Project 104.

48 Money Laundering Regulations SI 1933/1993.

49 Cl 1.

and insurance brokers, estate agents, public accountants, financial-instruments traders, persons who carry on the business of a casino or gambling institution, persons who deal in bullion, coins or Krugerrands, members of a stock exchange, persons who issue traveller's cheques or similar instruments, and any group of persons that may be described by the term "stokvel".

The Minister of Finance ("the minister") may grant an exemption to any accountable institution or class of accountable institution from compliance with all or any of the provisions in the proposed bill.[50] When considering an application for exemption, he must act in consultation with the Money Laundering Policy Board to be established in terms of the bill.[51]

The problem with an apparently exhaustive list of accountable institutions is that there is no room for the expansion of the list. One may ask why other persons, such as art and antique dealers, have not been included. Internationally, cultural property and art works are a major problem in money laundering, apparently second only to drug trafficking. The project committee was aware of this problem and considered adopting a generic definition but could not find suitable common characteristics which would include such a wide variety of institutions and persons. Various respondents suggested that the definition be left open-ended, allowing the minister to designate any other institution or person as an accountable institution by regulation as the need arises. The project committee was of the view, however, that this approach would confer dispensing powers on the minister and that the scope of the Act would therefore not be fixed by the Act itself.[52]

The inclusion of attorneys has met with strong opposition. Attorneys argue that the duty to report will erode the relationship of trust and confidentiality which exists between a lawyer and his client, and will violate attorney-client privilege. The framework will, however, not apply where an attorney is approached for advice or assistance in respect of an offence. The bill specifically provides "that nothing in this 'Act' shall be construed so as to infringe upon the common law right to legal professional privilege as between attorney and client".[53] The Financial Action Task Force ("FATF")[54], in its report on money-laundering typologies,[55] stated that an important trend has been the rise of a class of professional money-laundering facilitators. Among the more common tactics observed by FATF member countries has been the use of attorneys' trust accounts for the placement and layering of funds. Other ploys include the establishment of shell corporations, trusts or partnerships by attorneys, accountants and other professionals. In Australia, solicitors are obliged to report

50 Cl 54.
51 Cl 35.
52 *Report* 19.
53 Cl 2.
54 The Financial Action Task Force was established by the G7 Economic Summit in Paris in 1989 to examine measures to combat money laundering. In April 1990 it issued a report with a programme of forty recommendations in this area. These recommendations were revised during 1995 and 1996.
55 Financial Action Task Force on Money Laundering, Annual Report 1995-1996 FATF-VII, Report on Money Laundering Typologies Annex 3 1996-06-28 5.

"significant cash transactions" only.[56] In Germany, lawyers acting as trustees have to disclose the trust beneficiaries.[57]

4 2 Sources of money laundering – the scope of the offence

The substantive offence of money laundering is not dealt with in the bill, but in the Proceeds of Crime Act.[58] The prohibition on money laundering refers to "proceeds of crime", and "proceeds of crime" means "any payment or other reward received . . . by the defendant or over which the defendant has effective control . . ., in connection with any criminal activity carried on by him or her or any other person . . .".[59]

4 3 Principal requirements

4 3 1 Client identification

The starting point of an administrative system to combat money laundering is an institution's ability to identify its customers. Accountable institutions will be required to obtain proof of a client's identity when a business relationship is established or a single transaction is concluded with that client.[60]

When an accountable institution is approached to conclude a transaction in the course of a business relationship, that institution must ascertain, in the prescribed manner –

(a) the identity of the person who approached the institution;

(b) the identity of the client with whom the business relationship was established; and

(c) the identifying particulars of all accounts at that institution which are involved in that transaction.[61] Where a client or prospective client is acting on behalf of another person, the institution will have to obtain proof of the identity of the person on whose behalf he or she is acting and of the authority of the client to enter into that transaction.[62]

If a person fails to provide the required information, the institution concerned will be precluded from giving effect to a business relationship or a transaction concluded with that person, and from concluding a transaction in the course of a business relationship.[63]

---

56 S 15 of the Financial Transactions Reports Act 1988 as amended by the Financial Transactions Reports Amendment Act 1996. The Amendment Act came into force on 1997-05-13. A "significant cash transaction" is one involving AUD 10 000 or more.

57 When opening a trust account, regardless of whether a cash deposit is to be made or a cashless transaction is involved, the attorney or notary must issue a statement to the effect that he is not acting on his own account and he must specify the financial beneficiary in accordance with s 8 of the Money Laundering Act. The client should be informed beforehand of the disclosure of this information. ("Geldwuschegesetz" which came into effect on 1993-11-29). In the United Kingdom, legal practitioners are not included in the regulatory framework set out in the Money Laundering Regulations. See, however, ss 93A and B of the Criminal Justice Act 1988.

58 S 28.

59 S 3. See also the definition of "proceeds", "property" and "defendant" in s1 of the Act, and the definition of "proceeds of criminal conduct" in cl 1 of the bill.

60 Cl 2(1).

61 Cl 3 and see also cl 18.

62 Cls 2(2) and 3(2).

63 Cls 2(3) and 3(3).

The documents that may be accepted as proof of a person's identity will be prescribed by regulation.[64] The Minister may also exempt an accountable institution from compliance with this requirement.[65] One may assume that the identity of an individual will be ascertained by reference to a birth certificate, driver's licence, passport or similar document. Different documents may be required depending on whether the client is located inside or outside South Africa, and on the particular types of account or particular methods of dealing relevant to the particular sector.

4 3 2 Record-keeping

Effective record-keeping is essential to the investigation of money-laundering schemes. Accountable institutions must keep records of information obtained when a single transaction is concluded or a business relationship is established, and when a transaction is concluded in the course of a business relationship.[66] This will be the information identifying the client. Where a person is acting on behalf of a principal, records must be kept of the identity of the principal and of the authority to establish that relationship.[67]

Records must also be kept of information in respect of specific transactions, carried out either in the course of a business relationship or as single transactions. In this case the records should reflect the identity of the person who concluded the transaction, the identity of the client with whom the relevant business relationship was established, the identifying particulars of the accounts at the institution that are involved and the nature of the transaction.[68] The identity of the person who obtained the information on behalf of the institution must also be kept on record.[69]

Records must be kept for a period of at least five years after completion of a transaction or the date on which a business relationship has ended.[70] The manner in which records should be kept will be prescribed by regulation.[71] Records should be kept in a form that will enable them to be retrieved or reconstituted within a reasonable time-frame, after a demand for that information either internally within the organisation or following an external demand. An accountable institution must take reasonable steps to ensure that no unauthorised person gains access to its records.[72] Information kept in the records of an accountable institution will also be admissible as evidence in court.[73] Accountable institutions will be required to formulate and to implement internal policies to ensure effective record-keeping.[74]

4 3 3 Reporting of information by accountable institutions

The bill, like the Australian FTR Act, provides for a hybrid reporting system – a combination of threshold- and suspicion-based reporting. Accountable institutions

64 Cl 53(1)(a).
65 Cl 54(1).
66 Cl 4(1)(a) and (b)
67 Cl 4(1) and (2).
68 Cl 5.
69 Cls 4(1)(e) and 5(1)(f).
70 Cls 4(3) and 5(3).
71 Cls 6 and 53(1)(d).
72 Cl 6(2).
73 Cl 7.
74 Cl 19.

are required to report to the Financial Intelligence Centre ("the Centre") on the following:[75]

(i) cash transactions above a limit to be prescribed;

(ii) suspicious transactions; and

(iii) international electronic funds transfers.

4 3 3 1 Cash transactions above a prescribed limit

An accountable institution must report to the Centre details of any transaction involving the payment or receipt of cash exceeding an amount to be prescribed by regulation. The prescribed details must be reported as soon as is reasonably possible but not later than five days after becoming a party to such transaction.[76]

The setting of an amount for a threshold is, of course, arbitrary and in this regard it is desirable that a threshold is not prescribed in the primary "Act" but will be prescribed by the minister by way of regulation.[77] This will allow the minister to set different thresholds for different institutions where this is appropriate. Given that South Africa is by and large a cash-driven society, an amount of, say, R10 000 may be too low for traditional financial institutions, and the sheer number of reports which this would generate could render effective processing difficult or even impossible. On the other hand, an amount of R10 000 may be too high for the stokvels, for example. Allowing the amount to be determined by regulation will also facilitate greater flexibility in adapting to changing circumstances and the granting of exemption from this requirement where this is warranted.[78]

"Smurfing", or structuring the transaction to avoid the threshold, is not made an offence. This could be remedied by obliging an accountable institution to report details of any transaction exceeding the prescribed limit *whether the transaction is carried out in a single transaction or in several operations which seem to be linked*,[79] or a separate offence of smurfing could be created.[80] Arguably, smurfing could be reported as a suspicious transaction, but it would be far easier to rely on a substantive offence of smurfing.

Since a threshold-based reporting system is automatic, it leaves less scope for corruption and errors of judgement. It will also ensure that transactions which appear innocent when seen in isolation are reported and may be found to warrant investigation when compared with information reported by other institutions.[81] A disadvantage of this method of reporting, particularly if the threshold is too low, is that the system may be flooded with meaningless reports.

The real issue, however, is whether a threshold-reporting system makes for effective control. In theory, systematic analysis of movements of capital helps

75 To be established in terms of cl 22 of the bill.

76 Cl 8. See also the definition of "cash" in cl 1.

77 Cl 53(1)(e).

78 Cl 54.

79 See a 3(2) of the EU Directive on Money Laundering, where similar wording is used.

80 This is the position in Australia. S 31 of the FTR Act requires the prosecution to prove only that it is "reasonable to conclude" that a person intended to evade the reporting requirements of the Act, not that the defendant actually had an intention to evade. See in this regard *Leask v The Commonwealth of Australia High Court* 1996-11-05.

81 *Report* 12.

eliminate the element of chance in the investigation of fraudulent transactions. In practice, however, it has not been established that even the most advanced technological systems make such analysis possible, since the reports submitted are not the only source of information to be cross-checked and dissected.[82]

4 3 3 2 Suspicious transactions

An accountable institution is obliged to report to the Centre any transaction where there are reasonable grounds to suspect that the transaction brings, or will bring, the proceeds of criminal conduct into the possession of the institution, or will in some way facilitate the proceeds of crime.[83] Reports must be made as soon as is reasonably possible but not later than ten days after becoming aware of such grounds. *Culpa* will probably suffice for a conviction under this section; the phrase "where there are reasonable grounds" would indicate this. An institution must also report any attempt to conclude a transaction that was discontinued when the institution required information in compliance with the bill, where there are reasonable grounds to suspect that the transaction may have resulted in the proceeds of criminal conduct coming into the possession of the institution or facilitated the transfer of the proceeds of crime.[84]

On the one hand, suspicion-based reporting has the advantage that a person will have to apply his or her mind to the matter at hand. On the other, "suspicion", whether reasonable or otherwise, is by its nature subjective. The success of a suspicion-based reporting system depends on appropriate training. The bill gives effect to this in that accountable institutions are obliged to implement internal policies which will ensure that persons in charge of or employed by the institutions are aware of their duties in terms of the bill and which will provide adequate training to persons required to report in terms of the bill.[85]

While the concept of "know your customer"[86] is, by design, not expressly defined, so that each institution can adopt procedures best suited to its own operations, accountable institutions must, as a minimum, develop internal policies on the identification of transactions, record-keeping and information which must be reported and on the procedure to report such information.[87]

Internal procedures for reporting information will obviously differ from one institution to another, but ideally, depending on the size of the institution, provision should be made for the appointment of a reporting officer to whom reports can be made.[88] The reporting or money-laundering officer must have access to

---

82 See Thony "Processing financial information in money laundering matters: the financial intelligence units" unpublished paper, October 1996. (Jean-Francis Thony is a senior legal adviser, United Nations International Drug Control Program.) This paper was circulated by the Commonwealth Secretariat at a money-laundering conference held in Cape Town, October 1996. In the US, where amounts of USD 10 000 and over must be reported, the Financial Crimes Enforcement Network (FINCEN) currently processes some 11,5 million transactions per year. In Australia, where cash transactions of AUD 10 000 must be reported, AUSTRAC reported 947 000 reports of cash transactions during the 1994/1995 financial year.

83 Cl 9(1).

84 Cl 9(2). It is interesting to note in passing that the Australian legislation contains no such provision.

85 Cls 20 and 21. Failure to implement such policies constitutes a criminal offence (cl 44).

86 See fn 38 *supra*.

87 Cls 18, 19 and 20. See also cl 53(1)(i).

88 See in this regard the UK Money Laundering Regulations 1993.

any internal information necessary for the full investigation of any report. In this way, the suspicions of one employee would be quelled by the knowledge of the reporting officer, and the number of suspicious transaction reports which might otherwise be made to the Centre would be reduced. Furthermore, the Money Laundering Policy Board is empowered to issue guidance notes to accountable institutions. Examples of suspicious transactions could be included in these notes.

If the bill is passed into law, there will be two statutes dealing with the reporting obligation in different ways. The following undesirable situation will prevail: persons who carry on business, or who are in charge of a business undertaking, will have to report their suspicions within a reasonable period to the commercial branch of the SAPS in terms of the Proceeds of Crime Act, while accountable institutions will have to report within ten days to the Centre in terms of the proposed Money Laundering Control Act. What of the situation where the person is both an accountable institution and a person who carries on a business? Will he or she have to report to both the SAPS and the Centre? And within which period should the suspicion be reported? Moreover, the Act and the bill may impose different standards. The phrase used in the Proceeds of Crime Act is "reason to suspect", while the bill requires an accountable institution to report where "there are reasonable grounds to suspect". The undesirable situation in which the substantive offence and one reporting obligation are contained in the Proceeds of Crime Act and the other reporting obligation in the proposed Money Laundering Control Act will remain. This problem can easily be resolved by the repeal of section 31 of the Proceeds of Crime Act once the bill is passed into law. The obligation to report in terms of the Drugs Act will be repealed.[89]

4 3 3 3 International electronic funds transfer

Accountable institutions are required to report to the Centre all international electronic transfers into or out of the Republic as soon as reasonably possible, but not later than five days after the funds were sent or received. This provision will not apply where the institution is acting on behalf of a bank.[90] As the telegraphic transfer of funds is reportedly heavily utilised by international drug-trafficking cartels, this provision may prove to be an important weapon against money laundering.

4 4 Reporting by supervisory bodies

Unlike the earlier draft bill, the revised bill includes supervisory and regulatory bodies in the reporting structure. If a supervisory body has reasonable grounds to suspect that property which is or was under the control of an accountable institution is the proceeds of criminal conduct, or that the accountable institution has

89 See the schedule to the bill. S 30 of the Proceeds of Crime Act will also be repealed. A new s 31A, which provides that any person *may* report to the Centre a suspicion that property which comes into his or her possession may be the proceeds of crime, will be inserted in the Act. This permissive provision is complemented by a new ss 2(a), which provides that no duty of secrecy or confidentiality or disclosure of any information about the affairs of a client or customer of an accountable institution will prevent a person from making a report under ss (1). Furthermore, no liability based on a breach of a duty of secrecy or confidentiality will arise from a disclosure made in good faith of any information under ss (1).

90 Cl 10.

facilitated the transfer of such proceeds, it must report the suspicion to the Centre as soon as is reasonably possible, but not later than ten days after becoming aware of such grounds.[91]

4 5 Currency-transfer reports

A person who intends to transfer cash in the form of South African or foreign currency exceeding the amount prescribed from time to time, into or out of the Republic, must report the details of that transfer to the Centre before transfer takes place.[92]

4 6 Manner of reporting information

The information that should be reported and the manner in which reports must be made will be prescribed by regulation.[93] The information that must be reported will not necessarily be the same for all types of institution but should ideally be sufficient to enable investigating authorities to identify the person carrying out the transaction, the number of accounts involved, the true holders of accounts, the nature of the transaction, the payee or beneficiary, the form of payments or transfers, as well as the origin and destination of funds. An accountable institution that has disclosed information to the Centre in compliance with an obligation imposed on it under the bill may continue with that transaction unless otherwise instructed.[94]

Some of the well-publicised cases involving the movement of funds for illegal purposes have involved complex networks of interbank transactions designed to disguise the connection between the original source of the funds and the ultimate recipient. Perhaps the best-known example of this involved the Bank of Credit and Commerce International ("BCCI").[95] The BCCI had transferred funds through the international banking system while concealing the identity of the original paying customer and the ultimate beneficiary. It was able to do this because international banking practice at the time did not require the identity of the customer to be recorded in the transfer instructions. BCCI exploited this to conceal a circular routing of funds where fictitious loans were drawn and reintroduced into BCCI disguised as the servicing of loans to unrelated customers. The scheme can be, and has been, converted by others to launder dirty money in such a way that the audit trial is broken and cannot be followed by an investigating officer. The Society for Worldwide Interbank Financial Transactions (SWIFT) has subsequently, at the request of the FATF, taken action to stress to its users the need for complete details of the paying customer and the ultimate beneficiary in order not to break the money-laundering audit trail when sending customer transfers.[96]

4 7 Confidentiality

The obligation to report overrides any duty of secrecy owed to the customer or client, whether such duty is imposed by any law, the common law or any

---

91 Cl 11. Supervisory bodies are not obliged to report in terms of the FTR Act.
92 Cl 12. See also cl 53(1)(f).
93 Cls 13 and 53(1)(g) and (h).
94 Cl 14 and see cl 25(1)(b).
95 See Hitchins "Accounting and auditing issues" in *Butterworths international guide to money laundering law and practice* (1995) 295.
96 SWIFT MT 100 Messages.

agreement.[97] The person or institutions making reports in good faith will be protected from any liability for breach of secrecy or confidentiality, regardless of the basis of this duty.[98]

The protection afforded to persons reporting information should go further than protection against liability. The identity of such a person and the fact that he or she has made a report should also be kept confidential. To this end, the bill provides that a person who has disclosed or initiated the disclosure of information will be a competent but not a compellable witness.[99] No evidence about the identity of a person who made or initiated the disclosure, or the contents of such a disclosure, or the grounds upon which such a disclosure was made, will be admissible as evidence in criminal proceedings in a court of law unless that person testifies at such proceedings.[100]

4 8 Financial Intelligence Centre

Rapid dissemination of information on laundering activities is crucial. Such information must also be capable of being easily and systematically analysed. This is the function of financial intelligence units or centres. There is diversity both in form and in function among the several countries which have financial intelligence units.[101]

The Financial Intelligence Centre provided for in the bill is an administrative model, which will fall under the supervision of the Minister of Finance. The advantage of the administrative model over the police and the justice model, where centralisation of reports is undertaken by the police or justice departments respectively, is that it makes a clear distinction between cases of suspicion, which are dealt with administratively, and offences, which are the province of law-enforcement services.

The structure of the Centre has not been decided upon. One option that was mooted was to attach it to the Central Bank. One of the advantages of attaching the Centre to the exchange-control division of the Bank is that it will have access to all the resources of that department. Communication channels are already in place, although obviously these systems were not designed with money laundering in mind. A problem with linking it to the Bank is that it may exclude from the reporting structure financial intermediaries outside the banking sector, who or which have little or no contact with the Bank.[102] A Centre that functions independently may be in a better position to distribute the information among the different authorities whose task it will be to investigate the information with a view to instituting criminal proceedings.

The functions of the Centre will include the collection and analysis of information, the dissemination of such information to the relevant investigating authority, and the conducting of investigations into money-laundering activities.

---

97 Cl 15.

98 Cl 16(1).

99 Cl 16(2). In this regard the bill goes much further than the Proceeds of Crime Act.

100 Cl 16(3). See also s 16(5D) of the FTR ACT, which prevents any information concerning a suspect transaction report from being admitted as evidence in legal proceedings.

101 In Australia, AUSTRAC is attached to the office of the Attorney General, but functions virtually independently. In the US, FINCEN is attached to the US Treasury, which has strong law-enforcement branches.

102 *Report* 15.

The Centre will also function as a supervisory body to oversee the compliance by accountable institutions within the administrative framework.[103] The earlier draft bill did not give the Centre investigative powers. The Project Committee was of the view that any inability of the investigating authorities to utilise the information properly would defeat the whole purpose of the administrative framework. This would in turn render the Act a dead letter with significant, yet fruitless, cost implications for the business community. As both the SAPS and the Office for Serious Economic Offences are seriously underresourced, it was decided to give the Centre investigative powers. It is interesting to note, however, that the general trend in many countries is not to vest central agencies with investigative powers. This is often to prevent the filtering function and the investigative functions from becoming blurred.[104]

The Committee was of the view that if the Centre is to carry out investigations it should have powers similar to those of the Office for Serious Economic Offences and those used in the investigation of exchange-control contraventions. The bill gives effect to this recommendation.[105] The general powers of the Director of the Centre include requiring an accountable institution to provide the Centre with access to records that the institution is required to keep and the exchange of information with foreign institutions which perform similar functions to those of the Centre, and with foreign investigating authorities.

4 9 Access to information

Information held by the Centre will reflect the manner in which persons conduct their business. This information may be used to infringe upon a person's privacy and to gain a competitive advantage. Access to this information is therefore restricted. The bill limits access to such information to an investigating authority and authorities outside the Republic which perform similar functions to those of the Centre, where the Director believes that such information is required for the purpose of investigating criminal conduct. Where the director of an accountable institution is of the opinion that information relates to a transaction reported by the institution, that institution may have access to such information. The Commissioner for Inland Revenue ("the CIR") may also have access to the information. A court may also order the disclosure of such information. A person who is given such information may use that information only for the purpose of performing his or her functions.[106]

In my view it is not clear why the CIR should have access to information. Tax evasion does not seem to be covered by either the Proceeds of Crime Act or the bill.[107] The restriction on access to information may also be open to constitutional

---

103 Cl 23.

104 AUSTRAC, eg, does not have investigative powers. The Proceeds of Crime Unit in Canada is unusual in that it is made up of both investigators and prosecutors from the Ministry of Justice.

105 Cls 26 to 29.

106 Cl 33. This provision will include, within its prohibition, "tipping someone off" that an investigation is pending or that a report has been made. It was therefore not necessary to create the separate offence of tipping off as in the United States.

107 See the definition of "proceeds" in s 1(i)(vii) and s 3 of Proceeds of Crime Act and fn 20 and *supra*. In Australia the Taxation Office has a statutory right of access to information held by AUSTRAC. However, s 16 of the FTR Act specifically obliges a cash dealer to report to the Director, *inter alia*, each transaction where the case dealer has "reasonable

continued on next page

challenge on the basis that it violates a person's right of access to information.[108] Of course, the state may be able to prove that such a limitation is reasonable and justifiable in an open and democratic society.[109]

The Project Committee was of the view that the giving of feedback by the Centre is an operational matter of the Centre and should not be regulated by legislation.[110] An accountable institution may, however, have access to information retained by the Centre which the Director deems fit and which relates to a transaction reported by the institution.[111] The giving of feedback should be obligatory. It is important for a number of reasons, not least of which is that it is a vital part of the education process for the accountable institutions involved and is necessary if suspicion is to be removed from a possibly innocent customer.

4 10 Administration

The Project Committee realises the value of a co-operative approach to the administration of the framework of the bill. To this end, the Money Laundering Policy Board will formulate a national policy on money laundering and advise the Minister on the steps to be taken to implement such a policy and to promote public awareness.

The Board will be further empowered to advise accountable institutions on their duties under "the Act", to issue guidance notes to these institutions, to monitor compliance with the administrative framework and to advise the minister on the granting of exemptions from any provision in the bill.[112] The Board will consist of the Director of the Centre and representatives of all the types of institution to which the framework will apply.[113]

---

grounds to suspect" that information which he possesses may be relevant to the investigation of an evasion or attempted evasion of a taxation law.

108 S 32 of the Constitution provides "that "[e]veryone has the right of access to –
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights".
Ss (2) provides that national legislation must be enacted to give effect to this right. In terms of item 23(2) of Schedule 6 to the Constitution, until such legislation is enacted, s 32(1) must be taken to read as follows:
"Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights."
The proposed legislation is the Open Democracy Bill. Until the bill is enacted, a person wishing to have access to information held by the Centre as a state organ will have to show that such access is required for the exercise or protection of his right. Once the bill is enacted, he will have access to such information without more. (The bill had, at the time of writing, not yet been tabled in Parliament.) The bill regulates the use and disclosure of personal information held by both government and private bodies such as credit bureaus without the consent of the individual to whom it relates. The bill also affords to such persons the right to see their records and the right to have incorrect, misleading or incomplete records corrected. See further Williams "Access to information in the new South Africa" 1997 *De Rebus* 563.

109 See the limitation clause, s 36.

110 *Report* 31.

111 Cl 33(1)(d).

112 Cl 36.

113 Cl 37.

5 CONCLUSION

Creating a culture of compliance within the financial-services industry will not be easy. The questioning of customers' legitimacy, integrity and even identity conflicts with established practice, and the duty to keep customers' affairs confidential is recognised at common law[114] and is enshrined in legislation.[115] Employees will have to develop an attitude of suspicion towards their customers and their business, which is extremely difficult to achieve in a sector characterised by increasing competition and decreasing margins.

The reporting of transactions may be essential to the tracing of the proceeds of crime and the combating of money laundering, but should the failure to report be criminalised?[116] Consider the following hypothetical situation: What if a person engaged in a business or an accountable institution suspects or has reason to suspect that the client may be involved in money laundering, but fails to report this? The suspicion, although reasonable, turns out not to be well-founded. Would such a person be guilty of a crime? What if the person does *not* suspect money laundering, but the reasonable person would have formed such a suspicion? If the suspicion is ill-founded, would that person be guilty of a criminal offence? In respect of the former, it seems that such a person would indeed be guilty of an offence, even though there is no underlying offence. As regards the latter, if the test is that of the reasonable person (an objective test), the unsuspecting individual would also be guilty of the offence. If failure to report is criminalised, perhaps *dolus* should be required for a conviction. A person who deliberately fails to disclose a fact within his or her knowledge would, in any event, be guilty of assisting another to benefit from the proceeds of crime.[117]

The criminal law does set standards from which regulations and compliance procedures can operate with due authority and, most importantly, it provides a basis for international co-operation. It has been suggested[118] that instead of criminal sanctions, administrative sanctions should be imposed by the various regulators or, where the organisation is not regulated, by the Centre. I am not sure whether this is the answer, but until violent crime is brought under control, the resources of government will never be properly focused on insidious crimes.

In the United Kingdom, the civil law rather than the criminal law is of far greater significance in terms of risk for bankers and other intermediaries. It is the development which has taken place in the law relating to constructive trusts that has placed those who handle other people's money in jeopardy.[119] While our law does not recognise the constructive trust there may be solutions in our common law.

---

114 *Tournier v National Provincial and Union Bank of England* 1924 1 KB 461; *GS George Consultants and Investments (Pty) Ltd v Datasys (Pty) Ltd* 1988 3 SA 129 (T); *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 1991 1 SA 100 (A).

115 S 236(4) of the Criminal Procedure Act 51 of 1977 and s 33 of the South African Reserve Bank Act 90 of 1989.

116 The bill adopts a dual approach to the enforcement of the administrative framework. It provides for both criminal and administrative sanctions. Offences and penalties are dealt with in ch 9 of the bill.

117 In terms of s 29 of the Proceeds of Crime Act.

118 By Nicky Newton-King, legal counsel for the JSE, in representations to the Standing Committee on Justice on the Proceeds of Crime Bill 1996.

119 See Rider "Taking the profit out of crime. An international perspective from the UK". This paper was circulated at the Institute for International Research Money Laundering Conference held on 1997-04-15 in Johannesburg.

Another concern is whether we have the resources to implement and enforce the proposed bill. The cost of compliance, both start-up and ongoing, will be considerable. In this regard, the Committee urges the Department of Finance and other relevant authorities to consider the creation of an asset-forfeiture fund into which the confiscated proceeds of crime can be deposited. The funds accumulated in such a fund could be applied to defray the cost of investigations and prosecutions as well as to facilitate compensation for persons who suffered loss as a consequence of the offence in question.[120] But the creation of an asset-forfeiture fund will not cater for the initial capital outlay, particularly if South Africa is to emulate Australia with its sophisticated data bases and electronic reporting systems.

While the policy underpinning the existing legislation and the proposed bill is laudable, its *implementation* and particularly the enforcement of the reporting obligations, needs further careful consideration. One must, for example, guard against duplicating the reporting procedures, turning the business community into criminals and overloading the system so that meaningful analysis becomes impossible. The effectiveness of costly and burdensome requirements imposed on accountable institutions must be routinely reviewed by the financial industry, the enforcement authorities, politicians and the legislature to ensure that they continue to be justified in deterring money launderers.

[I]t is essential too that we always remember that a constitution cannot be constantly enforced by the sharp points of bayonets. For a constitution to persist, to survive, to thrive, indeed to become transcendental, it must rely on the people's continuing support – today, tomorrow and in the future. It must rely on an inter-generational acknowledgment of its ongoing legitimacy. It must count on a continuing popular subscription to its tenets.

NN Kittrie "The task ahead: making the Constitution work for pluralism" 1992/3 American University Journal of International Law and Policy *647 649.*

120 *Report* 33. The creation of such a fund is in keeping with recommendation 38 of the FATF Interpretative Notes and has been effected in the United States.

AANTEKENINGE

ENKELE GEDAGTES OOR DIE REGSPOSISIE EN ROL VAN BEHEERLIGGAME VAN OPENBARE SKOLE IN DIE NUWE ONDERWYSOMGEWING

1 Beheerliggame binne die nuwe onderwysomgewing

Ten einde enige wetgewing wat met skoolonderwys handel korrek te kan uitlê, is dit noodsaaklik om die omstandighede waarbinne die wetgewing funksioneer, te verreken. Enkele kenmerke van die onderwysomgewing word vervolgens vermeld.

Transformasie Die hele onderwysstelsel word gekenmerk deur steeds versnellende transformasie, dit wil sê veranderinge wat uiteindelik bedoel is om alle fundamentele regte ten aansien van onderwys (sien a 29 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996) ten volle te laat realiseer (vgl in die algemeen Malherbe "Reflections on the background and contents of the education clause in the South African bill of rights" 1997 *TSAR* 85–99). Skoolbestuur en -beheer is een van die areas wat deur transformasie geraak word. Transformasie is grootliks gerig op die ongeveer negentig persent van die onderwysinrigtings in die land wat tradisioneel benadeel was. Nogtans het transformasie uiteraard ook ingrypende implikasies vir die oorblywende tien persent.

Nasionale ideale Sekere nasionale ideale vind weerklank in die onderwys in die vorm van nasionale en provinsiale wette wat skoolonderwys direk en indirek raak. Die beheerliggaam van die skool (as statutêre orgaan waardeur die skool as publiekregtelike regspersoon handel en wat sekere aspekte van die skool se interne funksionering bepaal – sien a 15 en 16 van die Suid-Afrikaanse Skolewet 86 van 1996), kom toenemend onder die soeklig en moet rekenskap kan gee van sy aandeel aan die politieke, ekonomiese en maatskaplike transformasie en herstrukturering van skoolonderwys. Die beheerliggaam moet ook rekenskap kan gee (sien bv a 43 van die Skolewet) van sy benutting van die finansiële bronne wat aan die skool beskikbaar gestel word.

Onder die nasionale ideale en eise wat in die onderwys verreken moet word, tel die volgende:

- Die fundamentele reg op basiese onderwys insluitende die reg op onderwys in die taal van iemand se keuse waar dit redelikerwyse doenlik is (sien a 29 van die Grondwet en die "Language in Education Policy" van die nasionale Minister van Onderwys gepubliseer in *SK* 18546 van 1997-12-19).
- Die verbod op onbillike diskriminasie. Hierdie verbod sluit in onbillike diskriminasie op grond van ras, taal, geloof, en die finansiële posisie van 'n leerder se ouers of hulle weiering om die betrokke skool se missiestelling te onderskryf (a 9(3) van die Grondwet en a 5(3) van die Skolewet).

- Die demokratisering en desentralisering van bestuur en beheer, onder andere deur die geleentheid wat aan ouergemeenskappe gegee word om deel te neem aan die beheer van 'n skool.
- Die beginsel van koste-effektiewe bestuur en administrasie wat waarskynlik meegespreek het in die bepalings wat beheerliggame statutêr verplig om die fondse en ander middele wat die owerheid beskikbaar stel, aan te vul (vgl a 36 van die Skolewet).

Toenemende litigering Die aard van die nuwe Grondwet (bv sekere vae en algemene bepalings en onduidelikheid oor die begrensing van fundamentele regte) maak 'n toename in litigering oor onderwyskwessies in 'n groter mate moontlik en selfs onafwendbaar (sien in die algemeen *In re: The School Education Bill of 1995 (Gauteng)* 1996 4 SA BCLR 537 (CC); *Grove Primary School v Minister of Education* 1997 4 SA 982 (K); *Premier Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools* 1999 2 BCLR 151). Beheerliggame moet uiteraard poog om juridies so korrek as moontlik op te tree wanneer hulle hul voorgeskrewe werksaamhede verrig en hul bevoegdhede uitoefen.

Verskraalde owerheidsrol Daar is sterk aanduidings dat die owerheid nie die middele het (menslike hulpbronne, finansieel en andersins) om 'n sterk teenwoordigheid te handhaaf en 'n ondersteunende rol op alle vlakke van bestuur en beheer in die onderwys te speel nie (sien ook "National norms and standards for school funding" in *SK* 19347 van 1998-10-12). Sekere owerheidsorgane wat in die verlede sterk leiding en steun van sentrale vlakke van die regering ontvang het, vind dat daar tans minder steun (soos advies, riglyne, ens) beskikbaar is vanweë sake soos regstellende optrede, rasionalisering en die gepoogde herstel van onbillike optrede van die verlede.

Uit hierdie verskraalde rol kan onder andere afgelei word dat beheerliggame in 'n groter mate:

- self vir hulle eie opleiding vir hulle taak, inligtingsversameling, ensovoorts verantwoordelik sal wees en genoop sal wees om innoverend op te tree;
- van mekaar, van samewerking met nasionale instellings en van gebruikmaking van die dienste van kundigheidsentrums afhanklik sal wees;
- aandag sal moet gee aan netwerkskepping om mekaar te help om hulle rol ten opsigte van onderwys in die besondere skool en in die betrokke gemeenskappe na behore te kan speel. Hulle sal daarom betrokke moet raak by opvoedings-, maatskaplike, gesondheids-, ontspannings-, ontwikkelings-, voedings- en ander programme in hulle gemeenskappe, tot voordeel van sowel hulle eie skole as die onderwys in die land as geheel (vgl ook a 26(1) van die Noord-Kaapse Wet op Skoolonderwys 6 van 1996).

Toenemende pluriformiteit Demografiese druk sal waarskynlik toenemend tot groter verskeidenheid (ten minste in die leerderbevolking) van die meeste skole lei. Dit sal op sy beurt waarskynlik die konflikpotensiaal in skole verhoog en 'n uitdaging aan die beheerliggaam bied om deur weldeurdagte beleid en praktyk konflik te voorkom, te minimaliseer en op 'n juridies aanvaarbare wyse te bestuur. Dit wil voorkom of Suid-Afrikaanse skole in die algemeen nog nie genoeg aandag gee aan die feit dat hulle besig is om multikultureel en multireligieus te word nie en dat hulle voorbereiding in hierdie verband nog nie afdoende is nie.

2 Iets oor die werksaamhede en rol van beheerliggame

Uit die toepaslike wetgewing kan die volgende afgelei word (sien in die algemeen ook Beckmann, Geyer en Prinsloo *Thematic analysis of the SA Schools Act, 1996* CSAEMP (1997)):

- Die beheerliggaam verrig sy werksaamhede onderworpe aan die Grondwet, nasionale en provinsiale wetgewing en ander regsvoorskrifte vervat in regulasies, beleidsdokumente en amptelike norme en standaarde. Die regsbeginsels wat die verhouding tussen al hierdie tipes regsreëls bepaal en oplossings vir teenstrydighede bied (sien bv a 146 en 147 van die Grondwet) is uiteraard van besondere belang.
- Die beheerliggaam is bedoel om aan 'n verskeidenheid belanghebbendes soos ouers, leerders, opvoeders en nie-opvoeders in 'n tipe vennootskapsverhouding inspraak in die beheer van die skool te gee (sien die aanhef tot en a 24(1) van die Skolewet).
- Die beheerliggaam is in besonder verantwoordelik vir die beheer van die skool deur middel van 'n stel beleidsdokumente (betreffende toelating, godsdienstige seremonies, taal, die missie van die skool, dissipline, ens) terwyl die hoof (prinsipaal) en die opvoeders verantwoordelik is vir die professionele bestuur van die skool (sien a 16(1) en (3) van die Skolewet).
- Die beheerliggaam moet die professionele bestuurders van die skool in hulle werksaamhede ondersteun (a 20(1)(e) van die Skolewet). Die presiese wyse waarop dit moet geskied, is nie wetlik omskryf nie.
- Die beheerliggaam is verantwoording verskuldig aan die hoof van die betrokke provinsiale onderwysdepartement wat funksies daaraan toeken sowel as aan die skool- en die breër gemeenskap waarbinne die skool funksioneer.

Enkele aantekeninge by die bostaande is gepas:

- Hoewel daar statutêr onderskei word tussen die beheer en die professionele bestuur van die skool (sien a 16 van die Skolewet), is die onderskeid nie altyd duidelik nie. Uiteraard kan die beheer- en professionele funksies by 'n skool kwalik in waterdigte kompartemente geskei word. Die beheerliggaam kan sekere funksies ooglopend slegs verrig in oorleg met die opvoeders by 'n skool. 'n Voorbeeld is die aankoop van opvoedkundige materiaal en die bepaling van die keuse van vakke (ingevolge a 21(1) van die Skolewet). Die ontwikkeling van 'n skool deur die verhoging van die kwaliteit van onderwys (volgens a 20(1)(a) van die Skolewet) kan ook beswaarlik deur die beheerliggaam verrig word sonder om opvoeders by die skool op die een of ander wyse te betrek. Bogenoemde voorbeelde illustreer onder meer dat daar 'n besondere verhouding tussen die skoolhoof en die voorsitter van die beheerliggaam moet wees om te voorkom dat die funksie-onderskeid tot 'n magstryd en spanning in die skool lei – tot nadeel van veral die leerders (vgl in die algemeen Heystek "The role of the community in school governance" in De Groof en Malherbe *Human rights in South African education: From the constitutional drawing board to the chalkboard* (1997) 145 ev).
- Dit is duidelik dat 'n beheerliggaam nie totaal onfhanklik van ander liggame, groepe of persone kan funksioneer nie. 'n Beheerliggaam is byvoorbeeld in 'n verhouding van inter-afhanklikheid tot die nasionale Minister van Onderwys, die provinsiale LUR belas met onderwys, die provinsiale onderwyshoof, die prinsipaal en ander personeel by die skool, en leerders en ouers by die skool. Dié feit moet ook in die uitvoering van die beheerliggaam se statutêre werksaamhede neerslag vind.

- Die beheerrol van die beheerliggaam word in besonderhede in die Skolewet omskryf (sien bv a 5 6 7 9 20 21 36 38 39 41 42 43) maar nie die bestuursrol van die hoof nie, behalwe dat daar in die algemeen gestel word dat die hoof hierdie rol vervul onder die gesag van die betrokke provinsiale departementshoof van onderwys (vgl a 16(3) van die Skolewet). Talle ander regsbeginsels (insluitend die dienskontrak tussen die prinsipaal en sy werkgewer, die "Personnel Administration Measures" in *SK* 18432 van 1997-11-11 en talle ander wetgewende en arbeidsregtelike maatreëls) dien as bronne ter presisering van die prinispaal se professionele funksies.
- Die beheerliggaam het 'n verpligting (nie net 'n diskresie nie) om die middele wat die staat aan 'n skool voorsien, aan te vul (a 36 van die Skolewet). Die bepalings in verband met skoolgeld (a 39–41 van die Skolewet) is duidelike bewys hiervan asook artikel 20(4) van die Skolewet (ingevoeg deur a 6 van die Wysigingswet op Onderwyswette 100 van 1997) wat dit vir beheerliggame moontlik maak om opvoeders onder bepaalde voorwaardes aan te stel buite en behalwe die normale diensstaat. Beheerliggame wat sodanige aanstellings maak, moet dit uiteraard uit eie bronne finansier (a 20(9) en (10)).
- Alhoewel die Skolewet in die algemeen net na die "werksaamhede" van beheerliggame verwys, spreek dit vanself dat hulle ook al die hoof- en hulpbevoegdhede besit wat nodig is om hulle werksaamhede behoorlik te kan verrig (vgl in die algemeen Visser in De Groof en Malherbe 140–141; Visser "Some principles regarding the rights, duties and functions of parents in terms of the provisions of the South African Schools Act 84 of 1996 applicable to public schools" 1997 *TSAR* 626–636).

Ingevolge die Skolewet kan die werksaamhede van beheerliggame van openbare skole in drie groepe verdeel word (sien ook Beckmann, Foster en Smith *An analysis of the SA Schools Act* CSAEMP (1996)):

Verpligte werksaamhede (die sg a 20-werksaamhede) Dit is werksaamhede wat alle beheerliggame verplig is om te verrig en sluit sake in soos die bevordering van die beste belange van die skool; die ontwikkeling van die skool deur die voorsiening van gehalte-onderwys; die bepaling van beleid deur die aanvaarding van 'n grondwet vir die beheerliggaam; die aanvaarding van 'n gedragskode vir leerders; die aanvaarding van 'n toelatingsbeleid en die ontwikkeling van 'n missiestelling; die ondersteuning van die prinsipaal en ander opvoeders; die administrering en beheer van die skool se terreine, fasiliteite en geboue; die aanmoediging van persone om vrywillig dienste aan die skool te lewer; aanbevelings oor die aanstellings van opvoeders en nie-opvoeders en werksaamhede rakende die skool se begroting (sien a 20(1) van die Skolewet).

Sekere diskresionêre werksaamhede Volgens die Skolewet is 'n beheerliggaam nie verplig nie maar het 'n diskresie om onder meer die volgende werksaamhede te verrig: die aanvaarding van 'n taalbeleid vir die skool (a 6 van die Skolewet); die maak van reëls ten aansien van godsdiensbeoefening (a 7); die toelating van die gebruik van die skool se fasiliteite vir gemeenskapsdoeleindes (a 20(2)); die aansluiting by 'n vrywillige vereniging van beheerliggame (a 20(3)); en die skep en vul van poste vir opvoeders en nie-opvoeders by die skool uit eie bronne (a 20(4)).

Toegewysde werksaamhede (die sg a 21-werksaamhede) Die beheerliggaam kan skriftelik by die provinsiale onderwyshoof aansoek doen om die volgende werksaamhede toegewys te word: Die instandhouding en verbetering van die skool se

roerende eiendom sowel as onroerende eiendom deur die skool gebruik; die bepaling van die buite-kurrikulêre program van die skool; vakkeuses binne bestaande provinsiale raamwerke; die aankoop van handboeke en ander onderwysmateriaal; die betaling vir dienste aan die skool; ander werksaamhede in ooreenstemming met die Skolewet en enige toepaslike provinsiale wet (a 21(1) van die Skolewet; sien ook Kennisgewing 2362 van 1998 in *SK* 19347 van 1998-10-12 par 109 ev).

'n Bepaalde reg van die beheerliggaam Benewens die bevoegdheid om sekere werksaamhede op die voorgeskrewe wyse en volgens die algemene beginsels van die administratiefreg te verrig, het 'n beheerliggaam die reg om in sy werksaamhede ondersteun te word deur vermoënsbouprogramme wat deur die provinsiale onderwysdepartement aangebied moet word (a 19(1) van die Skolewet) asook op ander ondersteuning van die hoof en van ander onderwysamptenare (a 19(2) van die Skolewet). Die juridiese betekenis en afdwinging van hierdie regte is in onsekerheid gehul. Die wyd-gerapporteerde begrotingsprobleme van die onderskeie provinsiale onderwysdepartemente laat die vraag onstaan of die dwingende prioriteite van die departemente soos die aanstel van personeel en die oprigting van nuwe skole ruimte sal laat vir betekenisvolle programme soos voorsien in artikel 19(1). Die vraag ontstaan voorts hoe effektief die reg op bystand van die prinsipaal en opvoeders by 'n skool is en of daar enige praktiese remedies bestaan waardeur die reg beskerm word (vgl in die algemeen hfst 3 van die Grondwet wat handel oor samewerkende regering op alle vlakke).

3 Die status en belangrikheid van 'n beheerliggaam

'n Openbare skool is 'n besondere tipe regspersoon wat die wetlike bevoegdheid het om sy voorgeskrewe werksaamhede te verrig (a 15 van die Skolewet). Die beheerliggaam is in 'n beperkte en omskrewe wyse die "directing mind" van 'n skool (sien *S v Coetzee* 1997 3 SA 527 (CC)) wat namens die skool sekere besluite neem en die skool teenoor die buitewêreld kan verteenwoordig. Buitestanders is byvoorbeeld gebonde aan die toepassing van die beheerliggaam se wettige toelatingsbeleid ingevolge artikel 5 van die Skolewet gemaak.

Die beheerliggaam het ook sekere beleidmakende en ordeningsfunksies ten aansien van die interne werking van die skool. Persone betrokke by die skool word deur wettige besluite van die beheerliggaam gebind (deur bv die reëls wat dit oor godsdiensbeoefening maak, die gedragskode vir leerders, die goedgekeurde begroting, die skorsing van 'n leerder as korrektiewe maatreël, ens).

Wat die belangrikheid van die beheerliggaam betref, moet op die volgende gewys word:

Die beheerliggaam is in 'n groot mate verantwoordelik vir die ontwikkeling van die skool en vir die gehalte van onderwys (a 20(1)(a) van die Skolewet). Dit dui daarop dat die nasionale en provinisiale regerings nie meer die volle verantwoordelikheid hiervan dra nie.

Die beheerliggaam moet die inisiatief neem ten aansien van die verwerwing van kennis en die bemeestering van vaardighede wat noodsaaklik is sodat almal wat by die skool betrokke is, hulle rolle behoorlik kan vervul. 'n Ernstige struikelblok is die gebrekkige kennis en ervaring van die meeste nuut verkose beheerliggame.

Die sukses van die vennootskapsgedagte in die aanhef of voorrede tot die Skolewet (sien hieroor Visser 1997 *TSAR* 626) en die voortbestaan van hierdie vorm van inspraak en gesag veral vir die ouer, sal grootliks afhang van die wyse waarop beheerliggame hierdie geleentheid benut. Indien sake skeefloop, kan verwag word dat die owerheid op grond van sy verantwoordbaarheid teenoor leerders in die algemeen kan ingryp en ander beheer- en bestuursmodelle kan oorweeg – byvoorbeeld 'n terugkeer na sentrale beplanning en bestuur.

Die beheerliggaam beklee 'n besondere posisie in die skool wat in die wetgewing as 'n vertrouensposisie beskryf word (a 16(2) van die Skolewet). Beheerliggame behoort die vertroue van onderwysers, ouers, leerders, nie-opvoeders en ander lede van die gemeenskap en ook van die owerheid waardig te wees in hulle optrede. Die skool se belange behoort altyd swaarder as enige ander belang te weeg (insluitende die persoonlike politieke, ekonomiese en religieuse belange van die individuele lede daarvan) in die wete dat die individue van die toneel kan (en sal) verdwyn maar dat die behoefte aan onderwys (en dus aan verantwoordelike beheer) sal bly voortbestaan. Om vertroue te skep, beteken in hierdie verband onder andere om die belange van kinders te beskerm (sien bv die aanhef tot die Skolewet) en om opvoeders te oortuig dat hulle belange deur die beheerliggaam op die hart gedra word en dat die beheerliggaam poog om 'n klimaat te skep waarbinne hulle werk optimaal verrig kan word.

Die beheerliggaam motiveer betrokkenes om 'n leidende rol te speel in die uitbou van die skool (a 20(1)(k) van die Skolewet). Wette en regerings kan dit nie doen nie. 'n Skool is by uitstek 'n instelling waar die staat se rol aangevul moet word deur insette van 'n demokratiese beheerliggaam wat plaaslike waardes en belange verteenwoordig. Die beheerliggaam verwoord en verteenwoordig die ideale van die skoolgemeenskap.

Die beheerliggaam bevorder doelbewus verdraagsaamheid en wedersydse respek in die skool. Dit speel dus 'n belangrike rol om die waardes van die handves van regte as hoeksteen van die demokrasie (a 7(1) van die Grondwet) te bevorder.

4 Slotgedagte

Die owerheid en opvoeders behoort die wetlike rol wat aan beheerliggame toegeken is, behoorlik te verreken en te respekteer. Daar is ongelukkig aanduidings dat by te veel skole die prinsipaal en die professionele bestuurspan die beheerliggaam as 'n tipe rubberstempel sien. Daar word ook soms 'n onredelik beperkende uitleg van die statutêre bevoegdhede van die beheerliggaam gevolg. Die beheerliggaam moet inderdaad die professionele bestuur van 'n skool sover as moontlik ondersteun (a 20(1)(e) van die Skolewet) dog sonder om 'n slaaf van die onderwysowerhede of die skool se professionele bestuurspan te word.

JL BECKMANN
Universiteit van Pretoria, Sentrum vir Onderwysreg en Onderwysbeleid (SORB)
PJ VISSER
Universiteit van Pretoria

UBUNTU AS A CONCEPTUAL DIRECTIVE IN REALISING A CULTURE OF EFFECTIVE HUMAN RIGHTS

1 A need perceived

The condition of respect for others,
presupposes first the attaining of self-respect.
(Translation from Pierre le Vieux)

1 1 As an incentive to achieve simple justice between man and man, the inclusion of a bill of rights in the South African Constitution is a welcome addition. However, such a bill, no matter how well reasoned, carefully considered and adequately phrased it may be, is, in the end, just so many words put on paper. Seen in this light, it does not amount to much more than lawyers' law. We shall argue that it requires a further spark to bring the bill to life, to make it active and to make it a workable part of a multifaceted society. To be effective and functional, a system of human rights must be firmly embedded in a human-rights-friendly and supportive culture and in a rights-informed and rights-mentality people (cf Labuschagne "Die psigo-kulturele onderbou van effektiewe menseregte: opmerkinge oor die posisie van die vrou in die inheemse reg" 1995 *Stell LR* 360–362 (Labuschagne "Psigo-kulturele"); Labuschagne "Eerste wêreldse regsgevoel in 'n derde wêreldse sosio-ekonomiese en -kulturele milieu: opmerkinge oor die reg op regsverteenwoordiging in die strafproses" 1994 *SACJ* 54–58).

1 2 The starting point for this exposition is to be found in the decision in *Ryland v Edros* 1997 2 SA 690 (C). In brief, the facts were the following: Ryland had married Edros in accordance with Muslim rites during 1976. However, because of growing dissatisfaction with their relationship, the plaintiff (ie the husband) had, during 1991 and 1992, issued the required three notices to the defendant, thereby terminating the parties' marriage (701). As Muslim marriages are potentially, if not actually, polygamous, such marriages are regarded as against public policy. (See also Labuschagne "Regspluralisme en huweliksduplikasie in Suid-Afrika" 1993 *De Jure* 171.)

Amongst other things, defendant claimed arrear maintenance, prayed for a consolatory gift because the dissolution of the marriage was at the behest of the plaintiff and enquired about an equitable share of her contributions to the plaintiff's estate (700). These actions were opposed by the plaintiff. The defendant's counterclaim (714) was lodged in October 1994. The importance of this date, occurring as it did after the coming into force of the interim Constitution (Act 200 of 1993), will be adverted to in paragraph **1 3** below.

As monogamy was (until October 1998; see also par **2 3** below) the only legally and visibly acclaimed marriage format in South Africa, the court had to decide whether the contract resulting from a Muslim marriage was tainted by the fact that such a marriage is potentially polygamous (although the marriage in the instant case was monogamous) and therefore contrary to the then declared public policy. In practice, certain consequences of indigenous African marriage were recognised – therefore, inevitably, the marriage was, albeit for limited purposes, recognised as well (cf Labuschagne "Erkenning van die inheemse huwelik" 1991 *THRHR* 483). The court had occasion to refer to the decision in *Ismail v Ismail* 1983 1 SA 1006 (A) where the court had decided that

> "the claims . . . are based on a custom or a contract which arises directly from, and is intimately connected with, the polygamous relationship entered into by the parties. It follows from this that, if the polygamous relationship is regarded as void on the grounds of public policy, the custom or the contract which flows from this relationship is also vitiated" (1025).

1 3 The Constitutional Court has held that the interim Constitution is not retroactive or retrospective (*S v Mhlungu* 1995 3 SA 867 (CC) par 99). This the court in the instant case (714) found to be important because of the principle that, in general, the moment to consider whether a contract (or part of it) is enforceable is not when the contract was concluded, but when the court is asked to make an order. (See also *Magna Alloys and Research (SA) Ltd v Ellis* 1984 4 SA 874 (A) 897; Kerr "Stare decisis in a reunited state" 1996 *SALJ* 226–227; Labuschagne "Retroaktiewe wetgewing" 1986 *SAPL* 135.) Thus although the marriage between Ryland and Edros had already been dissolved during 1992, the defendant brought her action only after the interim Constitution came into force. The judge found that "[i]n the circumstances I am satisfied that the *Ismail* decision no longer operates to preclude a court from enforcing claims such as those brought by the defendant in this case" (711).

The court explained its new standpoint:

> "[I]n the present case it would be difficult to find that there has been such a change in the general sense of justice of the community as to justify a refusal to follow the *Ismail* decision if it were not for the new Constitution" (704).

Under the given circumstances the court based its decision – correctly, it is submitted – on the "fundamental alteration in regard to the basic values" of the society brought about by the interim Constitution (704). It has been pointed out that customary law in South Africa had become isolated because it was ignored in the ongoing legislative processes during the 1970s and 1980s (Bennett and Peart *A sourcebook of African customary law* (1991) v). Under those circumstances it could be appreciated that the then current version of customary law would have suited "a large and conservative African constituency; any reform would inevitably bring an improvement in the status of women, something few men would support" (Bennett and Peart *op cit* v-vi). But situations alter and evolve. Public policy does change in the course of time. Therefore, in principle, it is possible for a South African court to deviate from the decision in *Ismail* (Malan "Oor gelykheid en minderheidsbeskerming na aanleiding van *Ryland v Edros* en *Fraser v Children's Court, Pretoria North*" 1998 *THRHR* 301–304).

1 4 However, an issue much wider than the contractual relationship between Ryland and Edros was broached during the disquisition by the court. It is our contention that the court irrevocably started a move in the direction of accepting other formats of marriage, as distinct from monogamy, as legally valid in South Africa. Indicating the way, there are already adaptations and adjustments occurring to the traditional marriage and the nuclear family in some other countries (Labuschagne "Eengeslaghuwelike: 'n menseregtelike en regsevolusionêre perspektief" 1996 *SAJHR* 534 (Labuschagne "Eengeslaghuwelike"); Schutte-Heide-Jørgensen "Recht op homohuwelijk" 1997 *Ars Aequi* 86). There are several universal evolutionary processes at work in socio-juridical value systems of mankind (Labuschagne "Eengeslaghuwelike" 548) and these are constantly eroding long-cherished beliefs regarding, for example, marriage formats. (See also Dlamini "Should we legalise or abolish polygamy?" 1989 *CILSA* 330, where he states that the reason why polygamy – which is an integral part of African customary law – was not allowed in South Africa was ethnocentric bias).

It is clear from the *Ryland* decision that the interim Constitution, particularly chapter 3, paved the way for bringing about fundamental changes. These include, amongst other things, interpersonal relationships in South African society. While such relationships are important worldwide in any case, they are of critical importance here and now. The court favoured the view that "it is quite inimical to all the values of the new South Africa for one group to impose its values on another" (707).

In explaining the point, the court used the example of two Christians getting married, but where it later transpired that the officiating minister had not been a legally recognised marriage officer. According to the court, no-one would hold that this marriage was not legally valid (574, 710). If this is correct, the court continued, then it is not possible "to distinguish such a case from a case of two Muslims who are married in accordance with Muslim rites in circumstances where the marriage is not legal in terms of Act 25 of 1961" (710).

It was indicated in the instant case that public policy, being of a dynamic nature, is essentially a question of fact (704). Reference was made to the article by Mr Justice FP van den Heever in 1941 *SALJ* 337 – "Immorality and illegality in contract", but, with respect, the court's words in *Ryland* were wrongly reported in 1996 4 All SA 557 (C) and given as "what is *immortal* is a factual not a legal problem" (568; emphasis added. At 704, of the SALR, however, "immoral" was spelled correctly). The misprint points out a moral. It is submitted that immortality indeed goes beyond the bounds of the law. In the same manner, runs our argument, marriage regimes (in their human, religious, psychological and sociological context) are beyond the reach of the law as well.

1 5 The court followed the constitutional instruction and, in terms of section 8(2) (ie "[N]o person shall be unfairly discriminated against, directly or indirectly, and ... on one or more of the following grounds ... ethnic or social origin, ... *religion* [or] *culture*" (emphasis added)), applied the values of equality and tolerance for diversity in recognition of the plural nature of South African society. These values affect the concepts of public policy and *boni mores* which the courts must apply (708–709).

1 6 The judge stressed that what he had said did not necessarily apply to a contract applicable to a marriage that is actually, as opposed to merely potentially, polygamous; no question of actual polygamy arose in the instant case and no comments would necessarily be applicable to such a case (709). It is to be noted that the marriage under discussion was clearly not polygamous (it having been terminated when the plaintiff had no other wife so that the polygamous potential was never realised) and, furthermore, the court was not asked to recognise the validity of the marriage, but merely to decide upon contractual matters.

2 Legal development

... a noble necessity rather than a practical ideal ...

(an old adage transposed)

2 1 Professor Kerr undertakes a searching discussion about the interpretation of the interaction between constitutional dispensation and customary law as applied in the law of succession to be found in the decision in *Mthembu v Letsela* 1997 2 SA 936 (T). In "Inheritance in customary law under the interim Constitution and under the present Constitution" 1998 *SALJ* 267, he points out that the normal mechanisms whereby customary law develops and changes are legislation, precedent

and custom. (See also Kerr *The customary law of immovable property and of succession* (1990) 15-19 and cf Labuschagne "Beheer en voogdy oor kinders na egskeiding in die inheemse reg: twee vorme van regsakkulturasie" 1991 *Obiter* 116; Van Heerden "Die intestate erfopvolgingsreg van 'n swart vrou in 'n gebruiklike huwelik: *Mthembu v Letsela* 1997 2 SA 936 (T)" 1998 *THRHR* 522.) Kerr shows that, of the three mechanisms identified, legislation is the one most suited to large-scale changes to law and agrees with the finding of the court namely "that such development should rather be undertaken by Parliament".

2 2 It is instructive to note that Kerr does not list the three possibilities disjunctively, but being combined with the conjunction "and", the situation allows for concurrence of these elements. In the present note, it is mooted that the gradual change in legal precepts wrought by custom (which indicates a perceived need in a particular society at a particular period in its history) would in most instances be a forerunner to a (seemingly) sudden and abrupt legislative change of the law. Note as well that the "sanctioning of unofficial law by the [African] community concerned may be of a conventional, formal and a conscious structured nature, or may show itself in *unconscious behavioural patterns of that community*" (Van Niekerk *The interaction of indigenous law and western law in South Africa: a historical and comparative perspective* (LLD thesis, Unisa 1995) 154 (Van Niekerk *Interaction*) (emphasis added)). Furthermore, the point has previously been raised that now could be the time to inquire whether the crime of bigamy – which would also include polygamy – should not be abolished (Labuschagne "Dekriminalisasie van bigamie" 1986 *De Jure* 68).

2 3 A further development is a bill (the Recognition of Customary Marriages Bill, W110 of 1998) passed by Parliament at the beginning of November 1998. This bill, according to its long title, aims to make provision for the recognition of customary marriages and to provide for matters connected with them. That a customary union is not invariably against public policy, precisely because Parliament recognised the rights of guardianship stemming from a customary union, was already advanced by Kerr twenty-five years ago (cf his "Guardianship of children of Bantu customary unions: the inter-personal conflict of laws problem" 1973 *SALJ* 10 and Labuschagne "Regspluralisme, regsakkulturasie en onderhoud van kinders in die inheemse reg" 1986 *De Jure* 293).

2 4 It is to be noted that the South African Appellate Division has drawn the following conclusion: "[W]hile constitutionally the Republic is a single sovereign State, the composition of its peoples reflects a rich mosaic made up of a variety of races, cultures, languages and religions" (*Mohamed v Jassiem* 1996 1 SA 673 (A) 704). In view of this, the question may be raised whether the emphasis on the concept of nation-building is reconcilable with a human-rights dispensation which is essentially founded upon human individuality and autonomy (cf Labuschagne "Psigo-kulturele" 367).

When ascertaining the right of one group in South African society to make decisions for all the peoples of this country, we are instructed to attend to Didcott J's words: "No single group has a monopoly of such a society's 'right-thinking' members, and the 'mythical consensus' [of opinion] must encompass them all" (*Demmers v Wyllie* 1978 4 SA 619 (D) 629 and cf Würtenberger *Zeitgeist und Recht* (1991) 98–99; Obermayer "Über das Rechtsgefühl" 1986 *Juristenzeitung* 41–42).

Furthermore, the idea of a general concept of *boni mores* as the standard for determining wrongfulness is not identifiable with the principles of a bill of rights (Malan *op cit* 304). The author then indicates:

> "Weens die *neutrale* aanskyn van die bepaling [nl die *boni mores* van die gemeenskap as geheel] slaag dit daarin om die magstrategiese werking en die effek daarvan te verdoesel. Dit gee dus voor om 'n algemeen geldende (universeel omvattende) konsensus te weerspieël maar funksioneer daarenteen as hegemoniese ideologie en strategie" (*loc cit*; emphasis in the original. Cf Heyns "'Reasonableness" in a divided society" 1990 *SALJ* 279; Labuschagne "Die geregtigheidsalliansie van etnologie en strafreg" 1997 *SA J Ethnology* 59–60)."

Cognisant of the fact that we may be held accountable for committing the same transgression, namely that of prescribing a subjective viewpoint, we crave the reader's indulgence. The matter put forward here is viewed objectively and is not intended as a restriction. In interpreting and applying the law, South African courts must "take into account the values that underlie our Constitution" and the development of the common law and customary law must be undertaken "with due regard to the spirit, purport and object of the bill of rights" (Maithufi "The constitutionality of the rule of primogeniture in customary law of intestate succession: *Mthembu v Letsela* 1997 2 SA 935 (T)" 1998 *THRHR* 142). It is significant that the present Constitution "addresses the need to bring outdated and distorted customary law institutions in line with the values of the Constitution" (Mokgoro "Ubuntu and the law in South Africa" 1998 *Buffalo Human Rights L Rev* 20 (Mokgoro "Ubuntu")).

3 Constitutional provision

> *All the soarings of my mind begin in my blood.*
>
> (Rainer Maria Rilke)

3 1 The post-amble to the interim Constitution declared that the Constitution provided a bridge between the past of a deeply divided society and a future founded on the recognition of human rights. The peoples of South Africa must transcend the divisions and strife of the past. These elements, then, can now be addressed on the basis that there is a need for understanding and not for vengeance, a need for reparation and not for retaliation, a need for ubuntu and not for victimisation. Careful consideration should be given to the positive aspects included in the philosophical foundations of customary law when reconciling the latter with individual human rights (Bekker "How compatible is African customary law with human rights? Some preliminary observations" 1994 *THRHR* 446–447. See also Prinsloo "Die inheemse opvolgingsreg getoets aan die Grondwet: *Mthembu v Letsela and another* 1997 2 SA 936 (T)" 1998 *TSAR* 574; Prinsloo "Tweede aanval op die inheemse opvolgingsreg" 1998 *TSAR* 771).

As Langa J stated in *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC), 1995 2 SACR 1 (CC):

> "It may well be that for millions in this country the effect of the change has yet to be felt in a material sense. For all of us, though, a framework has been created in which a *new culture must take root and develop*" (par 221; emphasis added).

An essential element of the viability of this "new culture" is to be found in ubuntu. However, to attempt a facile definition of ubuntu would defy "the very essence of the African world-view and may also be particularly elusive" (Mokgoro "Ubuntu" 15. See also Mbigi and Maree *Ubuntu: the spirit of African transformation management.* (1995) 2 111–112.) In *Makwanyane* Langa J explained that this concept of ubuntu "is of some relevance to the values we need to uphold" (par 224). He also drew attention to the value it places on human dignity, and that there is a need for communality combined with the

inherency of interdependence between people (par 224 225). It is heartening to note the dictum of Mokgoro J when explaining that the "one shared value and ideal that runs like a golden thread across cultural lines is the value of *ubuntu* – a notion now coming to be generally articulated in this country" (par 307; "ubuntu" embraces the connotation of "sharing", and here it is to be shared by all in South Africa). Madala J defined ubuntu as a concept that contains "in it the ideas of humaneness, social justice and fairness" (par 237; cf also English "Ubuntu: the quest for an indigenous jurisprudence" 1996 *SAJHR* 641). Coupled with this view is the fact of Africa's socio-cultural heritage that is "potentially powerful in influencing, in shaping and in formulating the constitutional ethos [which has to] define judicial responses to jurisprudential challenges" in a complex society (Mahomed "Chief Justice hails new Constitution and African values" 1997 *De Rebus* 78). In this paradigm it is ubuntu that presents to "indigenous law a different dimension and which distinguishes it from mere primitive law" (Van Niekerk "A common law for Southern Africa: Roman law or indigenous African law?" 1998 *CILSA* 167).

It should be emphasised, though, that the notions underlying ubuntu are not unique to Africa. Clearly, the content of ubuntu can be traced to the admittedly embryonic altruistic inclination of humankind, which is a universal phenomenon and present even in some animal species (see Boorman and Levitt *The genetics of altruism* (1980) 1 *et seq*; Huntingford *The study of animal behaviour* (1984) 253–259; Hasbach *Altruismus und Moral* (1992) 115 177; Labuschagne "Die voorrasionele evolusiebasis van die strafreg" 1992 *TRW* 40–41; Labuschagne "Menseregtelike en strafregtelike bekamping van groepsidentiteitmatige krenking en geweld" 1996 *De Jure* 23 49). Ubuntu as a species of psycho-social behaviour (in fact it shows vestiges of a pre-natal womb memory) is universal and underpins much of the empathy resplendent in the human condition.

Thus the Biblical command to love one's neighbour represents an evolutionary culmination of this altruistic inclination.

The final opinion is that of Mahomed J, as he then was, which he formulated as follows:

> "[T]he need for *ubuntu* expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community" (par 263).

Although mankind continuously progresses to higher levels of rationality, specific prénascent traits of pure human bio-social nature are still clearly discernible in the human psyche. (Cf Lampe *Genetische Rechtstheorie. Recht, Evolution und Geschichte* (1987) 1 *et seq*.) Thus in the socio-juridical value structures in traditional African societies there is an unmistaken pre-rational and emotionally vivid "voorrasionele en oeremosionele") dimension (Labuschagne "Geloof in towery, die regsbewussyndraende persoonlikheid en die voorrasionele onderbou van die regsorde: 'n regsantropologiese evaluasie" 1998 *SA J Ethnology* 83–84) which, paradoxically, subverts individuality, personal autonomy and mundane humaneness in the very essence and moral fibre of a *Rechtsstaat* and a human-rights culture.

4 Implementation

> *No man is an Island, entire of itself*
> (John Donne "Devotions 17")

4 1 We would attempt to define ubuntu as that condition which goes beyond mere friendship and proceeds to a willing and unselfish cooperation between

individuals in society, with due regard for the feelings of others and not taking into account incidental social differences.

Ubuntu exhibits the following discernible components:

(i) individual-centred –

(a) internal, namely human dignity, steadfastness;

(b) external, namely compassion, honesty, humaneness, respectfulness;

(ii) community-centred, namely adhering to familial obligations, charitableness, cooperation, group solidarity, social consciousness.

4 2 Taken at its highest development, ubuntu exerts a strong moral obligation on the members of an adult, emancipated society. In the wider sense ubuntu entails having the interests of the community at heart and requires that a person's conduct is acceptable in that community. In this sense the concept of ubuntu can be used to promote and foster a culture of human rights in an African context (cf Van Niekerk *Interaction* 276).

4 3 The initial compiling and recording of a bill of rights is but the beginning. The bill's proper and effective implementation is manifestly its true objective. Apart from the bill being formally accepted, it also has to be practically applied and effectualised. The bill has to be experienced as a living entity in the daily lives of all people forming part of a multicultural society (cf Mqeke *Basic approaches to problem solving in customary law; A study of conciliation and consensus among the Cape Nguni* (1997) 10; see also Van Niekerk *Interaction* 271). To achieve this it has to be accepted, first and foremost, that a bill of rights is intended for the ordinary person in the street. The bill must have meaning for this person if it is to be successfully implemented. It will become a reality only when all citizens are in fact willing and mentally equipped to make it work.

5 ***In fine initium est***

Motho ke motho ba batho ba bangwe.

(Through others, I exist).

The spirit of altruism and humaneness that ubuntu exudes is a force which can be utilised to make the bill of rights real, effective and practicable. The concept of ubuntu can assist a human-rights culture to take hold of the minds of ordinary people (see also Mokgoro "Ubuntu" 18 20 22) and thereby create the much-needed human-rights mentality which is a prerequisite for an effective *Rechtsstaat*. This may not come easily and could be a gradual process with no foreseeable culmination.

PD DE KOCK
Vista University

JMT LABUSCHAGNE
University of Pretoria

DELICT AS AN ALTERNATIVE GROUND FOR LIABILITY IN A BANK-CUSTOMER RELATIONSHIP

1 Introduction

The bank-customer relationship is a contract of mandate (see Ailola "Uncrossed non-transferable cheques: a banker's right to refuse payment or collection. When

will the law change?" 1995 *SA Merc LJ* 234 235; Luntz "Cheques as mandate and as bills" 1995 12 *Banking & Financial Law Review* 189 190; Pretorius "Altered cheques and the collecting bank" 1997 *SA Merc LJ* 365 366; Malan and Pretorius *Malan on bills of exchange, cheques and promissory notes in South Africa* 1997 (hereafter "Malan") 334; Geva "Allocation of forged cheque losses – comparative aspects, policies and a model for reform" 1998 *LQR* 250 251–258; *Burns v Forman* 1953 2 SA 226 (W) 229B; *Liebenberg v Absa Bank Limited t/a Volkskas Bank* 1998 1 All SA 303 (C) 311c–f). The customer, as the mandator, gives his bank, the mandatary, instructions that are contained in individual cheques (see Cowen and Gering *Cowen on the law of negotiable instruments in South Africa* 1966 (hereafter "Cowen") 366–367; Malan "The liberation of the cheque (conclusion)" 1979 *TSAR* 201). One of the incidents of this contract is that the bank pays on cheques drawn on it by the customer in the amount for which they are drawn (Luntz *op cit* 190). Where the bank pays a cheque on which the customer's signature is forged it pays at its own risk as there is no mandate to pay and it cannot debit the account of the customer (Pretorius "Law of negotiable instruments" 1986 *Annual Survey of SA Law* 342 344; *Tedco Management Services (Pvt) Ltd v Grain Marketing Board* 1997 1 SA 196 (ZS) 205I–206A). The same position obtains where the amount on a cheque has been altered; it has been argued that the bank may only debit the customer's account with the original amount (Pretorius 1997 *SA Merc LJ* 367).

Because the bank can look to the customer for recompense only where it has performed its mandate, the corresponding duty of a customer in drawing his cheques is that he must not be negligent in giving his mandate. A customer will bear the loss where he breaches the duty of care he owes his bank and fails to draw his mandate with reasonable care (*Tedco Management Services* case *supra* 206E). A customer's contractual duty to draw his cheques with reasonable care to prevent forgery or alteration of the cheques is, however, a limited one: the customer must draw his mandate carefully and inform the bank of any known or suspected forgeries or frauds on his account (per Philips AJ in *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 3 SA 267 (W) 283A–B). This position has been judicially endorsed, for instance, in *Holzman v Standard Bank* 1985 1 SA 360 (W) 364B–C. A customer has no general duty to conduct his business in a manner that will prevent or minimise forgeries (see *Big Dutchman* case *supra*). For instance, the customer is not obliged to supervise his employees or to run his business carefully (*Big Dutchman* case *supra* 283A–B). The negligence complained of must also be the proximate cause of the loss (*Big Dutchman* case *supra* 283C–D; Geva *op cit* 264–266), so that, even though the customer's negligence may have given occasion to the bank's payment of a forged cheque, if it is not so "immediately connected" to the transaction as to have caused the payment, the customer is not liable (Geva *op cit* 264–265). In *Holzman v Standard Bank Ltd supra* the bank was not allowed to raise the drawer's negligence as entitling it to debit the customer's account where the customer entrusted the custody of his cheque books to an employee who forged the customer's signature; the employee had a gambling propensity, previous convictions and had also been removed from the register of accountants and auditors. However, he had for a long time led a blameless life and the customer was unaware that he had been removed from the register. In the opposite case where the customer's negligence facilitates a forgery, that is, where the forgery is "a natural and direct" consequence of the customer's negligence, the bank should be able to debit the customer's account with the amount of the cheque (Geva *op cit* 260).

The English position was stated in *London Joint Stock Bank v Macmillan & Arthur* 1918 AC 777 (HL) where it was held that it is incumbent on the customer to exercise reasonable and ordinary precautions against forgery and in giving his mandate so that the bank would not be misled. Where an alteration in the amount is a direct and natural result of breach of this duty, the customer will be responsible for the loss the bank may suffer as a result. This position was re-confirmed by the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* 1986 AC 80 (PC). The court inquired whether English law recognised a wider duty of care which is owed by the customer to his bank than that extrapolated in the established general principle that, first of all, he must refrain from drawing his cheques in a manner which may facilitate fraud or forgery, and, secondly, that he must inform the bank of any forgery or of any cheque purportedly drawn on his account as soon as he becomes aware of it (101C–D). Lord Scarman, in accepting the position taken in the *Macmillan*'s case, stated that the formulation of the duty of the customer in the latter case excluded, as a necessary incident of the bank-customer relationship, any wider duty on the part of the customer (103C–D). The customer's duty is to draw the cheques with reasonable care to prevent forgery; should forgery occur owing to the neglect of this duty and the bank suffers loss, the customer is liable (103B–C).

The Canadian authorities seem to recognise a higher level of care on the part of the customer. A customer not only has to take reasonable care in executing his mandate and to inform the bank of known forgeries but must also verify the accuracy of bank statements (Ogilvie "Banker and customer revisited" 1986 *Canadian Bar Review* 3 7) In *Canadian Pacific Hotels Ltd v Bank of Montreal et al* (1981) 122 DLR (3d) 519, the Ontario High Court implied that a large commercial customer owes a duty of care to its banker to apply adequate internal accounting controls to prevent forgeries (532). Although this decision was confirmed by the Court of Appeal, it was set aside by the Supreme Court. In delivering the Supreme Court decision, Le Dain J said that, in the absence of a verification agreement between a customer and a bank, there is no duty on the customer to examine his bank statements, nor is there any duty on the customer "to maintain an adequate system of internal accounting controls for the prevention and minimisation of loss through forgery" (*Canadian Pacific Hotels Ltd v Bank of Montreal et al* (1988) 40 DLR (4th) 385 432). The decision of the Hong Kong Court of Appeal in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* 1984 1 Lloyd's Rep 555, to the effect that it is not economically feasible nowadays for a bank to examine signatures on each and every cheque, and that the customer's duty of care should include reasonable care in the operation of the account, was overturned by the Privy Council. The latter court, while sympathetic to the approach of the Court of Appeal, reinstated the traditional position, holding that a customer must take care in the way he draws his cheque, and must warn his bank as soon as he knows that a forger is operating the account.

The duty of a customer to draw his cheques carefully to prevent forgery and alterations has been the subject of many articles and court decisions (eg Malan 1979 *TSAR* 20; Pretorius "The forgery of a drawer's signature on a cheque: proposals for the reform of the South African law" in Visser (ed) *Essays in honour of Ellison Kahn* (1989) 271; Luntz *op cit* 194–200; Pretorius 1986 *Annual Survey* 342; Pretorius 1997 *SA Merc LJ* 365; Geva *op cit*; *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd supra*; *OK Bazaars (1929) Ltd v Universal Stores Ltd* 1973 2 SA 281 (C); *Holzman v Standard Bank*

supra). It may be said that the contractual duties of a customer in a bank-customer relationship have been defined. However, whether the customer can be delictually liable to his bank is not as clear. The purpose of this paper is to examine the position in delict with a view to determining the potential liability of a customer to his bank in delict. Where a customer, in operating his account, acts in a manner that causes his bank to suffer a loss, can the bank hold the customer liable in delict?

2 Concurrence of claims

The same facts may render a person liable *ex contractu* as well as *ex delicto*. In this regard, it has been stated that where there is a breach of contract which also wrongfully and culpably causes patrimonial damage, the injured party has a choice of claiming *ex contractu* or *ex lege Aquilia* (Neethling, Potgieter and Visser *The law of delict* (1994) (hereafter "Neethling") 7, 253; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 496F–G). However, the traditional position has been to distinguish between contractual and delictual obligations, the former being voluntarily assumed while the latter are imposed by societal norms (Loubser "Concurrence in contract and delict" 1997 *Stell LR* 113 114). It has now been established in South African law that the same conduct may constitute both a delict and a contractual breach, in which event the claimant is free to choose whether to proceed in delict or on the contract (see Hutchison and Visser "Lillicrap revisited: further thoughts on pure economic loss and concurrence of actions" 1985 *SALJ* 590; *Lillicrap* case *supra* 497F–G). If the claimant bases his claim on delict, he must prove all the elements of the *lex Aquilia* independently of the contract (Hutchison and Visser *op cit* 590; *Lillicrap* case *supra* 499F–G). The issue of concurrence of actions will arise where the consequence of a contractual breach is a claim for damages, and the same facts also give rise to a delict. Whichever course of action is elected, the goal is recovery of damages for harm done (see Van der Walt and Midgley *Delict principles and cases Vol 1: Principles* (1997) (hereafter "Van der Walt") 44).

Parties to a contract will ordinarily agree on the consequences of contractual breaches. Other contractual provisions may be implied by law or otherwise; for instance, there are those provisions which are implied as *naturalia* of the contract or through trade usage. Those obligations which arise *ex delicto* arise independently of the contract (*Lillicrap* case *supra* 500G–H). According to the court in *Lillicrap*, negligent performance of a contractual obligation will give rise to a delictual claim where the facts in issue satisfy the requirements of both a contractual and an Aquilian action (499F–G). In the Zimbabwean case of *Correira v Berwind* 1986 4 SA 60 (ZH), where a patient sued a doctor for damages for negligence in a surgical operation, the court held that in a doctor-patient relationship, there are both contractual and delictual liabilities and that the duty of care which a doctor owes a patient is independent of any contract between the two. Thus the mere existence of a contract does not preclude an action in delict (Loubser *op cit* 120). The "independent delict" test as applied in *Lillicrap* has been hailed as "logical and according to law" (Midgley "Concurrent claims: test for establishing independent liability in delict" 1993 *SALJ* 66) despite the criticism the case has received (eg Boberg "Back to *Winterbottom v Wright*? – not quite! 1985 *SALJ* 213; Beck "Delictual liability for breach of contract" 1985 *SALJ* 222; Van Warmelo "Liability in contract and in delict" 1985 *SALJ* 227). However, in *Erasmus v Inch* 1997 4 SA 584 (W) Wunsh J interpreted the effect of *Lillicrap* rather differently. The judge maintained that *Lillicrap* seems to

preclude a delictual action for compensation for pure economic loss where a misstatement is made in the course of or as a result of the performance of a contractual obligation (595B–C). The judge also pointed out that in the light of the decision in *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) "the Supreme Court of Appeal will one day have to reconcile *Standard Chartered Bank of Canada v Nedperm Bank Ltd supra*, where a party which contracted to perform a service was held liable in delict, with *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd supra*, in which a concurrent delictual liability was denied" (595C–D). Wunsh J did not decide (as it was not necessary to do so) whether, where a claimant's case is for damages in delict arising out of a contract, the claim will be non-suited by reason of the *Lillicrap* case (595D).

3 Delictual principles in a bank-customer relationship

3 1 A customer's liability in delict

It has been earlier stated that a customer owes his bank a contractual duty to draw his cheques carefully and that if he breaches this duty, the risk of payment shifts to him so that, should a fraud or a forgery occur, the bank should be able to debit his account with the amount of the cheque. A customer who leaves enough space on the cheque to enable an alteration of the amount should bear the risk of alteration (see *Holzman supra* 364C–H; *Burns v Forman supra* 229A–B). The issue which then remains is whether in a bank-customer relationship, a delictual obligation exists independently of the contract to justify a claim by a bank in delict based on the negligence or fault of the customer. Pretorius 1997 *SA Merc LJ* 365 seems to think there is. In analysing *Barclays Bank DCO v Straw* 1965 2 SA 93 (O) he suggests that, although the bank may not have been entitled to debit the account of the customer, it should have lodged an independent delictual claim against the customer for damages based on the ordinary principles of the *lex Aquilia* (371). Hunter J in *Tai Hing supra* stated that "a customer owes to his banker both in contract and in tort a duty to take reasonable care to ensure the proper working of his account . . ." (580). However, a different approach was taken in the recent case of *Liebenberg supra*. Although it dealt with the situation where a customer sued his bank, it gives some indication of how the courts may treat a case where the bank sues its customer in delict. In the *Liebenberg* case the customer of the defendant bank claimed damages resulting from alleged wrongful and negligent actions of the bank. The particulars of claim were framed in delict, and the bank excepted to the claim on the ground that it disclosed no cause of action. In finding for the defendant, the court stated that the plaintiff's action for damages in delict was misconceived and disclosed no cause of action, since the claim emanated from a banker-customer relationship. Furthermore, the plaintiff failed to allege any facts or circumstances which warranted the extension of the Aquilian liability to his claim; nor were there policy considerations for the extension (311f–h).Traverso J stated:

> "I have been unable to find, nor have I been referred to any authority, which suggests that payment by a bank contrary to the terms of a mandate from its customer can give rise to any claim other than one for repayment of the amounts debited against his account without proper authority. To put it differently, a customer's claim against a bank for payments made contrary to the terms of a mandate, cannot properly be formulated as a claim for damages" (310d–e).

With due respect, it is possible that an act which is based on a contract may result in both a delict and a contractual breach. Not all aspects of a bank-customer

relationship are regulated solely by the contract. Even though the court found that the "relationship of proximity between the parties existed by reason of the banker-customer relationship only, and this relationship is regulated by contract" (311D–E), there are certain aspects of the relationship which can found both delictual and contractual liability. For instance, where a bank wrongfully dishonours a cheque, a claim in delict should lie (see Cowen 409–414; Malan 371; Neethling 252).The existence of a contract should not be the sole determining factor when deciding whether to allow a claim in delict. In the typical case of professional services (such as banking services) the delict cannot exist independently of the contract. It has therefore been suggested either that a basis must be found for distinguishing those breaches which are also delicts, or that it must be accepted that all culpable breaches of contract may also be delicts (Loubser *op cit* 124). Although the parties would not have had any duty towards each other but for the contract, if the negligent act of one of the parties causes the other loss, he should be allowed the choice of claim, provided that the innocent party is able to satisfy the requirements of the Aquilian action. The decision in the *Liebenberg* case may perhaps be justified if the reasoning is that the plaintiff failed to allege all the elements of the *lex Aquilia.*

It has been argued that the liability of the customer is not based on the existence or non-existence of the "selective" duties, but that the real question is whether the customer's conduct caused the particular loss, so that the concentration on the "selective" duties disguises the real problem (Pretorius 1986 *Annual Survey* 348). It has therefore been suggested that, when examining a particular case, the court may well find that the act or omission on the part of the customer caused the loss (348). However, not all damage-causing activities are actionable. Delictual conduct must be both wrongful and accompanied by fault (in the form of either *dolus* or *culpa*). The concept of wrongfulness entails an inquiry into whether a legally recognised individual interest has been infringed and whether the infringement was unreasonable (see Neethling 29; Van der Walt 55). The determination of what is reasonable also takes account of public policy (for instance what the community regards as *boni mores*) (Neethling 31–32). To curb an unchecked application of the reasonableness test, it has been argued that conduct should be regarded as unreasonable, and therefore wrongful, "if (a) it interferes with a person's subjective right in a legally unacceptable way; or (b) if it constitutes the breach of a duty owed by the defendant to the plaintiff which is recognised in law for the purposes of liability" (Van der Walt 55). Reference will be made to the general convictions of the community or *boni mores* when determining whether a person has acted in breach of a legal duty (Neethling 50).

An act or omission will be wrongful and therefore actionable if it is accompanied by fault (*culpa* in the wide sense) in the form of either intention (*dolus*) or negligence (*culpa* in the narrow sense) (see Neethling 113). An act or omission on the part of the customer should be regarded as negligent and thus as giving rise to an action in delict, it has been argued, if a "reasonable man" in the position of the customer

> "(a) would reasonably have foreseen the possibility of his conduct causing loss to the bank; (b) would have taken reasonable steps to guard against such loss; and (c) failed to take those steps. The customer's conduct must also be the cause of the loss" (Pretorius 1986 *Annual Survey* 347).

There must be a *causal nexus* between the conduct and the damage (Neethling 159; Van der Walt 163). The negligence giving rise to the loss must have been "in the transaction itself", that is, in the manner in which the mandate is given

(Pretorius 1997 *SA Merc LJ* 368). Although the conduct of the customer may have misled the bank into making a payment, the customer should be liable only if it can be determined that his action was the *causa sine qua non* of the loss the bank suffered. For instance, in *Universal Stores Ltd v OK Bazaars (1929) Ltd* 1973 4 SA 747 (A) it was held that where the carelessness added nothing to the form of the cheque, and the carelessness would be equivocal and in conflict with the expressed representation on the crossed cheque that it was "not negotiable", the expressed unequivocal representation must prevail (per Rumpff JA 761C–E). Thus, the customer would not be liable.

3 2 Compensation

A mandatary has a right to be reimbursed for losses incurred in the execution of his mandate (*Burns v Forman supra* 229B–C). Where the loss is the direct result of the fault of the mandator, he will be liable provided that the damage occurred through default on his part (*Webber and Pretorius v Gavronsky Brothers* 1920 AD 48). The mandatary must prove a causal connection between his loss (whether through fault or negligence) and the mandate. For instance, where a bank disburses a greater sum than that actually authorised through no negligence on its part but through the customer's negligence, the bank should be able to debit the customer's account with the amount disbursed (*Burns v Forman supra* 229B–C).

The loss which a bank ordinarily suffers as a result of a breach of care on the part of the customer is pure economic loss. It is trite law that a claimant may recover pure economic loss in an Aquilian action. The issue now, as suggested, is not *whether* to allow concurrence in pure economic loss cases but rather *when* it should be allowed (Midgley "The nature of the inquiry into concurrence of actions" 1990 *SALJ* 621 629).

The admission of pure economic loss in delict has somewhat blurred the traditional distinction between breaches of contract that are also delicts and those that are not, since the distinguishing factor was the delictual requirement of physical damage or bodily injury (Loubser *op cit* 124). Where the court is dealing with a delictual claim for damages for pure economic loss, the policy considerations of fear of multiplicity of actions and indeterminate liability should not arise in the bank-customer relationship, since the extent of the loss is finite and the potential claimant is determinable (Malan 432). However, in the light of the *Lillicrap* decision, it may well be that the courts will not readily accept an independent delictual action for pure economic loss where the relationship between the parties is contractual (Neethling 253 fn 65).

3 3 Apportionment of damages

Where a person who is claiming damages is partially responsible for his own loss, the court may apportion damages recoverable in terms of the Apportionment of Damages Act 34 of 1956. However, in *Straw supra* the court held that the loss which had been suffered by the customer could not be apportioned because (a) the customer was not claiming damages but was seeking a declaratory order and (b) historically, the Apportionment of Damages Act had not been intended to apply to claims based on breach of contract (99C–F). Watermeyer J in *OK Bazaars (1929) Ltd v Stern & Ekermans* 1976 2 SA 521 (C) 529 also listed his reasons for holding that the Apportionment of Damages Act does not apply to breaches of contract (527D–531).

In most cases where the customer is the complainant, he will be more likely to ask the court for a declaratory order, or for an order of recrediting. Where the customer seeks a declaratory order, in line with the decision in *Straw*, the court will probably not allow an apportionment of damages. The same position may obtain in a claim of recrediting (see *OK Bazaars (1929) Ltd v Stern & Ekermans supra*). But should a customer sue his bank in delict for breach of contract, the bank should be able to raise the contributory negligence of the customer and ask for an apportionment of damages. Where the plaintiff is the bank, it may opt for a claim in delict. Although the courts have held that the Apportionment of Damages Act does not apply to contractual claims for damages (for instance in *Straw supra*; *OK Bazaars v Stern & Ekermans supra*) there seems to be no reason why the Act should not apply to a contractual relationship, where the claimant has based his claim in delict (for support of this position, see Pretorius 1997 *SA Merc LJ* 371).

4 Conclusion

The relationship between a bank and a customer requires the customer, as the mandator, to act with due care and diligence in giving his mandate. While the courts have emphasised that the duty of care which a customer owes his bank is limited, the "selective" duties which have been enumerated should not be regarded as an exhaustive list. To determine whether a customer has not acted in breach of the duty of care he owes his bank, each set of facts should be looked into individually.

The liability of a customer who acts in breach of his duty of care towards his bank should not be decided only from the contract. Where the bank frames its cause of action in delict and a delict is proved, the bank should be awarded delictual damages. The right to a choice of action should be viewed from the generally accepted legal position that a claim for damages based on the same facts may give rise to either an action in delict or an action in contract, and in these circumstances the claimant should be allowed a choice of action.

The choice of action, in the context of a bank-customer relationship, brings into play the issues of apportionment of damages and recoverability of pure economic loss. A bank may not be allowed apportionment of damages if the claim is based on the contract, but if the claim is for recovery of delictual damages and all the elements of *lex Aquilia* are present, the court should allow an apportionment of damages where both the bank and the customer have been negligent. A claim by the bank will ordinarily be for recovery of pure economic loss and following the decision in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) the bank should not face any hurdles if its claim for damages is framed in delict.

The position taken in *Lillicrap* seems to point in a different direction. Because the court was not dealing with a contract based on a bank-customer relationship in *Lillicrap*, there is still hope that when the court has to decide a matter in which the bank sues its customer, it may apply the above principles and find in favour of a bank which opts to sue its customer in delict.

NTSIETSO MOFOKENG
University of South Africa

STATUTORY ILLEGALITY OF RESIDENTIAL LEASES

1 Introduction

Rectifying the inequality between contracting parties has caused a gradual erosion of freedom of contract. The reason for legislative and judicial intervention is to redress an imbalance of the power which has been engendered by freedom of contract. In this regard legal paternalism has been identified as playing an important role in the protection of the weaker party in the law of contract .

In general, any legal rule that prohibits an action on the ground that it would be contrary to the one party's welfare, such as restraints on contractual freedom, is paternalistic. Paternalism arises when legislatures select categories of persons deserving protection against freedom of contract and introduce legislation constraining unbridled freedom of contract in order to protect the weaker party. Consequently, paternalism and freedom of contract are incompatible. However, classical law justifies this form of control because it adheres to the notion that ultimately a society preserves its identity and stability through the observance of fundamental moral norms, and thus it follows that the judiciary should not defer to the principle of freedom of contract if this undermines the moral foundation of the social order itself.

The devolution of power from the national to the provincial legislature has provided an opportunity for the entrenchment of legal paternalism in the form of various laws which aim at protecting certain categories of persons. Thus the Gauteng Provincial Legislature has made use of the power granted by the Constitution Act 108 of 1996 in sections 104(1)(b)(i) read together with Schedule 4 part A, to adopt the Residential Landlord and Tenant Act 3 of 1997.

2 Sphere of application

The objectives of the Act are: to provide for the regulation of landlord-tenant relations in an attempt to promote stability; to lay down general principles governing conflict resolution; to provide for the investigation, mediation and determination of disputes between landlords and tenants; and to protect landlords and tenants against unfair and unlawful practices. The Act, together with regulations known as Regulations of Unfair Practices under the Residential Landlord and Tenant Act, published in Provincial Gazette No 4003 of December 1997, provide the framework within which this is to be achieved.

3 Legality of lease concluded in terms of legislation

3 1 Introduction

The Residential Landlord and Tenant Act, together with the proposed regulations, provides for a standard contract of lease, any departure from which constitutes an offence, and conviction of which is punishable by a fine or imprisonment. Section 11(1) of the Act provides that no landlord may let a residential

dwelling to a tenant unless the terms of the contract have been reduced to writing, substantially in the form of a prescribed contract. Section 37(1) of the proposed regulations provides that anyone failing to comply with or who contravenes the provisions of the Act or regulations is guilty of an offence punishable with a fine or imprisonment (s 37(2)).

The question is what effect the sanction has on the lease contract concluded in contravention of the Act or regulations.

3 2 General principle of the law of contract

It is a general principle of the law of contract that contracts which contravene some rule of law are unenforceable. Furthermore, it is not necessary for the statute expressly to prohibit the contract. In *Schierhout v Minister of Justice* 1926 AD 99 109 it was held that it is a fundamental principle of South African contract law that anything done contrary to a direct prohibition of the law is void and of no effect, whether the legislator has expressly decreed this or not. This implies that where a statute imposes a criminal sanction, all contracts concluded in consequence of the forbidden conduct are in principle to be regarded as null and void (Steyn *Die uitleg van wette* (1981) 197 *et seq*; Christie *The law of contract in South Africa* (1996) 377 380–381; *Standard Bank v Estate Van Rhyn* 1925 AD 266 274; Kerr *The principles of the law of contract* (1989) 156–157).

It is these implied statutory prohibitions in particular which may have widespread and inequitable results. For example, should the rent in terms of a contract of lease be in excess of that prescribed by statute or a rent board, the lease will be illegal and consequently void because of its content (Cooper *Landlord and tenant* (1994) 10–11). The consequences of such a nullity are that the lessee is denied all protection afforded him by the Rent Control Act 80 of 1976. Thus the effect which this would have would be the direct opposite of the effect the Rent Control Act intended.

3 3 Illegality qualified

To eliminate these and other unjust results, the courts have introduced certain qualifications. In *Standard Bank v Estate Van Rhyn* 1925 AD 266 274–275 the respondent contended that when the legislator penalises an act, it impliedly prohibits it, and that the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. Solomon JA accepted this as a general proposition, but denied that it is a hard and fast rule which is universally applicable. He took the view that what must be accessed is the intention of the legislature; should the conclusion be reached that the legislature did not intend to render the act invalid it would not be justified to make a finding of invalidity.

It has proved impossible to provide a general set of rules by which to determine the legislator's intention. What has evolved, therefore, are only certain indications (Steyn 196 *et seq*). A distinction has been made between the case where the imposition of a penalty is for the purpose of protecting the revenue and that where it is for the protection of the public. In the first instance the contract is not affected, while in the latter the transaction is invalidated (*McLoughlin v Turner* 1921 AD 537 544; Christie 380).

However, Christie (380) qualifies this position. He is of the opinion that this principle cannot be applied if the object of the legislation is not simply fiscal but is, even if only partly, the protection of the public (see *Delport v Viljoen* 1953 2 SA 511 (T) 516G).

4 Positive Law

The law governing who is being protected was settled in *Dhlamini v Protea Assurance Co Ltd* 1974 4 SA 906 (A) 915B–C, where it was held that if the imposition of a penalty is for the purpose of protecting the public, any contract concluded contrary to this prohibition is void. In this instance it was decided that the prohibition on selling fruit without a licence was actuated by considerations of public health, as a result of which all sales without a licence were void. The *Dhlamini* case was followed in *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) where Joubert JA held that the legislation requiring a licence for panel-beating within a municipal area was not pure fiscal legislation but was once again based on considerations of health and safety. Thus where the business of panelbeating is done without a licence the consequences of such a business are not legally valid and any income derived from it is illegal income (850B–C).

However, in *Metro Western Cape (Pty) Ltd v Ross* 1986 3 SA 181 (A) the point was raised for the first time that the general rule in terms of which a contract impliedly prohibited by statute is void and unenforceable, is not inflexible (188F–G). Ultimately it depends on the intention of the legislature. Reference was made to the dictum of Voet 1 3 16:

> "But that which is done contrary to law is not *ipso jure* null and void, where the law is content with a penalty laid down against those who contravene it ... The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the recission of what was done, than would follow the act itself done contrary to law."

In this particular case the court proceeded to consider the purpose and context of the ordinance pertinent to the facts of this case. This involved the question whether the fact that a dealer who had traded without a licence and without a certificate of registration, had concluded valid and enforceable contracts with third parties. Section 3 of the First Schedule to the Registration and Licensing of Businesses Ordinance section 15 of 1953 (C) prohibits such trading without possession of a certificate or a licence. Furthermore, in terms of section 21 of the ordinance, any person who fails to comply with any provision of the ordinance is guilty of a criminal offence and liable on conviction to a fine or imprisonment or to both. Technically this is a classic case of illegality and unenforceability. However, the court noted (191E–F) that to construe this legislation as affecting contractual rights and as rendering the specific contracts concluded by the trader with his customers void and unenforceable, would cause grave inconvenience and injustice to innocent members of the public. The inevitable result would be that innocent customers would be without their contractual remedies and would have no claim for damages against the guilty trader in respect of defective goods sold and delivered, or goods not conforming to a guarantee given in respect of them. In this case the question was raised whether the legislation, in addition to the penalties provided for, intended to render the trader's contracts void and unenforceable with the purpose of deterring him from trading in contravention of the provisions of the ordinance (191G). The disadvantages attached to the use of contract law to supplement the deficiencies of criminal law outweigh any usefulness it could have.

In *Pottie v Kotze* 1954 3 SA 718 (A) 726–727 Fagan JA pointed out that the usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the legislature to impose a deterrent penalty for which it has not expressly provided, but that recognition of the act by the court will bring

about, or give legal sanction to, the very situation which the legislature wishes to prevent. Fagan JA, however, qualified this statement by noting that a compulsory penalty of invalidity would have capricious effects, the severity of which might be out of all proportion to that of the prescribed penalties, and that it would bring about inequitable results between the parties concerned (727E–G). It was this last argument which caused Boshoff JA in the *Metro Western* case (192I) to hold that the purpose of the ordinance is sufficiently served by the penalties prescribed for illegal trading. The avoidance of the contracts concluded by the trader with customers would cause grave inconvenience and injustice to innocent members of the public without furthering the object of the ordinance.

4 1 Interpretation

The present position is therefore one in which the general principle of the law of contract in terms of which contracts concluded contrary to statute are regarded as unlawful and unenforceable, constitutes a new form of paternalism which is reflected in South African law in this instance. Growing concern about the protection of the intended beneficiaries of regulatory legislation has on occasion led to the acceptance of the notion that a contract concluded contrary to a direct prohibition of the law is not void, where such avoidance of a contract would cause grave injustice to innocent members of the public. The argument profferred in defence of this interpretation is that the purpose of the legislation is usually sufficiently served by the prescribed penalty.

Although the paternalistic rather than the classical approach is to be preferred, the criterion on which the alleviation of the concomitant injustice attached to the general principle is based, is to be viewed with concern. The courts have made the protection of the interests of innocent customers of the illegal traders of great importance in their interpretation of the relevant legislation. One could argue that these interests are protected by other non-contractual remedies. It is, however, unfortunate that the courts have decided to free themselves of the tyranny of rules and principles and break the bondage of maxims of interpretation without replacing these with new maxims, rules and principles to provide guidance for the future.

4 2 Effect of illegality

The effect of an illegal lease is that the contract is void and unenforceable. Illegality invokes the maxim *ex turpi causa non oritur actio* in terms of which neither party can institute an action based on the contract.

5 Conclusion

The question to be addressed now is: What effect will the imposition of a sanction have on a lease contract concluded in contravention of the Act or regulations? The purport of the legislation is without doubt to protect the public. In the application of the general rule and the recognised qualifications which the courts have introduced, this legislation provides a textbook example of illegality in the public interest. The fact that this result provides even less protection to contracting parties than the common law of lease does, raises doubts about the desirability of this very prescriptive legislation. The only way in which an equitable solution to the confusing situation can be obtained is for the courts to follow Voet 1 3 16 and to decide upon a paternalistic interpretation as was done in the *Metro Western* case. However, until the issue is tested, there is no assurance that this new legislation will not erode all security of tenure without furthering the object of the ordinance.

LUANDA HAWTHORNE
University of South Africa

DELIKTUELE AANSPREEKLIKHEID VAN 'N AFRIGTER VIR 'N BESERING DEUR 'N GIMNAS OPGEDOEN

1 Inleiding

In 'n saak wat op 6 Oktober 1995 (1998 *NJ* 190) voor die Hoge Raad in Nederland gedien het, het die volgende feitestel na vore getree: Op 28 Januarie 1985 het Astrid Veenhoven, toe 14 jaar oud, ten tyde van 'n gimnastiekoefening by die Christelijke Gymnastiekvereniging Oranje-Nassau Emmen gedurende dislokasie ("disloque") uit die ringe geval en 'n neurologiese letsel opgedoen as gevolg waarvan sy 'n blywende invalide geword het. Die gimnastiekafrigting ("turntraining") het onder leiding van Anja Hildebrands gestaan. Sy het in April 1984 as gimnastiekleidster by genoemde gimnastiekvereniging aangesluit. Op daardie tydstip het sy nie veel van die ringoefeninge geweet nie. Ten tyde van die onderrig met die ringe is die leerlinge in drie groepies ingedeel. Anja Hildebrands het toesig oor 'n ander groepie gehou. Astrid was in die groepie wat onder die toesig van Ruud Willems was. Hy is 'n geoefende gimnas maar het self nog nooit die dislokasie uitgevoer nie. Astrid was 'n ervare gimnas wat die dislokasie goed beheer het en haar val kon, as sodanig, nie verhoed gewees het nie. Onder die ringe word gebruiklik matte opgestel, naamlik drie kort matte van 1½ meter lank en een meter breed waarvan die kort kante met klitteband aanmekaar vasgeheg is. Niemand het Astrid se val en teregkom op die grond waargeneem nie. Sy is na die val op die grond aangetref met haar hoof op die vloer, maar buite die matte. Veenhoven, Astrid se vader, eis vervolgens van Hildebrands en die gimnastiekvereniging kompensasie vir die benadeling en skade wat sy deur die val gely het en nog ly. Die regbank te Assen wys op 3 Maart 1992 die eis van die hand op grond daarvan dat die val nie voorkom kon gewees het nie en dat die verweerders nie onregmatig gehandel het nie. Veenhoven teken vervolgens appèl na die Gerechtshof te Leeuwarden aan. Sy appèl word op 29 Junie 1994 gehandhaaf op grond daarvan dat die verweerders nie die nodige veiligheidsmaatreëls getref het om die gevolge van die val te voorkom of te beperk nie. In dié verband wys die hof op die volgende: (i) Hildebrands het geen opleiding in die ringoefeninge gehad nie en was gevolglik nie deskundig genoeg om die gimnaste self af te rig of aan ander afrigters leiding te gee nie. (ii) Willems het self nooit die dislokasie uitgevoer nie en was nie bewus van die spesifieke gevare verbonde aan die betrokke oefening nie en hy het ook nie behoorlik opgelet nie. (iii) Daar moes twee vangers by dié betrokke oefening teenwoordig gewees het. (iv) Vir dié oefening het die vereiste hoë mate van konsentrasie ontbreek aangesien daar op drie verskillende plekke groepies met oefeninge besig was. (v) Aangesien dit waarskynlik is dat Astrid op haar kop langs die matte geval het, is die afleiding geregverdig dat daar onvoldoende matte op die grond was. Die hof het uit hierdie vyf punte afgelei dat Hildebrands nie behoorlik sorg gedra het nie, dat die val haar en die gimnastiekvereniging (haar werknemer) toegereken kon word en dat daar 'n kousale verband bestaan het tussen die gebrek aan die tref van voldoende voorsorgmaatreëls en die ernstige letsel wat Astrid opgedoen het (par 3 van die verslag).

Hildebrands en die gimnastiekvereniging beroep hulle vervolgens op die Hoge Raad, die hoogste hof in Nederland. Die vraag na die aanspreeklikheid van 'n afrigter vir 'n besering wat 'n gimnas wat onder sy toesig is, opdoen, word in die onderhawige bespreking onder die loep geneem.

2 Aanspreeklikheid van 'n afrigter teenoor 'n gimnas

Die Hoge Raad beslis dat Hildebrands 'n werknemer van die gimnastiekvereniging was en dat laasgenoemde in die lig van artikel 1403(3) van die Nederlandse Burgerlike Wetboek dieselfde aanspreeklikheid as eersgenoemde opdoen (par 3 3). Die argument dat dit hier om 'n sportbesering gaan en dat ander norme behoort te geld, word deur die Hoge Raad afgewys. In alle regstelsels word aanvaar dat by bepaling van aanspreeklikheid vir beserings opgedoen gedurende 'n sportwedstryd, die aard van die spel en die ingeboude risiko's van die onderskeie sportsoorte meebring dat sekere aanpassings gemaak moet word (sien Eser "Zur strafrechtlichen Verantwortlichkeit des Sportlers, inbesondere des Fussballspielers" 1978 *Juristenzeitung* 368 en Labuschagne "Straf- en delikregtelike aanspreeklikheid vir sportbeserings" 1998 *Stell LR* 72 vir meer besonderhede). Ook die Nederlandse howe onderskryf hierdie uitgangspunt (sien Hoge Raad 28 Junie 1991 (1992 *NJ* 622); Hoge Raad 19 Oktober 1990 (1992 *NJ* 621); Hoge Raad 11 November 1994 (1996 *NJ* 376). Teen dié agtergrond verduidelik die Hoge Raad in die saak waarmee die onderhawige bespreking ingelei is, soos volg:

> "Ook de omstandigheid dat het gaat om wat het middel aanduidt als sportletsel, leidt niet tot toepassing van een andere maatstaf. Het gaat hier niet om de situatie waarin een deelnemer aan sport of spel letsel oploopt als gevolg van een gedraging van een andere deelnemer . . . maar om een geval van letsel dat is ontstaan bij een oefening onder leiding van een door de vereniging aangestelde trainer, waarbij de te beantwoorden vraag is of de trainer bij het leiding geven en de vereniging bij de aanstelling, gelet op alle omstandigheden van het geval, zijn tekortgeschoten in de zorg die van hen jegens de deelnemers aan de training kan worden gevergd" (par 3 3 van die hofverslag)."

In sy aanbeveling wys advokaat-generaal Hartkamp (in par 7) daarop dat dié saak vergelykbaar is met 'n beslissing van die Hoge Raad van 14 Junie 1985 (1985 *NJ* 736). Die feite van laasgenoemde saak is soos volg: Die 17-jarige Jan Brevoord, 'n leerling aan die Fivel College te Delfzijl, het tydens 'n gimnastiekles, onder leiding van die LO-onderwyser meneer Smit, 'n besering opgedoen wat hom 'n kwadrupleeg gelaat het. Tydens die les is oefeninge gedoen met behulp van twee minitrampoliens, wat eweredig aan mekaar en ongeveer 4 meter van mekaar was, met daarby behorende valmatte. Die leerlinge het in twee rye, onafhanklik van mekaar, sekere voorgeskrewe spronge uitgevoer. Daarna is hulle toegelaat om spronge na keuse uit te voer. Smit het hom toe bevind by die landingsterrein van die ander trampolien as dié waar Jan Brevoord hom bevind het. Laasgenoemde het getrag om die sogenaamde doodsprong uit te voer. Dit is 'n sprong wat gewoonlik in 'n swembad uitgevoer word, waardeur die liggaam na afset in 'n horisontale posisie, met die bene en arms gespreid, gebring word en die gimnas voor die neerkom die bene en arms weer intrek en hom so klein moontlik maak om die val te breek. Hierdie sprong het misluk, in die sin dat Jan die mat getref het terwyl hy nog steeds in 'n gestrekte posisie, met 'n ietwat vooroorbuiging, was. Onmiddellik na die sprong kon Jan nie meer beweeg nie. Kort daarna is hy, terwyl hy nog steeds op die mat gelê het, op sy eie versoek deur medeleerlinge op sy rug gekeer en nog later is hy, terwyl hy nog op die mat gelê het, deur hulle gedra en neergelê op die leggers van 'n brug. Op aandrang van Smit het van die leerlinge vir hom 'n sweetpak aangetrek. Daarna is 'n dokter (huisarts) ontbied en is hy met 'n ambulans na 'n hospitaal vervoer. Hoewel dit nie duidelik uit die hofverslag blyk nie, wil dit voorkom of die hof Smit se aanspreeklikheid baseer het op grond van sy optrede nadat Jan die betrokke sprong uitgevoer het. By bevinding dat hy onsorgvuldig (nalatig) opgetree het, word uitdruklik vermeld dat by besering nie aan 'n gimnastiekonderwyser dieselfde eise as aan 'n dokter

gestel kan word nie (par 3 2). Hy moes egter op rug- en nekbeserings bedag gewees het (sien die konklusie van advokaat-generaal Franx par 4 en vgl Hoge Raad 1995-01-13 (1997 *NJ* 175)). Dit is ook die houding van howe in ander jurisdiksies (sien Nygaard en Boone *Coaches' guide to sport law* (1985) 72–74; McCaskey and Biedzynski "A guide to the legal liability of coaches for a sports participant's injuries" 1996 *Seton Hall Journal of Sport Law* 7 31–32).

In die saak waarmee die onderhawige bespreking ingelei is, bevestig die Hoge Raad die beslissing van die Gerechtshof te Leeuwarden (par 4). Ten aansien van die (middellike) aanspreeklikheid van die gimnastiekvereniging verduidelik die Hoge Raad aanvullend tot die Gerechtshof te Leeuwarden soos volg:

> "Het Hof heeft bij zijn oordeel dat de vereniging op grond van art. 1401 (oud) aansprakelijk is, klaarblijkelijk causaal verband tussen het aanstellen van Hildebrands als trainster en het door Astrid opgelopen letsel aanwezig geacht. Dit oordeel geeft niet blijk van een onjuiste rechtsopvatting en kan voor het overige, verweven als het is met waarderingen van feitelijke aard, in cassatie niet op zijn juistheid worden onderzocht. In aanmerking genomen dat het bestuur van de vereniging Hildebrands, die van het onderdeel ringen weinig afwist, heeft aangesteld zonder haar op te dragen dit tekort op korte termijn op te heffen, is dit oordeel ook niet onbegrijpelijk" (par 3 6. Sien ook ten aansien van die Suid-Afrikaanse reg Neethling, Potgieter en Visser *Deliktereg* (1996) 362–368).

In 'n kommentaar op dié saak wys Brunner, met beroep op 'n beslissing van die Hoge Raad van 5 Januarie 1965 (1966 *NJ* 136), daarop dat die maatstaf vir onregmatigheid by gevaarskepping vir andere inderdaad reeds in die rigting van aanspreeklikheid dui. Hy omskryf onregmatigheid as "een functie van de kans op een ongeval en de ernst van de dan te verwachten schade, gedeeld door de bezwaarlijkheid van de vereiste veiligheidsvoorzieningen . . ." ("Noot" 1998 *NJ* 952 953). Die dislokasie hou, volgens hom, 'n reële risiko van ernstige letsel in. Daarom behoort veiligheidsmaatreëls by so 'n oefening ingestel te word. In sy kommentaar spreek Brunner die problematiek rondom die vraag na die bydraende skuld van die slagoffer ook aan (sien ook par 3 8 van die hofverslag). Hy wys daarop dat by ongevalle wat plaasvind omdat onvoldoende maatreëls getref is, daar dikwels ook sprake sal wees van 'n fout of onoplettendheid van die slagoffer. Die vraag kan dan ontstaan of die besering in sy geheel aan die gebrek aan behoorlike voorsorgmaatreëls toegeskryf behoort te word en of dit gedeeltelik aan die nalatigheid (fout) van die slagoffer (sportman of -vrou) toegeskryf behoort te word. In dié verband verwys Brunner na 'n beslissing van die Hoge Raad van 21 Oktober 1988 (1989 *NJ* 729). In dié saak het die eiser, ene Spekman, 'n sirkusvertoning bygewoon. Aan die einde van die vertoning is vrywilligers gevra om aan die laaste toertjie deel te neem. Spekman het hom daarvoor aangemeld. Van hom is verwag om op 'n ongesaalde esel sonder tuig te gaan sit. Hy is meegedeel dat hy nie aan die ore van die dier mag vashou nie en ook dat hy die dier nie mag skop om hom tot sy wil te bring nie. Spekman het daarin geslaag om die esel te bestyg, maar tydens die rit is hy onverwags afgegooi. Hy het met die val 'n ernstige heupbreuk opgedoen. Spekman spreek vervolgens die sirkus CL Mullens vir kompensasie aan. Die Hoge Raad verwerp die argument dat Spekman willens en wetens die risiko's verbonde aan die rit aanvaar het en gevolglik nie op kompensasie geregtig is nie en verduidelik:

> "Hct gaat hier immers, naar de onweersproken stellingen van Spekman, om schade veroorzaakt door een dier waarvan Mullens – als circusexploitant – zich bediende om het 'ter opluistering van de voorstelling' ongezadeld door onervaren lieden als Spekman te doen berijden, terwijl Mullens wist dat 'uitermate grote risico's in zich hield'. . . Dan is de circusexploitant, zowel als eigenaar van het dier of degene die

> zich daarvan bedient, als omdat het in strijd met de maatschappelijk betamende zorgvuldigheid is een ander aan een dergelijk gevaar bloot te stellen, voor die schade aansprakelijk, en kan hij zich niet aan die aansprakelijkheid onttrekken door zich erop te beroepen dat de bezoeker van zijn voorstelling de aan het berijden van dat dier verbonden risico's heeft aanvaard, nu immers de circus-exploitant, die de risico's minstens evengoed kende, zulks heeft uitgelokt. Ten hoogste is dan plaats voor een vermindering van de vergoedingsplicht indien de rechter op grond van de omstandigheden van het geval mocht oordelen dat de schade mede aan de bezoeker is toe te rekenen" (par 3 3. Sien ook die kommentaar van Brunner op dié saak in 1989 *NJ* 2760–2761).

In die saak waarmee die onderhawige bespreking ingelei is, kon nie bevind word dat Astrid enige vorm van bydraende skuld tot haar besering gehad het nie (par 3 8 van die Hoge Raad se beslissing en Brunner 1989 *NJ* 953).

Wat die Suid-Afrikaanse reg betref, is die posisie die volgende: Indien 'n afrigter 'n gimnas opsetlik beseer, is hy daarvoor strafregtelik en deliktueel aanspreeklik. 'n Afrigter wat dit as 'n reël-konkrete moontlikheid voorsien dat 'n gimnas beseer of gedood kan word en onverskillig daaroor staan, maak hom aan *dolus eventualis* skuldig (vgl *S v Beukes* 1988 1 SA 511 (A) 522; Loubser en Rabie "Defining *dolus eventualis*: a voluntative element?" 1988 *SAS* 415; Morkel *Towards a rational policy of criminal fault* (LLM-verhandeling UP, (1981) 27–74). Uit die gimnastiekomgewing blyk duidelik dat, soos elders aangetoon, die afrigter die dood of besering nie slegs as 'n reële nie maar ook as 'n konkrete moontlikheid moes voorsien het (Labuschagne "*Dolus eventualis*: die filosofiese onderbou" 1988 *SAS* 436 438–439). Elke gimnastiekafrigter is sekerlik bewus daarvan dat daar by veral gekompliseerde oefeninge 'n reële moontlikheid, in 'n algemene sin, bestaan dat 'n deelnemer beseer sou kon word. Dit alleen sou myns insiens egter nie *dolus eventualis* daarstel nie. Indien die afrigter in die konkrete omstandighede daarvan bewus was dat die gimnas 'n besondere liggaamlike en/of geestelike swakheid in dié betrokke oefeninge het, of 'n ander konkrete gevaarskeppende omstandigheid teenwoordig is en hy dit gelate aanvaar en die gimnas word as gevolg daarvan beseer of sterf, sou *dolus eventualis* hom toegereken kon word. Die finale toets vir *dolus eventualis* sentreer gevolglik om die konkrete gevaarskeppende situasie.

Wat aanspreeklikheid weens nalatigheid betref, is slegs een gemeneregtelike misdaad, naamlik strafbare manslag, ter sprake (vgl hieroor Labuschagne "Dekriminalisasie van nalatigheid" 1985 *SASK* 213; "Nalatigheid en voorsienbaarheid by strafbare manslag" 1994 *SAS* 221). Die deliktereg is egter nie daartoe beperk nie. In die Suid-Afrikaanse reg, in navolging van die Engelse reg, word by bepaling van nalatigheid met die redelike man-konsep gewerk. Die aard van dié toets word deur appèlregter Joubert in *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 410–411 soos volg verduidelik:

> "Dit dien myns insiens geen doel om die aanwesigheid van allerlei antropomorfiese eienskappe aan die *diligens paterfamilias* te probeer toedig nie omdat dit nie oor 'n fisiese persoon nie, maar slegs oor die benaming van 'n abstrakte objektiewe maatstaf, handel. Dit gaan ook nie oor die vraag wat die sorg van 'n legio tipes van redelike persone, soos 'n redelike geleerde, 'n redelike ongeletterde, 'n redelike geskoolde arbeider, 'n redelike ongeskoolde arbeider, 'n redelike volwassene of 'n redelike kind sou wees nie. Daar is steeds slegs één abstrakte objektiewe maatstaf en dit is die Hof se oordeel wat redelik is omdat die Hof hom in die posisie van die diligens *paterfamilias* plaas."

Hierdie beskrywing word deur Neethling, Potgieter en Visser as treffend aangemerk (129). Dit blyk egter dat geregtigheid verg dat by die redelike man-toets 'n

groeps- en omstandigheidskwalifikasie toegevoeg moet word. So word in *S v Van As* 1976 2 SA 921 (A) 928 verduidelik:

> "In die deliktereg gaan dit in die algemeen wat *culpa* betref oor 'n versuim om te voorsien en om versigtig te wees. In ons reg gebruik ons sedert die gryse verlede die *diligens paterfamilias* as iemand wat in bepaalde omstandighede op 'n sekere manier sou optree. Wat hy sou doen word as redelik beskou ... Hierdie *diligens paterfamilias* is natuurlik 'n fiksie en is ook maar al te dikwels nie 'n pater nie. Hy word 'objektief' beskou by die toepassing van die reg, maar skyn wesenlik sowel 'objektief' as 'subjektief' beoordeel te word omdat hy 'n bepaalde groep of soort persone verteenwoordig wat in dieselfde omstandighede verkeer as hy, met dieselfde kennisvermoë. Indien 'n persoon dus nie voorsien nie wat die ander persone in die groep wel kon en moes voorsien het, dan is daardie element van *culpa*, nl versuim om te voorsien, aanwesig. Dat voorsienbaarheid en versigtigheid aan mekaar geskakel is en dat gebrek aan versigtigheid gewoonlik spruit uit versuim om te voorsien, kan, dink ek, beswaarlik ontken word."

Hierdie siening toon 'n duidelike ooreenkoms met die meer verfynde strafregstelsels op die Europese kontinent (sien Roxin *Strafrecht AT* 1 (1997) 919–962; Hazewinkel-Suringa en Remmelink *Inleiding tot de studie van het Nederlandse strafrecht* (1996) 228–241). In seker die beste bydrae in dié verband in ons reg onderskei Scott sekere kategorieë van persone aan wie strenger of meer gerafineerde eise deur die reg gestel word. Hy verwys dan, onder andere, na prokureurs, medici en bestuurders van motorvoertuie ("Die reël *imperitia culpae adnumeratur* as grondslag vir die nalatigheidstoets vir deskundiges in die deliktereg" in Joubert (red) *Petere Fontes. LC Steyn-Gedenkbundel* (1980) 124 146–156. Sien ook Neethling, Potgieter en Visser 133–134). Wat ons hier het, is niks anders as die toepassing van die *culpa levissima* van die Romeinse reg op sekere kategorieë van persone (deskundiges) nie (Scott 162; vgl ook Labuschagne "Nalatige brandstigting: dekriminalisasie deur onbruik of regterlike oningeligtheid?" 1995 *Obiter* 216 217–220). Hierdie hoër standaard wat by bepaling van nalatigheid vir sekere deskundiges en funksionarisse gestel word, behoort ongetwyfeld ook vir afrigters van hoëgraadse beseringsriskante sportsoorte gestel te word, veral waar kinders en ander onervarenes betrokke is. Aan 'n gimnastiekafrigter, wat 'n kind leer om 'n rugwaartse salto uit te voer, word gevolglik hoër eise gestel as aan die ouer broer wat sy suster in die agterplaas met dieselfde oefening behulpsaam is. 'n Afrigter word nie hierdeur 'n versekeraar teen gimnastiekbeserings nie, aangesien beserings kan plaasvind selfs waar geen nalatigheid aan sy kant bestaan nie (Nygaard en Boone *Coaches guide to sport law* (1985) 12; Kelly "Prospective liabilities of sport supervisors" 1989 *Australian LJ* 669 671–672; *Broom v Administrator, Natal* 1966 3 SA 505 (D); Schroeder "Sport und Strafrecht" in Schroeder en Kauffmann (red) *Sport und Recht* (1972) 21 24; Eser 368). Om die funksies en verpligtinge van 'n afrigter sonder die nodige kundigheid en vaardighede op jou te neem, sou, as sodanig, reeds nalatigheid kon daarstel (Scott 155; McCaskey en Biedzynski 23–24; Nygaard en Boone 25; Weistart en Lowell *The law of sports* (1979) 980).

3 Gevolgtrekking

As gevolg van die hoë beseringsrisiko wat veral by gevorderde oefeninge in gimnastiek bestaan, word hoër eise as dié van die redelike man deur die deliktereg (en waar van toepassing ook die strafreg) aan 'n afrigter gestel. Dit blyk ook uit die beslissing van die Hoge Raad waarmee die onderhawige bespreking ingelei is. Duidelike aanknopingspunte vir dié benadering bestaan ook in ons reg.

JMT LABUSCHAGNE
Universiteit van Pretoria

AMENDMENTS TO THE MANAGEMENT RULES OF A SECTIONAL TITLE SCHEME INTRODUCED BY GN 1442 OF 31 OCTOBER 1997

1 Introduction

Besides the sectional plan, the document containing the rules of the scheme is considered the most important document of a sectional-title scheme, since the Act provides that the scheme must be managed by means of rules, as from the date of the establishment of the body corporate (Sectional Titles Act 95 of 1986 s 35(1) and (4)). The rules contained in the Annexures to the regulations constitute model rules for the scheme in the same way that Table A of the Companies Act (Act 61 of 1973, Sch 1) constitutes a model set of articles for a public company. The Annexures contain two types of model rule namely the so-called management rules (Annex 8) and the so-called conduct rules (Annex 9). The management rules deal mainly with administrative matters such as the election, meetings, powers and duties of trustees, the position of the managing agent and the convening of and procedure at general meetings. The conduct rules deal exclusively with the use and enjoyment of the sections and the common property and regulate matters such as the keeping of animals, refuse disposal, the parking of vehicles on the common property, damage or alterations to the common property, littering, washing lines and storage of inflammable substances.

Government Notice 1442 (*GG* 18387 of 1997-10-31) left the conduct rules unchanged but introduced certain amendments to the management rules. The main amendment concerns the determination of disputes between the body corporate and an owner or between owners arising out of the Act or the rules by means of arbitration (new r 71). Since this matter is a specialised topic which has been discussed elsewhere (eg by Butler "The resolution of disputes pertaining to sectional title schemes under management rule 71" *Stell LR* 256–279 and "Arbitration in sectional title disputes" 1998 (July) *De Rebus* 31), this contribution will concentrate on the other amendments introduced by the Government Notice. The amendments deal with matters relating to the trustees, the managing agent and the conduct of general meetings. These amendments should be read in conjunction with the amendments introduced to the Sectional Titles Act 95 of 1986 by the Sectional Titles Amendment Act 44 of 1997 and amendments to the general sectional-title regulations contained in the Government Notice referred to above. These amendments were discussed by the same author in 1998 *THRHR* 171–193.

2 Trustees

The first amendment concerns the qualifications of trustees. In terms of rule 5, a trustee or alternate trustee (appointed in case of absence or inability of a trustee in terms of r 9) need not be the owner of a unit as long as the majority of the trustees are owners or spouses of owners. Under the old rule 5, only the managing agent in that capacity was disqualified from being a trustee. Rule 5(b) has now been amended to disqualify not only the managing agent (in any capacity) but also his employees and any other employees of the body corporate from being elected as trustees. The aim of this amendment is to avoid a conflict of

interest between the trustees and the managing agent and employees of the body corporate. The function of the trustees is to take executive resolutions and either to execute them themselves or to delegate their execution to the managing agent or their other employees, and to supervise the work done by the agents and employees. Apart from a conflict of interest in this regard, a conflict can also arise if a managing agent's remuneration is decided upon by the board of trustees of which he is a member. The possibility of trustees abusing their position to become managing agents of the scheme is also excluded by this amendment. Note that managing agents, their employees and the employees of the body corporate are similarly disqualified from being appointed by owners as proxies to attend general meetings of the body corporate on their behalf.

The second amendment concerns the election of trustees. In terms of rule 6, trustees elected at an annual general meeting hold office until the next succeeding annual general meeting but are eligible for re-election. The new amendment now adds that existing trustees are eligible for re-election only if so nominated. This means that the provisions of rule 7, which deal with nominations, have to be complied with. This rule provides that written nominations containing the written consent of the person nominated must reach the body corporate not later than 48 hours before the meeting. If insufficient nominations have been received, a person can also, with his consent, be nominated at the meeting itself. Under the previous rule some uncertainty existed whether the existing trustees should be considered automatically re-elected if there were no nominations or insufficient nominations. This uncertainty is now removed. Existing trustees are eligible for re-election but must be nominated in the same way as any other person. They also hold office only until the next succeeding annual general meeting and not as under the New South Wales Strata Titles Act 1973 (s 72(1)(c)) until new trustees are chosen.

The third amendment deals with the attendance at meetings of the trustees. This is one of the most important amendments. In terms of rule 15, only trustees and the nominee of the holder of a first mortgage bond who has informed the trustees in writing of his interest are entitled to attend the meetings of trustees. The nominee of the mortgagee is entitled to attend and speak at all the meetings of trustees but is not, in his capacity as such, entitled to vote at the meeting. Rule 15 is now amended to allow any *sectional owner* to attend and speak at any meetings of the trustees but not in his or her capacity as such to vote at the meeting. The aim of this amendment is to render the work of trustees more transparent. It gives any owner the opportunity to attend the meeting, to speak his mind, to supply information to the trustees, to clear up misunderstandings and to obtain further information. Since every owner has a personal interest in the scheme, he should not only be able to air his views at general meetings, but also at meetings of the trustees where the day-to-day running of the scheme is conducted. While being conducive to transparency, the attendance of owners may, however, stifle the efficiency of trustees if the meetings of trustees are used by owners to air their grievances. A restriction by which owners were allowed to speak on topics only as determined by the chairperson, should possibly have been added. As the rule stands, the meeting of trustees would need a strong chairman to censure discussion of points which are not on the agenda or any other irrelevant discussion. It should be noted that although owners are entitled to attend the meetings of trustees, the trustees are not obliged to inform owners of the dates and agendas of their meetings. However, nothing prevents an owner from making enquiries from the secretariat when the next meeting of trustees will be held.

The next amendment concerns the quorum required for a meeting of trustees to be validly held. Rule 16 now provides that if the number of trustees falls below the number necessary to form a quorum (50 per cent of the number of trustees but not fewer than two), the remaining trustee (previous rule: the remaining trustees who may not be fewer than two) may continue to act but only for the purpose of appointing or co-opting additional trustees to make up a quorum or for the purpose of convening a general meeting of owners. The rationale for this amendment is presumably to endeavour to prevent the executive organ of a sectional-title scheme (namely the trustees) from becoming paralysed and to avoid any tactical move by the trustees to block important decisions. However, the co-opting of trustees is not regulated in the rules and it may be possible for a remaining trustee to co-opt his spouse and other persons who support him in order to form a quorum. This would, however, not improve the position, since the one trustee may adopt these persons only for the purpose of forming a quorum and not for the purpose of taking resolutions. In such a case the procedure prescribed in rule 17 should rather be allowed to govern. In terms of this rule a meeting of trustees not attended by a quorum within thirty minutes of the appointed time stands adjourned to the next business day at the same time. At such a meeting the trustees then present, who may not be fewer than two, constitute a quorum. Trustees are elected office holders and a quorum should be present before important resolutions are taken.

The removal of the chairperson is the subject of the next amendment. In terms of the new rule 19 not only the body corporate at a special general meeting but also the trustees at a meeting of trustees may remove the chairperson from office. Notice of the intended removal from office must be given in respect of either meeting. This new power given to trustees to remove an inefficient or unpopular chairperson can be seen as a logical corollary to their power to elect a chairman (r 18). It is also a much speedier procedure than having to convene a special general meeting for this purpose. This prevents chairpersons from abusing their position and is conducive to efficient administration of the scheme. The prior notification keeps the chairperson, trustees and the owners (in case of a general meeting) informed of the matter and allows them to prepare for the meeting. Note that no reasons for the removal of a chairperson need be given. Under the German *Wohnungseigentumsgesetz* (a 26) the owners may decide that a chairperson may be removed only for an important reason and then the reasons must be spelt out.

The next amendment concerns the signing of instruments. Although the headnote of rule 27 still refers to the signing of *instruments* the wording of the actual rule refers to the signing of *documents*. This covers all the documents signed by the trustees and not only formal (legal) documents usually designated by the word *instruments*. Since the amendment, documents must be signed by a trustee and the managing agent or by two trustees. In the case of a certificate issued in terms of section 15B(3)(i)(aa) by the body corporate to certify that all moneys owed to the body corporate have been made or that satisfactory arrangements for payment have been made on transfer of the unit, the signatures of *two* trustees (instead of one) or the managing agent is required. This prevents a trustee who wants to sell his unit from acting in bad faith and signing the certificate even though levies on his unit are still outstanding. The introduction of the four-eyes principle in this important instance of outstanding levies eliminates the possibility of abuse by a single trustee of signing a document to the detriment of the body corporate.

Rule 29 obliges the trustees to take reasonable steps to insure the buildings and all the improvements to the common property (r 29(1)) as well as the owners and the trustees (r 29(2)) against all kinds of risk. One of the duties of the trustees was to procure a cash policy for loss of money in the course of business to an amount equivalent to the total levies due and payable in one month, or such lesser amount as the trustees may determine, as well as for loss or damage to any receptacle for which the body corporate is responsible resulting from the theft or attempted theft of money. This rule refers to cash immediately required for day-to-day disbursement, for example payment for cleaning materials or the salary of employees of the body corporate. By deleting the reference to this type of insurance in the old rule 29(2)(c), the legislator has shortened the list of compulsory insurance that has to be taken out by the trustees. In comparison with the German *Wohnungseigentumsgesetz*, which obliges the manager to take out liability insurance and to insure the building against fire, (a 21 V 3), the South African list of compulsory insurance is unnecessarily detailed and complicated. If the sectional owners nevertheless want to be insured against the loss mentioned above, the owners may, in terms of rule 29(3), by special resolution direct the trustees to insure against such risk.

Rule 31, dealing with the contributions to be paid by sectional owners and their liability for an unsatisfied judgment against the body corporate, has been streamlined by an amendment of rule 31(3). Rule 31(1) stipulates that such contributions and liability are determined in accordance with an adaptation of the quota for expenses in terms of section 32(4) of the Act or else in accordance with the quota itself. Rule 31(2) provides that the body corporate should approve the budget for the following year at the annual general meeting and thus determine the amount estimated to be required to be levied upon the owners during the ensuing financial year. Rule 31(3) then requires the trustees to advise each owner in writing within fourteen days of the amount payable by him or her in respect of such estimate. This amount then becomes payable in instalments, as determined by the trustees. Naturally the trustees can inform the sectional owner of the amount payable by him or her only after the amount estimated has been divided by the quota or adapted quota of each owner. Since the manner of determination of the contributions and liability is already provided for in rule 31(1), the repetition in rule 31(3) has been correctly deleted and the rule streamlined.

The last amendment with regard to trustees concerns their power to invest funds. In terms of rule 43 any funds not immediately required for disbursements *may* be invested in a savings or similar account with any *registered* building society or bank approved by the trustees from time to time. The possibility of investing the money with any other registered deposit-receiving institution has been deleted. This means that the trustees may, if they wish, invest funds that are not immediately needed in a savings or similar account of a registered building society or bank. Since most building societies (except perhaps the Grahamstown Building Society) have been converted into banks, the investment-receiving institution will be mostly a registered *bank*. Note that the rules do not empower the trustees to invest moneys in any other way: they must either invest in a savings or similar account in one of the institutions mentioned above or deposit the money in a commercial bank or building society in accordance with rule 41.

3 Managing agent

Only three amendments deal with the status of the managing agent. These concern his appointment, the revocation of his appointment and his duty to notify interested parties of matters and conditions which could detrimentally affect the value or amenity of the common property and any of the sections of a sectional-title scheme.

With regard to the appointment of a managing agent, rule 46(1) is supplemented by the requirement that an agreement of appointment concluded between the trustees and the managing agent must be reduced to writing within 30 days of its conclusion. If it is not, the agreement is voidable at the instance of either party, namely the trustees or the managing agent. This provision was apparently inserted to force parties to reduce the terms of the contract of appointment to writing accurately within 30 days, that is, before too much time has expired. The difficulty with this provision is that it does not stipulate the time from which the 30-day period is to be calculated. The obvious point would be the time when an oral contract of appointment is concluded between the trustees and the managing agent. If this can be taken as correct, the contract will be voidable if it has not been reduced to writing within 30 days of conclusion. This means that the oral contract will remain valid if it has not been voided as a result of its not being reduced to writing within 30 days. Could the legislator have meant *void* instead of voidable? However, in terms of the first part of rule 46(1), the agreement of appointment between the trustees and the managing agent must be in writing. This confuses the matter even further. The proviso should rather have been that an oral agreement to appoint a managing agent should in future be reduced to a fully-fledged written contract of appointment within 30 days after such agreement has been reached. This would mean that the written agreement can be concluded only if the parties are *ad idem* with regard to all the provisions of the contract within 30 days after agreement has been reached orally. This would further mean that, since only a written contract of appointment will be accepted as valid, pressure will be exerted on the parties to reduce their contract to writing within the period allowed.

Rule 47 provides that the contract of appointment must specify the instances in which the appointment of the managing agent may be revoked. One of these is dealt with in rule 47(ii). This now reads that the appointment may be revoked if the managing agent is convicted of an offence involving an element of fraud or dishonesty or, where the managing agent is a company or a close corporation, if any of its directors is convicted of an offence involving an element of fraud or dishonesty. Formerly the position where the managing agent was a close corporation was treated differently. In such a case the appointment could be revoked if any of the *members* of the close corporation was convicted of *any offence*. The old rule therefore did not apply only to *directors* of a close corporation, but to any of its members; furthermore, the offence in question could be any offence (a traffic offence?) and did not need to be an offence involving fraud or dishonesty. The much narrower provision seems preferable, although it still seems unjust to penalise a managing agent if a director of his company who had nothing to do with the particular scheme is convicted of an offence involving fraud or dishonesty.

The last amendment concerns the duty of the managing agent to notify certain interested parties of all matters which in his opinion detrimentally affect the value or amenity of the common property and any of the sections. Under the new rule 48, the managing agent must report all such matters to the body corporate

and, further, not to all holders of registered sectional mortgage bonds, but only to those holders who have notified the body corporate of their interest in terms of rule 54(1)(b). Under the previous rule, the managing agent had to report to all registered sectional bondholders even if they had not notified the body corporate of their interest. The amendment avoids unnecessary reporting and thus additional expenses. It is also more practical in that the managing agent need not make arduous inquiries of the addresses of all sectional bondholders. The body corporate would have been furnished with the addresses of interested bondholders. The reference to rule 54(1)(b) also limits bondholders to holders of registered sectional mortgage bonds over units and excludes sectional bondholders over exclusive use areas and over the right to develop the scheme in phases in terms of section 25 of the Sectional Titles Act (cf the wide definition of "sectional mortgage bond" in s 1 of the Act). Since reporting to the body corporate would be by way of a report to a general meeting, the question could be asked whether this could not be considered sufficient reporting to a sectional bondholder who has informed the body corporate of his interest in attending general meetings. In practice, reporting to the body corporate would, however, usually take the form of a report to the trustees.

4 General meetings

The provisions with regard to the general meetings of owners have been amended only in a few minor respects. These amendments concern the agenda of the first general meeting and the business to be conducted at annual general meetings, the time when the annual general meeting must be held and the determination of persons who cannot qualify as proxies at a general meeting.

Rule 50(2) changes the order of the agenda for the first general meeting which must be held by the developer within 60 days after the establishment of the body corporate (r 50(1)). The election of trustees has been moved from the first position on the agenda to the sixth. By this amendment the agenda of the first general meeting is brought into line with the order of the business to be conducted at every subsequent annual general meeting under rule 56. The latter rule contains only minor stylistic amendments to the second last item of business that must be transacted at each annual general meeting (r 56(g), which deals with the giving of directions or the imposition of conditions on the powers of the trustees in terms of s 39(1) of the Sectional Titles Act).

The most important amendment with regard to general meetings is the amendment of rule 51 which stipulates when general meetings must be held. In terms of the amended rule 51, annual general meetings must be held within four months of the end of each financial year. Unless decided otherwise at a general meeting or by the trustees, the financial year of the body corporate runs from the first day of March of each year to the last day of February of the following year. The previous rule 51 stipulated that annual general meetings had to be held once a year without more than 15 months between the date of one annual general meeting and the next. Further, only the trustees (and not the general meeting as well) could decide that their financial year should not coincide with the financial year accepted by the Receiver of Revenue and most businesses. In particular, this amendment brings the "business" of running a large sectional-title scheme into line with generally accepted business practice and forces the trustees to act speedily, once the financial results of the previous financial year have been examined, to draw up the required reports and estimates for the ensuing financial

year. Sectional-title schemes that are accustomed to hold their meetings in December before the long summer vacation can still decide via their trustees or the general meeting that their financial year will run from 1 October to 30 September of the following year.

The last amendment concerns the question of proxies of sectional owners at general meetings. Rule 67(3) now provides that a proxy need not be a sectional owner but may not be the managing agent or any of his or her employees, or an employee of the body corporate.

5 Conclusion

The most important amendments to the management rules are the confirmation that owners are entitled to attend meetings of the trustees, the provisions governing the removal of the chairman of the trustees, the appointment and the revocation of the appointment of a managing agent and the provisions stipulating when an annual general meeting must be held. It is interesting to note that all the amendments discussed above, except rule 17 which deals with the signing of instruments, fall within the category of rules that may not, in terms of regulation 30(1), be added to, amended or withdrawn by the developer when submitting an application for the opening of a sectional-title register. Since these and other rules are regarded as forming the backbone of an efficient administration of a sectional-title scheme, they may, in terms of regulation 30(4), be amended by the body corporate only after at least 50 per cent of the units have been alienated to outsiders by the developer.

CG VAN DER MERWE
University of Stellenbosch

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains.

Benjamin N Cardozo The nature of the judicial process *102-103.*

VONNISSE

VERTROUE OP DIE SKYNVERWEKKING VAN BEVEILIGING: 'N FAKTOR BY AANSPREEKLIKHEID WEENS 'N LATE?

Longueira v Securitas of South Africa (Pty) Ltd 1998 4 SA 258 (W)

Daar is by herhaling reeds aangedui dat nieteenstaande beslissings van ons hoogste hof van appèl wat die gesonde "modern distinctions in our law of delict between fault and unlawfulness" (*Simon's Town Municipality v Dews* 1993 1 SA 191 (A) 196; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27) uitdruklik handhaaf, hierdie onderskeid steeds, ook deur die hoogste hof van appèl, veelal negeer word (sien Neethling "Onregmatigheid, nalatigheid; regsplig, "duty of care"; en die rol van redelike voorsienbaarheid – praat die appèlhof uit twee monde?" 1996 *THRHR* 685–686 – bespreking van *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A); Neethling "Nogmaals 'duty of care' – onregmatigheid en nalatigheid by aanspreeklikheid weens 'n late" 1997 *THRHR* 730–733 – bespreking van *Faiga v Body Corporate of Dumbarton Oaks* 1997 2 SA 651 (W)). In die lig van soveel teenstrydige en daarom verwarringstigtende regspraak, staan die uitspraak in *Longueira* uit as 'n baken wat die ontwikkelingsgang van die teoretiese grondslae van ons deliktereg in die huidige verband weer op 'n vaste koers plaas. Waarnemende regter Strauss verklaar naamlik, met verwysing na regter Van Zyl se beslissing in *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 2 SA 520 (W), onomwonde (261H–262A):

> "The judgment has also enjoyed the attention of academics – see, for instance Neethling *et al Deliktereg* 2nd ed para 5.2.7 (at 62) and Neethling and Potgieter (1990) *TSAR* 763.
>
> Although I have, with respect, no quarrel with the conclusion reached by Van Zyl J on the facts of the matter before him, I cannot unqualifiedly accept the route by which he arrived there. With the greatest respect to Van Zyl J there is, in my view, merit in the criticism raised by *Neethling and Potgieter* in the aforementioned article insofar as there appears to have been a confusion between wrongfulness (onregmatigheid) and fault (skuld); the use of the English law phraseology 'duty of care' (which is relevant when considering fault) while discussing unlawfulness, rather than the more apt phrase 'legal duty' may be indicative of confusion or at least lead to confusion by the reader of the judgment."

Die feite in *Longueira* is soortgelyk aan dié in die *Compass Motors*-saak. Die eiser se motor is gesteel terwyl dit geparkeer was op die sakeperseel van sy werkgewer. Die verweerder, 'n sekuriteitsonderneming, het ingevolge 'n ooreenkoms met die eiser se werkgewer sekere sekuriteitsdienste ten aansien van

die perseel en die goedere daarop verskaf. Die verweerder het dus verantwoordelikheid aanvaar vir die veiligheid van voertuie wat regmatig op die perseel geparkeer was. Desnieteenstaande het 'n dief daarin geslaag om die motor met die grootste gemak van die perseel te verwyder en daarmee te verdwyn. Die kernvraag was eerstens of die verweerder onregmatig opgetree het, dit wil sê of daar 'n regsplig op hom gerus het om die eiser se skade te voorkom, en tweedens, of die verweerder nalatig gehandel het. Net eersgenoemde vraag is vir doeleindes van hierdie bespreking van belang.

In hierdie verband verklaar regter Strauss met verwysing na *Compass Motors* soos volg (262A–D):

> "I disagree with Neethling *et al* that the judgment may be taken as authority for the recognition of a so-called 'seventh category of liability for omission', namely reliance by the victim on the negligent carrying out of the wrongdoer's undertaking. The, for want of a better definition, 'reliance theory' appears to have its origin in para 324A(*c*) of the American *Reinstatement of the Law*: *Torts* 2nd ed which reads as follows:
>
> > 'One who undertakes, gratuitously or for consideration, to render services to another which he should recognise as necessary for the protection of a third person or his things, is subject to liability to a third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if . . .
> >
> > (*c*) the harm is suffered because of reliance of the other or the third person upon the undertaking.'
>
> At 530D van Zyl J specifically stated that he was reluctant to restrict liability to cases where the third party is aware of the existence of security procedures. Knowledge of and reliance on the undertaking is but one of the facts to be taken into account in considering whether the wrongdoer owed a legal duty to the victim."

Vervolgens bevestig die hof (262E–263A), deur aanhaling van die bekende *dictum* van hoofregter Rumpff in *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596–597 oor aanspreeklikheid weens 'n late, die algemene beginsels wat in hierdie verband geld, en vervolg:

> "When considering the existence or not of a legal duty the facts of each matter makes it *res nova* but the principles remain the same – when finding that a legal duty existed in a particular case one is not laying down any new principles . . . [E]levating decisions on often repeated similar facts to categories is dangerous as it stifles the application of the principles to changing attitudes of the society and the way in which commerce is conducted. It is the application of principles which distinguishes South African law from, for instance, English and other systems which adopt a more casuistic approach and enable South African law to deal more easily with changes in attitudes and circumstances."

Waarnemende regter Strauss kom tot die volgende slotsom oor die bestaan al dan nie van bedoelde regsplig:

> "Although the facts *in casu* differ from those in the *Compass Motors* matter insofar as defendant did not enjoy the same measure of control over the premises, the reasoning for finding the existence of a legal duty applies with equal force and I adopt it . . . At the very least defendant was under a legal duty to plaintiff to minimise the risk of loss of his vehicle, which is what defendant had in terms of its agreement with [eiser se werkgewer] undertaken to do . . . Having for present purposes accepted that the general nature and ambit of the duty was limited to fulfilling the contractual obligations it does not mean that plaintiff is, insofar as there may be limitations and/or exclusions in the contract, bound by an agreement to which he had never been a party. The agreement is a factor taken into account in deciding whether a legal duty exists . . ."

'n Aantal aspekte van die uitspraak verg kommentaar.

1 Die hof bevestig dat die onregmatigheid van 'n late bepaal word met verwysing na die vraag of daar 'n regplig op die verweerder gerus het om positief op te tree ten einde skade vir die eiser te voorkom, welke regsplig bepaal word met verwysing na die *boni mores* of regsoortuiging van die gemeenskap. Hierdie toets is objektief in die sin dat "die totaal van omstandighede van 'n bepaalde geval" in ag geneem moet word (*Ewels supra* 597). Alle faktore wat volgens die *boni mores* kan dui op 'n regsplig om handelend op te tree, moet dus oorweeg word (*Administrateur, Transvaal v Van der Merwe* 1994 4 SA 34 (A) 363–364). Alhoewel dit nie moontlik is om by voorbaat 'n volledige lys te probeer gee van die faktore wat in hierdie verband 'n rol kan en moet speel nie – daar bestaan gevolglik beslis nie 'n *numerus clausus* nie – het daar nietemin met verloop van tyd 'n aantal faktore na vore gekom wat (sterk) aanduidend van die bestaan van bedoelde regsplig is en daarom die howe se taak in hierdie opsig kan vergemaklik (Neethling, Potgieter en Visser *Deliktereg* (1996) 55).

Dit behoef eintlik geen betoog nie dat die soepele *boni mores*-maatstaf, tesame met die toepassing van *stare decisis*, die howe in staat stel om op enige ontwikkelende terrein (soos aanspreeklikheid weens 'n late, suiwer ekonomiese verlies, nalatige wanvoorstelling en onregmatige mededinging: sien *idem* 55–68 289–293 296–297 308–309) 'n vaste patroon in die regspraak te ontwikkel waardeur konkrete riglyne (faktore) neergelê en die praktiese hanteerbaarheid van die betrokke regsgebied bevorder word. Dit lei weer tot die heilsame wetenskaplike bewerking en sistematisering (kategorisering) van die betrokke regsgebied en, uiteindelik, groter regsekerheid. Soos regter Strauss (263A–C, hierbo aangehaal) beaam, skep die erkenning van enige faktor of riglyn geensins 'n "nuwe" (absolute) regsbeginsel nie. Sy bewering dat die skepping van kategorieë gevaarlik is omdat dit (noodwendig) die soepele toepassing van die *boni mores*-onregmatigheidskriterium in veranderde omstandighede aan bande lê, hou egter nie steek as die howe se hantering van bedoelde faktore (riglyne of kategorieë) op die aangeduide regsterreine onder die loep geneem word, en weeg hoegenaamd ook nie op teen die voordele (waarna hierbo verwys is) wat die erkenning van konkrete reglyne wel vir die ontplooiing van ons reg inhou nie. Nietemin moet enige poging om kasuïstiek (soos in die Engelse en Romeinse deliktereg) ten koste van ons eie generaliserende benadering toe te pas, summier afgewys word (Neethling, Potgieter en Visser *Deliktereg* 5 vn 12) – 'n standpunt wat deesdae algmeen deur die howe onderskryf word (sien *Longueira* 263B–C; Van Heerden en Neethling *Unlawful competition* (1955) 53 64–64 167 mbt onregmatige mededinging).

Die volgende reeds uitgekristalliseerde kategorieë (faktore) kan op 'n regsplig by 'n late dui: (i) *omissio per commissionem*; (ii) beheer oor 'n gevaarlike voorwerp; (iii) 'n regsvoorskrif; (iv) 'n besondere verhouding tussen die partye; (v) die bekleding van 'n bepaalde amp; (vi) die kontraktuele onderneming vir die veiligheid van 'n derde; en (vii) die verwekking van 'n skyn dat 'n ander beveilig sal word (sien Neethling, Potgieter en Visser *Deliktereg* 55-68; vgl Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 31 ev; Van der Walt en Midgley *Delict. Principles and cases* (1997) 70–73; Boberg *The law of delict Vol 1 Aquilian liability* (1984) 210 ev; Burchell *Principles of delict* (1993) 39–45). Burchell *Delict* 44 vat die posisie soos volg raak saam:

> "The above ... categories are simply crystallised manifestations of situations where the legal convictions of the community have demanded a legal duty to act. Obviously there categories are not watertight and the argument for a legal duty to act is stronger where a situation falls into more than one of these categories. However, because of the flexible nature of the criterion of the legal convictions of

> the community, even a novel case which does not fall squarely within at least one of these categories, can be regarded as unlawful if the legal policy for imposing a duty to act is strong enough."

2 Die hof (262A–D) is gekant teen die erkenning van die sewende kategorie (hierbo vermeld), soos afgelei uit die *Compass Motors*-saak deur Neethling en Potgieter 1990 *TSAR* 766, te wete: Waar 'n persoon redelikerwys staatmaak of vertrou op 'n skyn wat deur 'n ander verwek word dat laasgenoemde eersgenoemde se veiligheid of dié van sy eiendom sal verseker, rus daar 'n regsplig op die skynverwekker om benadeling teenoor hom te voorkom (sien ook Neethling, Potgieter en Visser *Deliktereg* 67). Ongelukkig gee die regter 'n totaal skewe beeld van die pas gestelde riglyn, wat hy verwoord as "reliance by the victim on the negligent carrying out of the wrongdoer's undertaking". Eerstens vertrou die slagoffer sekerlik nie op die *nalatige* uitvoering van die verweerder se onderneming nie, maar juis op die nie-nalatige nakoming daarvan; en tweedens gaan dit by die gestelde riglyn om die vertroue wat deur 'n *skynverwekking* geskep word en nie deur 'n onderneming (ooreenkoms) nie. Laasgenoemde feit speel daarenteen juis 'n rol by die sesde katgorie hierbo vermeld, naamlik 'n kontraktuele onderneming om die veiligheid van 'n derde of sy goed te verseker. Die punt is dat die vertroue in beginsel op enige skynverwekking – selfs waar 'n kontraktuele onderneming heeltemal afwesig is – gebaseer kan word en daarom 'n faktor daarstel wat van die sesde kategorie onderskeibaar is. Bygevolg is regter Strauss se verwysing na die Amerikaansregtelike "reliance theory", wat vertroue op 'n kontraktuele onderneming vereis, ook nie toepaslik op bedoelde sewende kategorie nie.

Hiermee word natuurlik nie ontken nie, soos die hof tereg uitwys (262D, hierbo aangehaal), dat kennis van en vertroue op 'n kontraktuele onderneming deur 'n derde wel faktore is wat 'n rol kan speel om die aanwesigheid van 'n regsplig te bepaal. Trouens, kennis van of vertroue op bepaalde feite (anders as 'n kontraktuele onderneming), is al in ag geneem by die vasstelling van die regplig om positief op te tree in byvoorbeeld die geval van *omissio per commissionem* en beheer oor 'n gevaarlike voorwerp (Neethling, Potgieter en Visser *Deliktereg* 59–60 vn 119 600–611 vn 126), asook by die bepaling van die regsplig ten opsigte van suiwer ekonomiese verlies en nalatige wanvoorstelling (*idem* 289–299, 297–298; sien in die algemeen ook *idem* 42).

In casu het die hof uiteindelik hoegenaamd nie op die vertroue op en kennis van die ooreenkoms deur die eiser gesteun nie, maar bloot op die kontraktuele onderneming van die verweerder om verliese te minimaliseer vir persone wat hulle motors op die perseel laat (263H–I; dws kategorie ses hierbo), asook, vreemd genoeg, op die "reasoning for finding the existence of a legal duty" (283E) in die *Compass Motors*-saak, wat regter Van Zyl soos volg stel (530):

> "Should [third] persons be aware of the presence of a security system on the premises, they may be lulled into a false sense of security in deciding to leave their property on such premises. They are in fact relying on the presence of security guards and they may justifiably entertain the expectation that reasonable steps will be taken to protect their property."

Afgesien hiervan, het die volgende faktore ook op die bestaan van die regsplig gedui: die feit dat die verweerders in beheer was van 'n perseel waar daar 'n toestand van potensiële gevaar teenoor derdes (die moontlikheid van inbraak, beskadiging en diefstal) geheers het; en die feit dat die verweerder 'n beroep beklee het wat spesifiek daarop ingestel is om 'n sekuriteitsdiens op 'n besondere perseel te verskaf (vgl Neethling, Potgieter en Visser *Deliktereg* 68 vn 160).

Uit bostaande bespreking blyk duidelik dat die hof, nieteenstaande regter Strauss se ontkenning, minstens by implikasie steun verleen aan die erkenning van die sewende kategorie hierbo vermeld. Nietemin moet steeds in gedagte gehou word dat die bestaan van 'n regsplig om handelend op te tree in 'n bepaalde geval aan 'n enkele faktor maar soms ook aan meerdere faktore toegeskryf kan word. Dit beklemtoon dat *al die omstandighede* in 'n bepaalde geval in ag geneem moet word om te bepaal of daar 'n regsplig aanwesig was. Alhoewel die praktyk uitgewys het dat die vermelde sewe faktore baie sterk op die bestaan van 'n regsplig dui, gaan dit in finale instansie steeds om 'n bepaling van die *redelikheid* (volgens die regsoortuiging van die gemeenskap) al dan nie van die dader se versuim in die lig van al die omstandighede van die geval.

J NEETHLING
Universiteit van Suid-Afrika

THE SABADIA CONSPIRACY

S v Manyape unreported case CC 159/97 in the High Court of South Africa (Transvaal Provincial Division) Pretoria

1 Introduction

On 11 February 1996, Zahida Sabadia, wife of Dr Omar Aboobaker Sabadia, a well-known Pretoria psychiatrist, was killed under mysterious circumstances. Her body was found only three weeks after her death. During the latter part of 1997 and the first part of 1998, this interesting case unfolded in the Pretoria High Court, with Stafford J presiding.

The facts of this criminal case were not particularly noteworthy. Political undertones did emerge, however; for instance, strong ANC connections, evidenced *inter alia* by the continued presence of members of the ANC Women's League in court, and the involvement of former CCB members – which was something of a political irony since these former CCB members, now turned private investigators, were being employed by the selfsame ANC supporters (their erstwhile adversaries), a phenomenon not rare in the new South Africa. Another feature of the case that has recently become alarmingly common in South African society is hired killing, particularly of the husband-wife kind. A third, more subtle (or perhaps not so subtle) theme, is the underlying tension between the government and the judiciary, occasionally finding expression in a judge's comments in the judgment or sentencing of accused. Curlewis J, for example, made no secret of his opinion about the abolition of the death penalty when sentencing Moses Sithole to more than two thousand years of imprisonment. The question whether these comments by judges are fair or not, remains to be answered. However, even though the above-mentioned themes are neither surprising nor unique, they do once again point to deep-rooted tensions in South African society, politics, and the relationship between the government and the judiciary.

Far from these abstract questions, however, lie the hard facts of each criminal case heard in South African courts and the victims of each of these crimes.

Judges, politicians and society alike are faced with these realities in our crime-ridden society.

The Sabadia case was a telling illustration of these themes. Some of the ironies were that Manyape, Dr Sabadia's patient, who was to obtain "professional killers" to kill the doctor's wife, first contacted a private investigator who counted the arrest of Barend Strydom among his accomplishments. This private investigator was eventually responsible for the arrest of Manyape. After the planned hijacking and the failure of the police to make swift progress, the deceased's family (who are strong ANC supporters) obtained the services of Slang van Zyl and Jack le Grange (two former CCB members) who, in collaboration with ex-colonel Charlie Landman, finally succeeded in finding the body and arresting Dr Sabadia.

In the end, however, a judge is faced with the task of imposing a suitable sentence. In order to lay the foundation for the subsequent discussion of the sentence, we will set out the facts of the case in some detail. We will first sketch the basic case of the state by briefly setting out the charges against the accused and their respective plea explanations. In the next section we will discuss the judgment of the court by referring to the most important evidence, the question of the admissibility of evidence of a conspiracy and the court's findings.

In the section on the passing of sentence, we will refer to some controversial issues raised by the judge's sentence; to the question who should be considered to be morally more blameworthy in a contract killing, the hirer or the killer; and to the judge's considerations of the object of punishment in cases of hired killings. Having described the emphasis of punishment in such cases, the judge was faced with the question as to what would constitute the ultimate sentence in South Africa today. We will refer to the judge's comments in this regard and on the death penalty. Finally, the issue of parole will be discussed. A judge may impose a sentence reflecting society's revulsion and the object of punishment, but because of the current parole system, often only half of such a sentence is served. We will look critically at the current parole system and refer to the envisaged system under new legislation.

2 The indictment

Four accused, including Dr Sabadia, were charged with conspiracy to kidnap and murder Zahida Sabadia. Patrick Manyape, a former patient of Sabadia, stood trial as Accused 1; Albert Moeketsane, the person who performed the actual killing, was Accused 2; Richard Malema, the uncle of Accused 1, was Accused 3; and Sabadia was Accused 4. The accused will hereafter be referred to as Accused 1, 2, 3 and 4, respectively.

All four the accused pleaded not guilty to both charges. Accused 1 pleaded that he did not have the necessary *culpa* to be found guilty of the charges. At the time of the perpetration of the crimes he could not distinguish between right and wrong because of the medication he was taking. In his plea explanation he stated that he had been a patient of Accused 4, who had been treating him medically and psychiatrically for a period of 5-6 years. Accused 4 had administered medicine and drugs to him on a daily basis, which affected his central nervous system and his thought-processes and the cumulative effect of long usage of the medication affected him to such a degree that he could not discern between right and wrong at the time of the perpetration of the crimes. He also stated that the

treatment had caused him to view and accept his doctor, Accused 4, as a father figure. Accused 4 had manipulated him to such a degree that he was like clay in the hands of the latter and this had led to a lack of insight on his part.

Accused 2, 3 and 4 tendered no plea explanation, but their respective defences in the course of the trial are described below. Accused 2's defence was that, although he had originally agreed to be part of the kidnapping and associated himself with the plan to murder Zahida Sabadia, he later changed his mind and withdrew from the plan to murder her before the plan was carried out. He had run away from her on Sunday night, 11 February 1996, and stated that she was still alive at the time.

The defence of Accused 3 was that he was only part of a conspiracy to kidnap Zahida Sabadia and that he was not party to any agreement to kill the deceased. His case was that when Accused 2 removed the deceased from the car in which she had been when kidnapped, it was not with the intention to kill her and he had no part in what happened to her afterwards.

The defence of Accused 4 was that he denied any involvement in any plan or any conspiracy to kidnap and murder his wife. His case was that Accused 1, for reasons best known to himself, had arranged the hijacking and kidnapping of him and his wife and the killing of his wife. He stated that he was at all times held hostage by Accused 3, and that the latter had assaulted him with a knife.

3 The judgment

The trial proceeded for a period of 101 days and concluded with a judgment 189 typed pages long. The length of the trial was mainly the result of a detailed case presented by the state against the four accused, and of the fact that each of the four accused provided the court with different defences and differing versions of the facts. Consequently, the facts of the case became somewhat involved. To understand both the factual and the legal issues that presented themselves during the course of the trial, it is necessary to refer to the evidence and factual findings of the case in some detail.

3 1 The evidence

3 1 1 Planning the crimes

During the period 15 January 1996 to 11 February 1996, Accused 1 was psychiatrically treated by Accused 4 on a daily basis. It was during this time that Accused 4 persuaded and conspired with Accused 1 to bring about the death of Accused 4's wife. Accused 4 requested Accused 1 to obtain "professional killers" to carry out the heinous deed.

The evidence showed that Accused 1 had had an unusually high regard for Accused 4 and that a "unique" psychiatrist-patient relationship had existed between them. Under these circumstances, the court found that Accused 1 would have been susceptible to suggestions made by Accused 4 in respect of instructions and requests.

On Friday, 2 February 1996, Accused 1 approached Simon Mkondelele, a well-known private investigator nicknamed "Volcano", in compliance with a request made by Accused 4 to obtain a professional killer. Accused 1 told Volcano that "a doctor" was prepared to pay a reward for killing "the doctor's wife". The proposed plan was that the "wife" had to be run down while cycling, in order to make it look like a hit-and-run accident. Volcano declined the offer

and promptly reported the matter to the South African Police Services (SAPS), not knowing the identity of either the "doctor" or the "wife".

In his testimony, Volcano stated that he had again spoken to Accused 1 on Tuesday, 13 February 1996 (two days after the murder of Accused 4's wife). Accused 1 had a newspaper in his hand which contained a report on the front page that a doctor and his wife, a student doctor at Medunsa, had been attacked while relaxing at a restaurant called Bimbo's. Volcano then told Accused 1 that he had heard a similar report on a radio news bulletin and enquired from Accused 1 whether it was the same doctor about whom Accused 1 had approached him earlier and who wanted his wife killed. Volcano testified that Accused 1 had denied this and stated that the doctor and his wife in question had gone to Durban, but immediately corrected himself, saying that they had gone on honeymoon to Mauritius. Although Volcano was not part of the conspiracy, his testimony was important to confirm the existence of a conspiracy. The admissibility of Volcano's testimony was disputed by counsel for the defence, but was found to be admissible by the court. (The considered judgment of the court in this regard is dealt with in 3 2 below.)

Accused 4 was, however, determined to carry out the plan to kill his wife, and he devised and considered at least four specific plans before deciding upon the one that was used. This plan entailed that he and his wife would be hijacked by his co-conspirators at Ga-Rankuwa Hospital on Sunday 11 February 1996, where he and his wife would be attending a seminar. During the hijacking, the co-conspirators would assault and throw him from the motor vehicle and would then take his wife to a quiet place in order to kill her. This plan was described to Accused 1 with the request to obtain assistance for the execution of the plan.

On Friday 9 February 1996, Accused 1 approached his uncle, Accused 3, to assist him in the murder plan; Accused 3 in turn approached Accused 2 for additional assistance. On Saturday 10 February 1996, Accused 1, 2 and 3 visited the surgery of Accused 4 at Marabastad to ascertain the final details of the murder plan from Accused 4. Accused 1 entered the surgery alone and returned with R900-00. The money was used to purchase balaclavas, gloves, a knife, a toy gun, fuel for their vehicle and liquor. The three also finalised the details of the plan that was to be carried out the following day. Evidence also showed that Accused 1 played a major role in the planning and preparation of the proposed hijack and murder.

On Sunday 11 February 1996, however, Accused 4 met Accused 1 at the latter's house and informed him that the venue for the planned hijacking was to be changed from Ga-Rankuwa Hospital to Bimbo's restaurant. Accused 1 subsequently communicated the change of plan to Accused 2 and 3.

3 1 2 The commission of the crimes

On Sunday evening 11 February 1996, Accused 1, 2 and 3 proceeded to Bimbo's restaurant in a motor vehicle driven by Accused 1, where they waited for Accused 4 and his wife to arrive. Accused 4 and his wife arrived in a red Toyota Corolla motor vehicle shortly afterwards and entered the restaurant. When they returned to their motor vehicle, they were hijacked by Accused 2 and 3. Accused 2 was seated in front next to the wife of Accused 4, and Accused 4 was ordered to drive the motor vehicle whilst Accused 3 was seated at the back, pointing a toy pistol at the head of Accused 4. After travelling for some time and eluding a motor vehicle which was following them, Accused 3 ordered Accused

4 to stop the motor vehicle next to the railing of a certain bridge. This was the site that had been agreed upon by Accused 1, 2 and 3 the previous day. Although the conspirators had planned that Accused 1 would follow the hijacked motor vehicle, he was unable to do so as he had lost sight of their motor vehicle while they were travelling.

At the above-mentioned site Accused 2 and the wife of Accused 4 alighted from the motor vehicle whereupon Accused 2 took Accused 4's wife (hereinafter referred to as the "deceased") into the veld where he killed her, probably by strangling or stabbing her. (The cause of death could not be ascertained afterwards due to the advanced state of decomposition of the body.) He finally hanged her in a tree.

After Accused 2 and the deceased had alighted from the motor vehicle at the above-mentioned site, Accused 3 and 4 drove onwards on the Hornsnek road. At one stage they met up with Accused 1 and told him to follow them. Accused 1 followed Accused 3 and 4 for some distance, but they lost sight of him immediately after the Mahem road crossing. Accused 3 and 4 then returned to the site where they had dropped off Accused 2 earlier, but Accused 2 was nowhere to be found. They then proceeded to Atteridgeville, where they found Accused 2, who told them that he had killed the deceased.

3 1 3 Subsequent events

With regard to Accused 1, 2 and 3, the evidence showed that on Monday, 12 February 1996, Accused 3 met Accused 1 and told him that Accused 2 had killed the deceased. Later, Accused 2 and 3 also enquired from Accused 1 about their promised reward for carrying out the kidnapping and the murder.

With regard to Accused 4, the evidence showed that he had been taken to Ga-Rankuwa Hospital by members of the SAPS during the early hours of Monday, 12 February 1996, with injuries allegedly sustained during an assault on him. At 03h40 Accused 4 was examined by Dr Mbele who testified that Accused 4 had told her that he had been stabbed on the arms and kicked on the head. He had also told Dr Mbele that his vehicle had been hijacked and that his wife had been taken by the hijackers. Although Dr Mbele described the stab wounds as minor soft tissue wounds, which did not warrant hospitalisation, Accused 4 was nevertheless admitted to hospital at his own request.

During the afternoon of Monday 12 February 1996, Accused 4 made a sworn statement to the SAPS as a complainant in and a victim of a motor vehicle hijacking. For the purposes of this discussion it is necessary to mention that Accused 4 stated in this statement that he had been forcibly removed from the motor vehicle while his wife was still in the motor vehicle.

The testimony of Accused 4, however, contradicted the above-mentioned evidence in certain material respects. Accused 4 testified that he and his wife had been hijacked at Bimbo's restaurant, where he was forced at gunpoint to drive to a certain place, where Accused 2 and Accused 4's wife, the deceased, alighted from the vehicle, whereupon he was forced by Accused 3 to keep moving. At one point he managed to escape and run away from the vehicle, and thought he had successfully escaped from Accused 3. Accused 3, however, had caught up with him and assaulted him, hitting him on the head with a fist and with something that, according to Accused 4, felt like a motor vehicle jack. Accused 3 also allegedly stabbed Accused 4 with a knife. Accused 4 testified that he had screamed

loudly during the attack and that this had caused Accused 3 to abandon his attack and run away. (This piece of evidence emerged only during the cross-examination of Accused 2 and 3 by counsel for Accused 4.) Accused 4 also testified that after the above-mentioned attack on him, he walked to a petrol station near Bimbo's restaurant to seek help. He was assisted by a certain Lodi and was taken to the Ga-Rankuwa hospital by members of the SAPS, where he was treated for the injuries sustained in the alleged attack.

During the cross-examination of Accused 2 by counsel for Accused 4, it was stated that Accused 4 had been in the hijacked motor vehicle throughout the hijacking and that Accused 4 had left the motor vehicle only under the circumstances described in his testimony above. This version of Accused 4 was therefore at considerable variance with that of his version as a complainant in the hijacking case. The explanation given by Accused 4 for this variance was that the abduction of himself and his wife had been the most stressful episode of his life. He stated that he had been in a condition where he could not remember certain things and that it caused him to be confused. Accused 4 also ascribed his loss of memory and confusion to certain psychological conditions from which he had allegedly been suffering.

3 1 4 The arrests and finding of the body

When almost three weeks had elapsed without any trace of the deceased, her family, who were becoming increasingly worried and impatient, obtained the services of private investigators, Jack le Grange and Slang van Zyl, to assist in finding her. The private investigators liaised with Superintendent Landman of the Brixton Murder and Robbery Squad (who was not part of the official police investigation).

On Sunday 3 March 1996, Le Grange requested Accused 4 to accompany him to his office. On their way to Le Grange's office, Le Grange handed Accused 4 over to Landman and his team. The subsequent pointing out by Accused 4 of the place where his wife could be found, led to the finding of the deceased's body. The decomposed body was found hanging in a tree with a raincoat tied around her neck. A stethoscope, panties, handbag, credit cards, shoes and other articles belonging to the deceased were strewn on the ground.

Accused 4 was immediately arrested and asked to make a statement, which he did in Landman's motor vehicle. Accused 4's original version to the SAPS was that he had no knowledge whatsoever of the place where his wife had been taken from the motor vehicle during the hijacking, since he had been taken out first. It is significant to note that, at the stage when Accused 4 pointed out the site, no person, other than the four accused, had knowledge of where the body of the deceased could be found.

Parallel to these events, Accused 1 was arrested by the official investigative task force on Friday 1 March 1996, as a result of Volcano's report to the SAPS of the request made to him by Accused 1 to carry out the initial assassination plan. On Monday 4 March 1996, Accused 1 made a written statement, confessing to the abduction of the deceased and provision of assistance in her murder. On that same morning Accused 1 pointed out Accused 2 as one of the conspirators of the said crimes. Accused 3 handed himself over to the SAPS and made a written confession and a pointing out on Tuesday, 12 March 1996.

3 1 5 The motive

The court found that there could be no reasonable doubt that Accused 4, and only Accused 4, had a motive t-o kill the deceased. This motive was spelt out in his confession.

Despite the grandiose picture which Accused 4 painted of his lifestyle, he had in fact been in dire financial straits. Evidence showed that the payments received from Medihelp, a medical aid fund which was Accused 4's principal source of income, had become increasingly smaller and that the fund had ceased payments to him in May 1996. Accused 4 was also embroiled in financial difficulties regarding amounts he owed to either his brother-in-law or the family of his deceased wife. Evidence also showed that Accused 4 and the deceased had had a long history of marital problems.

The court held that Accused 4 stood to gain R2,9 million from an insurance policy on the life of the deceased, as well as R375 000-00 in respect of an additional policy, which had to be divided between himself and his children. These amounts could have been used to alleviate his financial problems. The court found it extremely strange that Accused 4 had shown very little interest in even investigating the accrual of R2,9 million to him; the court believed that someone who was entirely guiltless and blameless as far as the death of his wife was concerned, would at least have made enquiries.

3 2 Admissibility of evidence about the existence of a conspiracy

The admissibility of the evidence given by Volcano was disputed by counsel for the defence. The arguments focused on the fact that Volcano merely testified about "a doctor" who wanted to kill "his wife" and that no mention was made of the names of Accused 4 or the deceased.

In addressing the question of the admissibility of Volcano's evidence, the court referred to *R v Mayet* 1957 1 SA 492 (A), in which the appellant had engaged a certain Sam Jones to procure two persons to murder the deceased for reward. Jones first approached Brown and Hoffman, who declined the offer, and then approached and procured Dalton and Ferreira to commit the murder for reward. The question of law was whether the evidence of Brown and Hoffman in this regard was admissible evidence against the appellant.

In his judgment, Schreiner JA quoted from Phipson *On evidence* 9th ed 98:

> "On charges of conspiracy, the acts and declaration of each conspirator in furtherance of the common object are admissible against the rest; and it is immaterial whether the existence of the conspiracy, or the participation of the defendants be proved first, though either element is nugatory without the other."

Schreiner JA then added:

> "Although this principle may have originated in the English law of criminal conspiracy, it applies also where parties are charged with a crime and the case against them is that they acted in concert to commit it; it makes no difference whether the particular trial is of one or some or all of the conspirators. Words that are said as part of the carrying out of a purpose stand on the same footing as acts done; they differ from a mere narrative. All the evidence of acts, and words that, being executive, are indistinguishable from acts, must be looked at in order to ascertain whether there was a conspiracy, and, if so, who were the conspirators. If all the evidence brings the court to a conviction that the existence of the conspiracy and the identity of the conspirators are proved, the law does not find an insuperable difficulty in the logical objection that some evidence could only be used if the eventual conclusion were established" (494).

In *Mayet*'s case the court found that, although the attempt by Jones to obtain the services of Brown and Hoffman was abortive, their evidence about what was said by Jones in order to convince them to commit the murder, including the identification of the appellant, was admissible evidence against the appellant.

In the *Manyape* case, the court found that the evidence of Accused 1 could be equated with that of Sam Jones and that the evidence of Volcano could be equated with that of Brown and Hoffman. The court also found that, although the identity of Accused 4 and his wife had not been known to Volcano at the time of the conversation with Accused 1, it was clear to whom he was referring and the court accepted that Accused 1 was referring to Accused 4 and the deceased. The conversation between Volcano and Accused 1 was therefore found to be admissible against Accused 1 and 4 and that it established a conspiracy between them at the beginning of February 1996 to have the wife of Accused 4 killed.

In addition, the court held that these principles were also applicable to the statement made by Accused 2 to Accused 3, immediately after the murder that Accused 2 had killed the deceased. The court found the statement to be admissible as evidence against Accused 3 and 4 as co-conspirators.

3 3 The court's findings

The court held that Accused 1 was able to distinguish between right and wrong, and that he was criminally accountable at the time of the perpetration of the crimes. Despite some half-hearted attempts by Accused 1 to argue that he did not know right from wrong at the time of the perpetration of the crimes, he conceded under cross-examination by the state that he had known what he was doing despite the effect which the medicines had had on him. That concession meant that he did know right from wrong and was fully aware of the unlawfulness of his acts. Accused 1 moreover called no medical or expert evidence on which his defence could be founded. The court's finding was supported by Accused 4's evidence that, whatever the condition of his patient (Accused 1) between 15 January and 11 February 1996, he at no time lacked insight or judgment. The court found that at the time of the perpetration of the two crimes, Accused 1 was not dysfunctional, and was mentally normal from February 1996.

The court held that Accused 2 had killed the deceased. Whether the deceased was dead or alive before she was hanged in the tree was irrelevant to this finding. Whether she was strangled beforehand or throttled by the coat was also irrelevant, as was the question whether she was stabbed fatally or otherwise. For whatever reason, Accused 2 probably did not return to the road to be picked up by any of the other accused, after committing this horrendous murder, but found his own way home to Atteridgeville. What Accused 2 did to the deceased probably took him longer than he or they had bargained for. Implicit in this finding was that he did not run away and leave the deceased alive. If she had been left alive, there could never have been a murder victim or a murder case. The actions of Accused 1, 2, 3 and 4 after the removal of the deceased from the Toyota were incompatible with her not having been murdered.

The court rejected Accused 2's evidence that he had ever changed his mind in respect of his instructions to take the deceased into the veld and kill her. He dragged the terrified deceased with at least her handbag and her belongings out of the car, over the white railing, through the fence and into the veld, where he killed her.

The court rejected the defence of Accused 3 that he was only part of a conspiracy among the four accused to hijack the motor vehicle and accused 4's wife while he was in the car but that he was no party to any agreement to kill the deceased. The court held that he knew that when Accused 2 removed the deceased from the car it was with the intention to kill her.

The court also rejected Accused 4's denial of any involvement in any plan or conspiracy by Accused 1, 2 and 3 to kidnap himself and his wife and to murder his wife and let him escape with injuries ostensibly caused by his attackers. The court found that Accused 4, for reasons best known to himself, had arranged the hijacking and kidnapping of himself and his wife and the killing of his wife. He was not at all times held hostage by Accused 3, and he ordered Accused 3 to assault him with a knife.

4 The sentence

4 1 Issues considered

In sentencing the four accused, Stafford J touched upon a number of issues which make this sentence, although not reported, worth discussing. After the judge had found the accused guilty and described the horror of the crimes, he was faced with the issues involved in imposing a suitable sentence in South Africa today. Before he came to individualising the sentences of the accused by taking mitigatory and aggravating factors and their personal circumstances into account, the judge made a few remarks on the objects of punishment in this kind of crime and the kind of sentence that would constitute the ultimate sentence today. We will deal with the following questions raised by the judge in sentencing the accused:

- What is the ultimate sentence in South Africa today?
- Who is morally more blameworthy in a contract killing, the hirer or the killer?
- Would the death penalty be a deterrent in cases of premeditated crime?
- Is depression a mitigating factor or not?
- What constitutes true remorse, and can there possibly be rehabilitation without remorse?
- Is the current parole system adequate and satisfactory?

4 2 Objective of punishment

Stafford J was referred to a number of cases that are pertinent to this type of conspiracy and murder. The judge quoted the following three cases with approval.

First of all, he referred to *S v Dlomo* 1991 2 SACR 473 (A) where it was held (as per the head note):

> "Any decent member of society will instinctively and roundly condemn the hired killer. The reasons therefor are obvious. In the case of a murder committed by hired killers it is the *deterrent and retributive objects of punishment* which come to the fore. Hired killers must be made aware that, save possibly in exceptional circumstances, the Courts will impose the *ultimate sentence* upon them" (our emphasis).

Stafford J added that "what applies to hired killers must equally apply to those who hire them".

Next he referred to *S v Zondi* 1992 2 SACR 706 (A) where it was held (as per the head note):

> "No society can tolerate the killing of a person, on the whim of an instigator, by assassins, whether hired or acting fortuitously. Such serious crimes strike at the very root of an orderly society and the sentence of the court should serve not only to deter others from committing such crimes, but also to reflect the revulsion which any reasonable person feels for such heinous deeds.
>
> That the *deterrent and retributive objects of punishment* were decisive in the present case" (our emphasis).

Finally the judge referred to *S v Mabaso* 1992 1 SACR 690 (A) where it was held (as per the head note):

> "Held, further, that as the aggravating factors were concerned, that inasmuch as hired killing filled any decent person with revulsion and loathing and no civilised society could tolerate such conduct, the *deterrent and retributive objects of punishment* had to predominate.
>
> Held further that it was, however, true that the death sentence was not automatically the only proper sentence in respect of hired killings; the presence of 'exceptional' or 'special' circumstances could lead a Court to conclude that a sentence other than death was a 'proper one'.
>
> Held, further, that it was no easy question as to who was morally more blameworthy, the hirer or the killer, but that there was no basis in the instant case for treating any of the four appellants differently from the others.
>
> Held, further, there being no exceptional circumstances present in the instant case, that the death sentence was the only proper sentence in respect of all four appellants."

4 3 The death sentence

It is clear that the death sentence could have been passed in these cases. Those parts of the decisions are now academic, but *non constat* that the principles enunciated in them are not applicable in today's debate on a proper sentence. The judge said those principles were that the ultimate sentence, whatever it was, should be considered in the light of the revulsion of society to these crimes and that the emphasis of punishment in such cases was on deterrence and retribution. He remarked:

> "I am not a protagonist for the return of the death penalty. I am not and have not been an abolitionist. However, when one looks at the facts of this case it is difficult to imagine that accused 4, the instigator of this contract murder, would have had the courage to have conceived his plan and gone through with all its deceptions if he had known that the ultimate sentence probably awaited him. It serves no purpose to say that the death sentence would probably have been considered and might have been passed in this case. There is no death sentence in this country. Therefore, the debate is once again academic. But, I would be remiss in not saying that this case and the blameworthiness of accused 4 in this crime certainly make out a case for those who clamour for the return of the death sentence in this country on a selective basis. If the death penalty had been in existence, it might very well have had a deterrent effect on the premeditated plans of accused 4."

4 4 The ultimate sentence today

The "vacuum left by the abolition of the death sentence", as the judge called it, gave rise to a somewhat ironic debate in court. Counsel for Accused 4 suggested that life imprisonment was an inappropriate sentence, and so did counsel for the state – except that it was argued on behalf of Accused 4 that it would be too long

a sentence, and on behalf of the state, too short. The question is: how can a sentence of lifelong imprisonment be too short? As counsel for the state suggested, life imprisonment would not be an adequate sentence for Accused 4, since that sentence would be subject to the Parole Board's decision after twenty years despite the judge's recommendations. A recommendation by the judge that the accused be detained longer than twenty years would have no statutory force. The state argued that the most serious sentence that could in the present circumstances be passed was long-term imprisonment which would not be subject to the Parole Board's decision twenty years hence (as would be the case if lifelong imprisonment were to be imposed).

4 5 The parole system

4 5 1 Current position

As is mentioned above, the current policy of the Parole Board as regards a sentence of life imprisonment is that parole will be considered for the first time after twenty years of imprisonment, at which time a prisoner can be released. A recommendation by the judge that parole be considered only after a period of more than twenty years can be taken into account by the Parole Board, but this is not mandatory.

With regard to a determinate term of imprisonment, section 65(4)(a) of the Correctional Services Act 8 of 1959 stipulates that sentenced prisoners with determinate sentences are eligible for parole after half of the sentence has been served. No recommendations are provided for by statute in respect of non-parole periods.

4 5 2 The position in terms of Act 87 of 1997

The Parole and Correctional Supervision Amendment Act 87 of 1997 has been assented to by the President, but has not yet been promulgated. If enacted, it will be applicable to all prisoners in prison at that stage.

With regard to life sentences, section 9(d)(v) amends section 65 of the 1959 Act to the effect that a prisoner will not be released on parole before he or she has served twenty five years of his/her sentence. The judge's recommendation will be made law. Section 22 of the new Act inserts section 276B into the Criminal Procedure Act 51 of 1977, and provides that a court which sentences an accused to a term of imprisonment may, as part of the sentence, determine a period during which a prisoner may not be released on parole (known as the non-parole period). It further stipulates that the non-parole period may not exceed two-thirds of the imposed sentence or twenty-five years, whichever is the shorter. Sections 7 and 8 stipulate that in the case of a prisoner serving a life sentence, the Parole Board must submit a report on the possible release and conditions under which such a prisoner will be released to the court which sentenced the prisoner. Such a court may then order the release of the prisoner on parole and set the conditions.

With regard to a determinate sentence, parole will be considered after half the sentence has been served, except if section 276B is applicable (as explained above). If a court determines a non-parole period in terms of section 267B of the Criminal Procedure Act, it is binding on the Parole Board.

In this case, however, the judge could not impose a sentence on the basis of an Act not yet in force.

Counsel argued that the sentences of the accused should not be "loaded" to counter the current system of parole, since that system could change tomorrow and then a prisoner would serve an unjustly long sentence. In this case Stafford J imposed the sentences on the basis of the current parole system. The judge said (in respect of Accused 4) that he had to pass a sentence which would effectively remove him from society for a long enough period for him not to be a realistic danger to society. He stated:

> "Life imprisonment was considered, but the present inadequate and unsatisfactory legislation could lead to accused 4 being released, for instance, before accused 2 and if for any rhyme or reason, accused 1 and 3 are not paroled before twenty years, accused 4's life sentence might turn out to be less than their sentences of twenty five years."

However, as reflected in the sentence, the judge did take the age of the accused into account and said that he hesitated to pass a sentence which would exceed the accused's life expectancy.

4 6 Individualising the sentences

The judge approached the blameworthiness of each accused separately, differently and on the basis of the facts that were relevant to their complicity in the conspiracy. We will highlight only a few aspects.

A forensic psychiatrist was called on behalf of Accused 1 for purposes of mitigation, who diagnosed the accused as suffering from a mood disorder which he described as depression. The accused was found to have suffered from depression at the time of the perpetration of the offence and was still suffering from it when tried in court. The psychiatrist did not suggest that Accused 1's criminal responsibility was reduced in any way by the said condition nor did he suggest that the depression in itself was mitigatory of any sentence for Accused 1's role. However, depression seen in conjunction with three other factors was held to be in fact mitigatory. The unique relationship that existed between the doctor and his patient, the continued administration of drugs such as Rohypnol and Anafranil by Accused 4, and Accused 1's dependent personality made him susceptible to his doctor's suggestions and less able to resist Accused 4's pressure. Furthermore, it was found in mitigation that Accused 1 showed remorse, which the judge defined as meaning that he would be unlikely to commit such crimes again, and that he was capable of rehabilitation.

A forensic criminologist was called on behalf of Accused 3 for purposes of mitigation. This report stated that Accused 3 had been in dire financial straits, and therefore extremely vulnerable to any money-making suggestions and that it was vulnerability rather than inherent evil that precipitated his participation. The judge accepted this evidence and in addition found that Accused 3 was remorseful to a degree.

Perhaps to underline what was said above with regard to the parole system, it may be mentioned that Accused 2 had sixteen previous convictions of violence against property and persons, including two convictions for rape. Within a year of being paroled for rape, and with little or no persuasion, he was not only prepared to kill for money, but in fact actually committed the heinous murder. The judge stated that this placed him in the category of a recidivist who does not respond to any form of punishment.

Accused 4 persisted in his innocence, which is his right. But, in the light of this, the judge could find no suggestion of remorse. He defined true remorse as

an indication that it is improbable that an accused will ever commit a similar crime again; without remorse, no rehabilitation is possible. In fact, in Accused 4's case, he found several aggravating factors: first, to plan the death of one's wife, the mother of one's children; secondly, to go to the lengths of persuading one's psychiatric patient to obtain hired killers; thirdly, the offering of a reward to bring this about; fourthly, the subterfuge of driving around in the car for almost six hours with Accused 3 in furtherance of the conspiracy; and fifthly, Accused 4's deliberate lies to the police, not only about his lack of knowledge of where his wife could be found, but his deliberately false statements aimed at putting the investigators off the trail.

Accused 4 had conceived, initiated and instigated these crimes. In this sense the judge held him, the hirer, to be morally more blameworthy than his footsoldiers.

All the accused were sentenced to fifteen years' imprisonment on the count of kidnapping, but these sentences were ordered to run concurrently with the murder sentences. Accused 1 and 3 were sentenced to twenty-five years each. Accused 2 was sentenced to forty years' imprisonment, with a recommendation that he be detained for thirty years without being considered for parole. Accused 4 was sentenced to fifty years' imprisonment, with a recommendation that he be detained for thirty-five years without being considered for parole.

Accused 1, 3 and 4 applied for leave to appeal, but it was denied. Stafford J held that another judge would not impose different sentences.

5 Conclusion

We have sketched the grim facts of this case: an affluent psychiatrist who, in financial difficulties, influenced his patient to obtain the services of killers to kill his wife, presumably in order to get his hands on the insurance money; a poor uncle who, extremely vulnerable to money-making suggestions, agreed to assist in the murder; and an even poorer ex-convict who, less than a year after being paroled for rape, was prepared to kill for money.

The judge found all the accused guilty and imposed sentences reflecting society's revulsion to such deeds by emphasising the deterrent and retributive objects of punishment. The judge did not over-emphasise the difference between Accused 4 on the one hand and Accused 1, 2 and 3 on the other hand, but he did attribute the conception, initiation and instigation of the crime to Accused 4 and in this sense held him to be more blameworthy than the others.

The difference in the imposition of a sentence and its implementation once again became clear in this case. In passing sentence, the judge considered what sentence would be considered as the ultimate sentence in South Africa today, in the light of the abolition of the death penalty. He also referred to the inadequacy of the current parole system. One may conclude that under the current system of parole, the ultimate sentence is one of long-term imprisonment rather than imprisonment for life.

Whilst acknowledging the academic nature of his remark, the judge remarked on the possible deterrent value of the death penalty in cases of pre-meditated crime. However, these comments on the death penalty by judges (Curlewis J eg, has recently made much stronger remarks on the abolition of the death penalty), albeit of an academic nature, and remarks on the parole system such as in this case, seem to signify judges' frustration with imposing "paper sentences". They are evidently not satisfied with the way in which the effect of their sentences is

completely thwarted by political and administrative procedures. In addition, it seems that they are sending a message to the authorities that the high incidence of crime in the country needs to be addressed urgently.

The envisaged parole system will address this concern of judges to the extent that it will give the courts the power to determine the actual period (non-parole period) that prisoners must effectively serve. This decision of the trial judge will be binding on the Parole Board. Moreover, the discretion actually to grant parole to a prisoner will also lie with the trial judge. The Parole Board's decision with regard to parole will, namely, be subject to the decision of the court that sentenced the prisoner. These measures do seem to constitute an improvement, but are not without practical problems either.

JANNET DU PLOOY-GILDENHUYS
MARIÉ BLACKBEARD
University of South Africa

STRAFREGTELIKE RESPEKTERING VAN JEUGDIGES SE REG OP PSIGOSEKSUELE SELFBESTEMMING*

BGH, Urt v 19/11/1996, NStZ-RR 1997, 1998

1 Inleiding

Uit dié saak wat aan die einde van 1996 voor die *Bundesgerichtshof* (*BGH*) in Duitsland gedien het, blyk dat die beskuldigde deur die *Landgericht* (*LG*) te Konstanz op agt klagtes van oortreding van artikel 182(2) van die Duitse Strafwetboek (*Strafgesetzbuch: StGB*) skuldig bevind is deurdat hy sy 14-jarige stiefdogter wat onder sy toesig was seksueel misbruik het. Daar was getuienis voor die hof dat die inisiatief tot die seksuele handelinge vanaf die dogter gekom het en dat sy reeds voorafgaande seksuele ervaringe van dié aard gehad het. Die vraag of laasgenoemde twee faktore 'n invloed op strafregtelike aanspreeklikheid behoort te hê, word hier onder die loep geneem.

2 Die Duitse reg

Verskeie bepalings van die *StGB* is hier ter sake. Artikel 176 *StGB* stel strafbaar diegene wat seksuele handelinge met 'n kind onder die ouderdom van 14 jaar pleeg of teenoor hom/haar of 'n derde deur die kind laat pleeg. Die verdere detail van hierdie artikel is nie vir onderhawige doeleindes relevant nie (sien ook a 180 *StGB* en Schönke, Schröder en Lenckner *Strafgesetzbuch. Kommentar* (1997) 1288 1307). Artikel 182(2) *StGB* stel strafbaar 'n persoon, ouer as 21 jaar, wat 'n

* Dank word hiermee uitgespreek teenoor die Alexander von Humboldt-Stiftung en die Universiteit van Pretoria wat my in 1997 finansieel in staat gestel het om 'n deel van dié navorsing aan die Ludwig-Maximilians Universität in München, Duitsland te kon onderneem. Die menings hierin uitgespreek verteenwoordig nie noodwendig dié van genoemde instansies nie.

jeugdige onder die ouderdom van 16 jaar misbruik deur seksuele handelinge met hom/haar te pleeg of met 'n derde te laat pleeg en daardeur die ontbrekende vermoë van die slagoffer tot seksuele selfbestemming uitbuit. Blykens artikel 182(3) *StGB* word 'n beweerde oortreding van artikel 182(2) *StGB* slegs op aanvraag vervolg, tensy die vervolgingsverantwoordelike weens die besondere openbare belang 'n ingryping vanuit openbare gesag as gebiedend beskou. Die hof kan in ieder geval van bestraffing afsien indien, in die lig van die gedrag van die persoon teenoor wie die daad gerig is, die onreg gering is (a 282(4) *StGB*). Daar kan hier terloops vermeld word dat geslagsmisdade tans in die Duitse reg so omskryf word dat beide geslagte, ongeag die geslag van die dader, beskerm word (sien Helmken "Vergewaltingungsreform und kein Ende?" 1995 *ZRP* 303; Labuschagne "Sexual orientation, sexual autonomy and discrimination in definition of crime" 1996 *SAJHR* 321).

In die saak waarmee die onderhawige bespreking ingelei is, wys die *BGH* daarop dat die *Landgericht* beslis het dat, nieteenstaande die feit dat die "slagoffer" aanleidend tot die seksuele handelinge was, die dader die toenadering moes weerstaan het, aangesien sy slegs 14 jaar oud was en bloot op grond van haar ouderdom nie tot seksuele selfbestemming in staat was nie. Hierdie siens-wyse kan volgens die *BGH* nie stand hou nie. In geval van kinders onder die ouderdom van 14 jaar, gaan artikel 176 *StGB* onweerlegbaar van die standpunt uit dat hulle nie tot seksuele selfbestemming in staat is nie. By jeugdiges, dit wil sê vanaf bereiking van die ouderdom van 14 jaar, is die posisie egter anders. By hulle kan die vermoë tot seksuele selfbestemming teenwoordig wees, maar dit moet in elke besondere geval konkreet vasgestel word (vgl ook *BGH*, Beschl v 23/1/1996, NJW 1996, 1294; *BGH*, Beschl v 20/7/1995, NStZ 1996, 32). Die feit dat die stiefdogter reeds vorige seksuele ondervindinge gehad het, kan tot 'n bevinding van 'n vermoë tot seksuele selfbestemming aanleiding gee. 'n Teenoorgestelde aanname, naamlik dat die vorige seksuele ervaringe daarop dui dat sy reeds vroeër slagoffer van 'n seksmisdaad was, behoef 'n uitdruklike bevinding en motivering. By twyfel kom die voordeel die beskuldigde toe. Dit wat in die geval van persone bo die ouderdom van 14 jaar bestraf word, is nie geslagsdade as sodanig nie, maar die seksuele uitbuiting of misbruik van die jeugdige (sien ook Labuschagne "Strafregtelike beskerming van kinders teen seksuele misbruik in 'n multikulturele gemeenskap" 1997 *SALJ* 276).

3 Die Suid-Afrikaanse reg

Geslagsomgang met 'n meisie onder die ouderdom van 12 jaar was in ons gemenereg as *stuprum qualificatum* strafbaar (sien *D* 48 19 38 3; Mommsen *Römisches Strafrecht* (1899) 792; Voet *Commentarius ad pandectas* (1707) 48 5 2; Matthaeus *De criminibus* (1661) 48 3 5 8; Carpzovius *Rerum criminalium* (1758) *qu* 69 37–46; Van Leeuwen *Censura forensis* (1741) 1 5 23 9; Labuschagne "Enkele strafregtelike aspekte van ontug met jeugdige meisies" 1974 *Speculum Juris* 41–43). In ons gemenereg was die uitbuiting van 'n gesags- of afhanklikheidsverhouding vir seksuele doeleindes insgelyks onder *stuprum qualificatum* strafbaar (sien *C* 9 10; Voet 48 5 2; Matthaeus 48 3 58; Carpzovius *qu* 69 23; Van Leeuwen 1 5 23 9; Labuschagne "Strafbaarheid van die seksuele uitbuiting van 'n gesagsverhouding" 1993 *De Jure* 444–445). Die gemeenregtelike misdaad *stuprum qualificatum*, of soos Arntzenius (*Institutiones juris Belgici* (1963-uitg) 2 3 5) dit noem, "gequalifiseerde hoererijen", het in Suid-Afrika (geleidelik?) gedisintegreer. Geslagsomgang met 'n meisie onder die

ouderdom van 12 jaar is, in stryd met beide die Romeins-Europese reg en die Engelse reg, deur ons howe as 'n vorm van verkragting strafbaar gestel (*Socout Ally v R* 1907 TS 336 338; *R v Z* 1960 1 SA 739 (A) 743; Labuschagne 1975 *Speculum Juris* 52-56). Die misbruik van 'n gesags- of afhanklikheidsverhouding vir doeleindes van geslagsomgang kan tans in ons reg as verkragting strafbaar wees (sien *S v S* 1971 2 SA 591 (A) 597; *S v Faassen* 1989 2 PH H54 (A); Labuschagne 1993 *De Jure* 445). Geslagshandelinge wat nie geslagtelike penetrasie tot gevolg het nie, kan in beide bogenoemde gevalle as onsedelike aanranding strafbaar wees (sien Labuschagne "Onsedelike aanranding, geweldadige geslagsomgang en misdaadsistematiek" 1988 *Obiter* 87). By meisies onder die ouderdom van 12 jaar word deurgaans met 'n afwesigheid van toestemming-fiksie gewerk.

Artikel 14 van die Wet op Seksuele Misdrywe 23 van 1957 beskerm seuns en meisies onder 16 jaar strafregtelik teen buite-egtelike geslagsgemeenskap asook seuns en meisies onder die ouderdom van 19 jaar teen heteroseksuele en homoseksuele "onsedelike of onbehoorlike dade". Dit stel 'n verweer daar indien die "slagoffer" ten tyde van die daad 'n prostituut was, die dader onder die ouderdom van 21 jaar was en hy vir die eerste keer aangekla word. By hierdie verweer is iets van die respektering van die reg op seksuele selfbestemming van 'n jeugdige te bespeur, maar dan ook net ten aansien van 'n prostituut. Die ouderdomsgrense blyk grootliks arbitrêr te wees (sien Labuschagne "Ouderdomsgrense en die bestraffing van pedofilie" 1990 *SAS* 20); Louw "Sexual orientation and the age of consent" 1994 *SACJ* 132).

4 Ondergeskikte posisie van die vrou en paternalisme

Die vrou se seksuele integriteit, in besonder haar baarvermoë, het oorspronklik aan 'n ander, naamlik 'n man of 'n groep wat in ieder geval deur mans beheer is, behoort (Labuschagne "Regakkulturasie, lobolo-funksies en die oorsprong van die huwelik" 1991 *THRHR* 545). Vroue is, en word tot op die hede, as deel van die buit van diegene wat as oorwinnaars uit 'n oorlog tree, beskou (sien Schneider "Vergewaltigung in kriminologischer und viktimologischer Sicht" in Schwind (red) *Festschrift für Günter Blau* (1985) 341; Labuschagne "Verkragtingsfantasieë en toestemming in die strafreg" 1992 *SAS* 72; Labuschagne "Geregtigheidsdinamiek van die vroutipiese" 1996 *SAPR/PL* 240). Die ontwikkeling en huidige stand van die omskrywing van geslagsmisdade kan slegs na behore begryp word teen die agtergrond van die sosio-juridiese ondergeskikte posisie wat die vrou tradisioneel beklee (vir meer inligting hieroor sien Labuschagne "Die penetrasievereiste by verkragting heroorweeg" 1991 *SALJ* 148; "Verkragting in die inheemse reg: Opmerkinge oor die oorsprong van vroulike ondergeskiktheid in misdaadomskrywing" 1994 *Obiter* 85; "Die rol van die strafreg in versekering van die vrye psigoseksuele ontplooiing van kinders" 1996 *SALJ* 585; Labuschagne en Van den Heever "Liability for adultery in South African indigenous law: remarks on the juridical process of psychosexual autonomisation of women" 1997 *CILSA* 95–96). Die opkoms en ontplooiing van die vrou se reg op psigoseksuele selfbestemming het in 'n toenemende mate die effek dat geslagsmisdade heromskryf en herinterpreteer word (vgl hieroor Tügel en Heilemann *Frauen verändern Vergewaltiger* (1987) 12 ev; Sick *Sexuelles Selbstbestimmungsrecht und Vergewaltigungsbegriff* (1993) 336; Labuschagne "Verkragting deur 'n late?" 1995 *SALJ* 217 en "Die opkoms van 'n abstrakte penetrasiebegrip by geslagsmisdade" 1997 *SALJ* 461).

5 Gevolgtrekking

Uit die uitspraak van die *BGH* in die saak waarmee die onderhawige bespreking ingelei is, blyk dat die vermoë tot psigoseksuele selfbestemming van kinders bo die ouderdom van 14 jaar in Duitsland strafregtelik erken en gerespekteer word (sien ook die Kanadese saak *R v Galbraith* (1994) 90 CCC (3d) 76 (Ontario CA)). Dit bevestig 'n standpunt wat ek vroeër ingeneem het, naamlik dat hoewel jeugdiges teen seksuele misbruik beskerm moet word, dit nie beteken dat hulle (natuurlike) psigoseksuele ontplooiing deur die strafreg onderdruk of geskend mag word nie ("Die rol van die strafreg in versekering van die vrye psigoseksuele ontplooiing van kinders" 1996 *SALJ* 588–589). Dit geld vir albei geslagte en enige vorm van seksuele oriëntasie (sien verder hieroor Schroeder "Das 29 Strafrechtsänderungsgesetz – a 175, 182 StGB" 1994 *NJW* 1501; Labuschagne "Sexual orientation, sexual autonomy and discrimination in definition of crime" 1996 *SAJHR* 323; Schutte-Heide-Jorgensen "Recht op homohuwelijk?" 1997 *Ars Aequi* 86 91).

JMT LABUSCHAGNE
Universiteit van Pretoria

[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Learned Hand J in Cabell v Markham *148 F 2d 727 (2nd Cir 1945) 739.*

BOEKE

HENOCHSBERG ON THE CLOSE CORPORATIONS ACT VOLUME 3

by PM MESKIN assisted by JA KUNST

Butterworths Durban 1997

Price R262, 20 (looseleaf)

At present, *Henochsberg on the Close Corporations Act Volume 3* authored by PM Meskin (a High Court judge), and assisted by JA Kunst (an attorney) consists of four parts. The first contains all the sections of the Close Corporations Act 69 of 1984 (as amended) with commentary. The second part contains the Appendices: Appendix 1 includes the Close Corporation Administrative Regulations and Forms, and Appendix 2 details the professions whose members qualify for appointment as accounting officers in terms of section 60 of the Close Corporations Act. The last two parts of the publication contain the Table of Cases and the Index.

According to the preface, the aim of the work is to analyse the sections of the Close Corporations Act critically, with particular attention to the practical application of the provisions of the Act. The author seeks to achieve this in the part of the work containing the provisions of the Close Corporations Act and the explanatory notes relating to each section of the Act. Each commentary not only contains a general comment on the section to which it relates, but also includes references to provisions in other statutes which may be of importance in the particular context, as well as references to any relevant administrative regulations and forms. These will serve as a comprehensive and easily accessible aid to any practitioner involved with close corporations.

Further, the author frequently identifies possible problems with the interpretation of a section. He then sets out any arguments relating to it clearly and concisely. Reference is made to the intention of the legislature, cases on the section and relevant articles and comments made by other authors. The author finally suggests his own well-reasoned interpretation.

In conclusion, I think it may be said that the author has achieved his aim. *Henochsberg on the Close Corporations Act Volume 3*, a looseleaf publication, is a welcome addition to the two volumes of *Henochsberg on the Companies Act*.

SM LUIZ
University of South Africa

BEGINNER'S GUIDE FOR LAW STUDENTS/BEGINNERSGIDS VIR REGSTUDENTE

by DUARD KLEYN and FRANS VILJOEN

Second edition; Juta, Cape Town 1998; ix and 336 ix en 340 pp

Price R120,00 (soft cover)

The second edition of this successful beginner's guide to South African law and legal studies will be welcomed by lecturers at South African universities. The basic format of the book is the same as that of the first edition; however, there are a few changes and some important additions in the second edition. This review will focus on these, since the first edition was reviewed in this journal.

Perhaps the most important change was brought about by the coming into force of the 1996 (final) Constitution. This necessitated a rewrite of sections of chapter 13 of the first edition (chapter 14 in the second edition) as well as the incorporation of new material. Included in these are sections on the legislative, executive and judicial authority, traditional leaders and the eleven official languages. One cannot help but admire the ability of the authors to set out our constitutional history as well as the basic principles and provisions of the final Constitution in fewer than 20 pages. Chapter 15, which deals with human rights, follows logically on this exposition of the Constitution and, once again, a short (historical) philosophical background is provided. This chapter focuses, amongst other things, on the different "generations" of rights, as well as the limitation of rights, the application of human rights (with reference to vertical and horizontal application) and the interpretation of the Bill of Rights. Throughout the discussion, the relevance of this for every citizen is brought home by illustrations from our case law where the Bill of Rights has already had an impact on South African law.

Another innovation in the second edition is the inclusion of chapter 10: Law and the Business World. In this chapter the basis of business transactions, namely the contract, is discussed, as well as the different forms of entrepreneurship. In an interesting scenario, the growth of A's business (as well as the legal implications) from a single-owner enterprise to a partnership, to a close corporation and, eventually to a company, is explained by means of illustrations that will strike a familiar chord with everyone. This down-to-earth approach will definitely go a long way towards dispelling the myth that "business and business law" is the domain of corporate men in suits.

On a more general note, the language is accessible and the presentation user-friendly. But above all, the material is made relevant by the inclusion of examples of everyday legal documents, such as wills and contracts. An interesting feature is the use of newspaper clippings about the law and legal issues. These newspaper extracts are used as a device to stimulate critical thinking in the reader's mind, as well as to present a "worldly" perspective of the law. At a time when the credibility of our law and legal system has become a favourite subject of debate, the would-be lawyer must be equipped to enter the debate at any level.

I am convinced that this book will not only provide students with the legal knowledge to do this, but also with the necessary skills. And, even though the work is aimed at beginner students, there is enough to stimulate the more advanced "non-lawyer" reader who is seeking a basic understanding of the workings of South African law. Thus the authors could have cast their net wider than the first-year law student in the preface to the work.

A point of criticism that may be levelled against the work is that it has no index. An index of limited scope would definitely have added to its user-friendliness and would have ensured that lawyers (other than beginner students) also use the book, albeit for background reading or for touching up on basic principles. A consolidated list of all sources used (which is at present provided at the end of each chapter) would also not have come amiss. A worrying aspect – for this reviewer – is the quality of the paper. Better quality paper will, of course, have an impact on the price, but will the paper used for this edition withstand the onslaught of eager students when it comes to marking text for study purposes?

In conclusion, this is a most enjoyable read, even for the more experienced and advanced lawyer. It constantly engages the reader/student by asking the questions that need to be answered today. The authors can rightly be proud of their work and lecturers at South African universities can prescribe it with confidence.

ELSABE SCHOEMAN
University of South Africa

Illegal income and remunerative loss – III: Loss of lawful earning capacity*

Mervyn Dendy
BCom LLB
Associate Professor of Law, University of the Witwatersrand, Johannesburg

OPSOMMING

Onwettige inkomste en beloningsverlies – III: Verlies van vermoë om wettig te verdien

Die weiering deur die howe om skadevergoeding vir beloningsverlies toe te ken tensy afhanklikes kan bewys dat die tersaaklike kontrakte deur hulle oorlede broodwinner aangegaan regtens afdwingbaar is, is heftig deur akademiei gekritiseer, en wel om drie redes: eerstens druis dit in teen die kriterium van verlies van verdienvermoë wat deur die appèlafdeling in menige sake goedgekeur is; tweedens is dit onbillik om sy onskuldige afhanklikes met die misdaad van die broodwinner te besoek; derdens word die afhanklikes se reg op onderhoud aangetas en skadevergoeding moet vir die gevolglike verlies van onderhoud toegeken word. Derhalwe word beweer dat skadevergoeding op grond van die verlies van die broodwinner se vermoë om *wettig* te verdien, bereken behoort te word. Uit 'n sorgvuldige bestudering van die uitsprake in *Dhlamini v Protea Assurance Co Ltd* 1974 4 SA 906 (A) en sake wat op *Dhlamini* gevolg het, blyk dit dat skadevergoeding ontsê is bloot omdat dit op grond van onwettige beloning self bereken is. Die howe het in der waarheid nooit die moontlikheid van toekenning van skadevergoeding vir verlies om wettig te verdien uitgesluit nie. Inteendeel: Suider-Afrikaanse howe het in verskillende beslissings wat sedert 1991 gelewer is, skadevergoeding vir verlies van wettige verdienvermoë toegeken. Hierdie nuwe beleidsrigting moet ondersteun word aangesien dit 'n *via media* bied tussen enersyds die nie-toekenning van skadevergoeding in alle sake van onwettige beloning en andersyds die afdwingbaarheid van verbode kontrakte vir alle doeleindes.

2 2 2 Criticism

The judicial policy of denying damages outright to the dependants of earners of illegal income unless the plaintiff(s) can show that the income-producing transactions in question are legally enforceable, has come in for severe criticism from academic lawyers, for the following reasons.

First, the principle adopted in *Santam Insurance Ltd v Ferguson*, being based upon the reasoning in *Dhlamini*, is inconsistent with the adoption by the

* The financial assistance of the University of the Witwatersrand, Johannesburg, the Centre for Science Development (HSRC, South Africa), the Board of Control of the Attorneys Fidelity Fund and the Mellon Foundation towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at are those of the author and are not necessarily to be attributed to the University, the Centre for Science Development, the Board of Control of the Attorneys Fidelity Fund or the Mellon Foundation.

Appellate Division of loss of earning capacity as the basis of the claim by the income-earner or his dependants.[210] For although it was utilised illegally, the breadwinner's earning capacity has still been lost and for that there must be compensation. And if the income-earner is no longer alive to seek damages himself, his dependants must surely be held entitled to receive damages representing the share of the proceeds of the deceased's earning capacity that would have been their due had he lived[211] – the approach of the Appellate Division in *Shield Insurance Co Ltd v Booysen*.[212] After all, if the income-earner were alive and were sued by his dependants for maintenance, he could not escape liability for support by pleading that his income was illegally earned.[213]

Secondly, it is both unfair and contrary to legal policy to visit upon dependants the sins of their breadwinner, especially since, as Vos J observed in *Ferguson*,[214] the dependants may be unaware that the income used to support them was tainted.[215] (And even if they did know that it was earned illegally, they may in consequence have been occasioned "more heartache and worry than anything else".)[216] This consideration applies with equal force whether or not the deceased could himself have recovered the proceeds of his illegal activities.

Thirdly, whether the breadwinner's income was earned legally or unlawfully, his dependants sue, if he is killed, for the loss of their *right* to claim support from him. Where the dependants, not being the spouse or children of the breadwinner, lack any claim for support against his deceased estate,[217] the action of the tortfeasor in causing the breadwinner's death extinguishes completely the right of his dependants to receive support from him. Where the dependants, being the spouse or children of the deceased breadwinner, enjoy a right to maintenance from his estate,[218] the action of the tortfeasor in negligently killing the

---

210 See critieism (iv) of the deeision in *Dhlamini* in the first artiele of this series. Cf, however, the remarks of Aaron AJ in *Carstens v Southern Insurance Association Ltd* 1985 3 SA 1010 (C) 1020D–H.

211 See eg Boberg *Delict* 594; Koch *Damages for lost income* (1984) 168; Neethling *et al Delict* 229; Neethling *et al Deliktereg* 235; Blommaert "*Booysen v Shield Insurance Co Ltd* 1980 3 SA 1211 (SOK)" 1981 *TSAR* 176 ("Blommaert") 180; Claasen "Skadevergoeding weens die verlies aan toekomstige verdienste of onderhoud, en onregmatige bedrywighede in die verlede" ("Claasen 'Skadevergoeding'") 1984 *THRHR* 439 446; Claasen "Weer eens skadevergoeding weens die verlies van toekomstige verdienste of onderhoud, en onwettige inkomste in die verlede" ("Claasen 'Weer eens skadevergoeding'") 1986 *THRHR* 343 343–344, 346; Dendy "Loss of support" 248–249; Roos and Clark "The law of delict and the illegal breadwinner" 1987 *THRHR* 91 97; Reineeke "Nabetragtinge oor die skadeleer en voordeeltoerekening" 1988 *De Jure* 221 ("Reineeke") 237.

212 1979 3 SA 953 (A) 964B.

213 See Claasen "Weer eens skadevergoeding" 345; Reineeke 238.

214 1985 1 SA 207 (C) 208I–209A.

215 Boberg *Delict* 593; Davel *Skadevergoeding* 144; Blommaert 179; Claasen "Weer eens skadevergoeding" 345, 347; Dendy "Loss of support" 248.

216 Boberg *Delict* 593.

217 *Glazer v Glazer* 1963 4 SA 694 (A) 706H–707D; Boberg *Persons* 283–284. On the position of the surviving spouse, see the next footnote.

218 *Carelse v Estate De Vries* (1906) 23 SC 532 first recognised such a right as aeeruing to minor children; *Ex parte Jacobs* 1982 2 SA 276 (O) and *Hoffmann v Herdan* 1982 2 SA 274 (T) extended it to major children. By means of the Maintenance of Surviving Spouses Aet 27 of 1990, Parliament vested in the surviving spouse a right of aetion against the estate of the deeeased spouse for the provision of the survivor's reasonable

continued on next page

breadwinner robs the dependants of their right to support to the extent that the breadwinner himself would have been able to render support but his estate is unable to do so.[219] "What [the dependant] has lost", said Holmes JA in *Peri-Urban Areas Health Board v Munarin*,[220] "is a right – the right of support"; for that loss there must be compensation.

3 THE PROPER APPROACH, AND CASES THAT HAVE FOLLOWED IT

Assuming that the criticisms directed at the decisions in *Dhlamini* and *Santam Insurance Ltd v Ferguson* are well-founded, the question arises how damages in such cases are to be assessed. It must be noted, first, that in none of the cases in which the claims failed was it stated that compensation will not be claimable in illegal-income cases on any basis *whatsoever*: the courts have merely laid down that damages will not be awarded on the basis of the illegal earnings as such. Thus, in both *Dhlamini*, where the income-earner herself was refused damages, and *Mankebe*,[221] where the *Dhlamini* principle was applied to a claim on behalf of a child, the courts referred with approval to an Australian decision, *Meadows v Ferguson*,[222] to the effect that

> "if the conclusion is reached that the earnings of which the plaintiff has been deprived are earnings derived from an illegal employment or activity, I am of opinion that on grounds of public policy the court should not recognize *those earnings* as affording a proper basis for the award of damages".[223]

This statement cannot be read as authority for the proposition that the earner of illegal income cannot recover compensation at all; it simply says that damages cannot be awarded if they are calculated on the basis of the illegal income itself, leaving open the possibility that compensation may be awarded on some other basis. So, too, in *Dhlamini* itself, Rumpff CJ, after citing the above passage from *Meadows v Ferguson*, said:

> "Skade *wat bereken word volgens die maatstaf van inkomste verkry uit 'n aktiwiteit wat teen die goeie sedes of wat misdadig is*, sal . . . nie vergoed word nie . . . ."[224]

These *dicta*, it is submitted, cannot be read as authority for the proposition that the earner of illegal income cannot recover any damages *at all* for loss of income

---

maintenance needs until death or remarriage in so far as she is not able to provide for those needs from her own means and earnings. Generally on Act 27 of 1990, see Van Zyl "Maintenance" in Clark (gen ed) *Family law service* (1988) para C24; Barnard, Cronjé, Olivier *The South African law of persons and family law* (1994) by Cronjé 251–252; Visser and Potgieter *Introduction to family law* (1998) 188–189.

219 The right to receive support exists, in the latter case, only to the extent that the estate is able to provide it, for a duty of support never extends beyond the ability of the provider to discharge it (see Boberg *Persons* 249 fn 2).

220 1965 3 SA 367 (A) 376C. Cf *Groenewald v Snyders* 1966 3 SA 237 (A) 247B–C; *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) 851D–E, where Joubert JA spoke of the dependant's "verlies van haar reg op onderhoud". See Blommaert 177; Claasen "Skadevergoeding" 443; Claasen "Weer eens skadevergoeding" 345 347; Davel "*Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A)" 1986 *De Jure* 167 169; Dendy "Loss of support" 249 251; Reinecke 235 238.

221 1986 2 SA 196 (D).

222 [1961] VR 594

223 597–598, my emphasis.

224 1974 4 SA 915B–C; my emphasis.

that could have been earned by him during the period of his incapacitation. They state simply that damages cannot be awarded if computed on the basis of the illegal income that would otherwise have been earned, and leave open the possibility of recovering compensation calculated on some other basis. The second plaintiff (the income earner) in *Dhlamini* recovered no damages at all, precisely because there was no evidence to suggest that she could have earned income in some other, legitimate, way.[225] So also in *Booysen v Shield Insurance Co Ltd*, the seminal decision authorising the extension of the *Dhlamini* rule to dependants' actions, Addleson J stated that the degree of "illegality" which prevented recovery of the proceeds of the deceased's income-earning activities

> "seems to me . . . to preclude the dependant from relying on *the illegal income* as a basis for compensation".[226]

Again, this does not preclude *any* claim by the dependants, but merely one in which the damages have been assessed on the basis of the deceased's illegal earnings.[227]

In the light of the above, damages should surely be recoverable by dependants in illegal-earnings cases on the basis of what the deceased could *lawfully* have earned had he lived, *even where it is probable that he would in fact have continued to earn income illegally*. This approach takes cognisance of the fact that "there can hardly be anyone who, however illegal his actual income, does not also have the capacity to earn money by lawful means".[228] It is only when damages are claimed for a loss of earnings *per se* that the illegality or otherwise of the lost income is in issue at all. When compensation is sought for loss of earning capacity the matter does not arise, for by "earning capacity" must be meant the ability to earn income *lawfully*. Loss of lawful earning capacity is a sufficiently flexible criterion to enable the courts to steer between the two unacceptable extremes of, on the one hand, the enforceability for all purposes of illegal contracts and, on the other, outright invalidity in all cases, providing the *via media* referred to in the criticism of the decision in *Dhlamini* in the first article of this series.

It would be reasonable to assume that the breadwinner engaged in an illegal income-producing activity because the proceeds were higher than he could have received from putting his earning powers to lawful use. The damages awarded to breadwinners on the basis I have suggested will therefore in most cases be lower than compensation based upon the unlawful earnings themselves. Even the damages awarded to dependants for loss of support may, for this reason, sometimes be lower when compensation is assessed on the basis of the breadwinner's capacity to earn income lawfully than they would have been had the

---

225 911B. See also the argument of counsel for the respondent at 909H–*in fine*, in which loss of *lawful* earning capacity was clearly foreshadowed as a possible criterion for an award of damages in illegal-income cases.

226 1980 3 SA 1211 (SE) 1218A, my emphasis.

227 See also *Mba* 1981 1 SA 122 (Tk) 125D–E and *Mankebe*, in the latter of which Wilson J said: "I am satisfied that, in certain circumstances, a plaintiff can recover . . . damages even where the maintenance was derived illegally or from an illegal source" (1986 2 SA 196 (D) 203H–I).

228 Boberg *Delict* 594; cf *Booysen v Shield Insurance Co Ltd* 1980 3 SA 1211 (SE) 1215C; *Shield Insurance Co Ltd v Booysen* 1979 3 SA 953 (A) 965C–D; *Mba* 1981 1 SA 122 (Tk) 125H; *Ferguson v Santam Insurance Ltd* 1985 1 SA 207 (C) 208H–I.

assessment been based on his illegal earnings. The precise amount of the compensation awarded will rest upon the evidence placed before the court by the breadwinner or the dependants, as the case may be. The plaintiff will bear the onus of establishing, on a balance of probability, what the breadwinner could lawfully have earned, by adducing evidence of, for example, his educational, professional or trade qualifications, talents that he could lawfully have exploited, legal income-earning activities carried on by him, prospects that he may have had at the time of his injury or death of obtaining lawful employment, and the like. That such damages may be difficult to assess is clear; that the court may not for that reason adopt a *non possumus* attitude and refuse to make an award is, however, trite.[229] The approach I have outlined here may be readily adapted, by the making of an appropriate deduction from the award of damages, to cater for the contingency that the breadwinner's unlawful activities would have been stopped by the authorities sooner or later, or perhaps even that the income-earner may have been incarcerated for his unlawful behaviour and thus prevented altogether from earning a living for the period of his imprisonment.

These arguments, which enjoy the support of many South African legal academics, have borne judicial fruit in recent years. This first occurred in *Lebona v President Versekeringsmaatskappy Bpk*.[230] There the deceased had supported the plaintiff, his customary-law wife, out of his illegal earnings as an unlicensed hawker. In assessing damages for loss of the support to which the plaintiff would have been entitled from her husband had he not been killed, said Flemming J, the court had to enquire what his income would have been had he exploited his earning capacity lawfully.[231] The work which the breadwinner had been physically and mentally capable of doing, his qualifications and the available employment opportunities had all to be borne in mind,[232] as well as the fact that he was probably earning more from his illegal occupation than he would have earned from a lawful one.[233] In *Lebona*, however, the court had also to take into account the fact that if the deceased had not been killed in 1986, he would probably have been able to procure a hawker's licence by 1989, following a relaxation of the conditions for the granting of one.[234] The illegality of the means by which the plaintiff's keep was earned constituted no bar to an award of compensation for loss of support, since the deceased could not have resisted a claim for maintenance by the plaintiff by averring that his income was earned unlawfully.[235] Earlier decisions in which damages had been denied to breadwinners (eg the *Dhlamini* case) or their dependants (eg *Santam Insurance Ltd v*

229 *Hersman v Shapiro & Co* 1926 TPD 367 379; *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 198; *Anthony v Cape Town Municipality* 1967 4 SA 445 (A) 451B–C; *Southern Insurance Association Ltd v Bailey* 1984 1 SA 98 (A) 114pr. A similar exercise must be carried out when claims for loss of earning capacity are instituted on behalf of children who have been disabled and consequently prevented from earning a living when they reach adulthood. The task of quantifying damages in such instances is even more difficult than in cases of illegal income earned by adults, since the tender age of the child makes the process of computation far more speculative.

230 1991 3 SA 395 (W).

231 401J–402A, 402J–403A.

232 402A–B.

233 402J–403A.

234 404I.

235 403B–C, E–F, H–I.

Ferguson) were distinguished on the ground that the claims in those cases were based on the breadwinner's illegal earnings *per se*, rather than on what the breadwinner could lawfully have earned had he utilised his income-producing ability to the full.[236] The test of enforceability of the underlying income-earning transactions postulated in *Dhlamini* and applied in *Ferguson* could, said the court, be discarded in favour of a loss-of-earning-capacity approach.[237]

Next to follow the *Lebona* approach was De Villers J in *Dhlamini v Multilaterale Motorvoertuigongelukkefonds*.[238] There the deceased husband of the plaintiff had unlawfully operated a taxi without the requisite road-transportation permit, supporting the plaintiff and their children out of the income he earned by doing so. Since he was licensed to drive a taxi, however, and since work as a taxi-driver was readily available, the deceased could legitimately have earned the same income had he chosen to do so. That being so, said De Villiers J, it was likely that he would soon have taken up lawful employment as a taxi-driver,[239] and the fact that he worked illegally prior to his death could be taken into account as an indication of his capacity to earn income lawfully.[240] Damages for loss of support were therefore awarded, subject to a 30 per cent deduction to allow for general contingencies and for the deceased's transfer from illegal to lawful employment. For the reasons given in criticism of *Santam Insurance Ltd v Ferguson and Mankebe*, the decision in the second *Dhlamini* case must be welcomed. The contingency deduction made in *Dhlamini* is, however, open to criticism. No explanation is given in the judgment of De Villiers J why the deceased's expected change-over from illegal to lawful employment should have occasioned any interruption in the earning of income or in the provision of support by him. Had there been proof that, for example, the deceased's illegal operation of a taxi may have been stopped by the authorities or that he may have been incarcerated for contravening the Road Transportation Act 1977,[241] the deduction could properly have been made. Without such evidence, though, it was insupportable for, as the Appellate Division has acknowledged, "[i]t is ... erroneous to regard the fortunes of life as being always adverse: they may be favourable".[242] Nor was the agreement between counsel in *Dhlamini* that a contingency deduction should be made[243] a sound reason for doing so: an unwise and unwarrantable concession by plaintiff's counsel surely cannot absolve a trial court of its duty to dispense justice to his client, or bind the court to disregard Appellate Division *dicta*.

A year later, in *Xatula v Minister of Police, Transkei*,[244] damages for loss of support were awarded to the dependants of a deceased member of uMkhonto we Sizwe ("MK") after the latter had been killed in a confrontation with a member of the Transkeian Police, notwithstanding that at the time of the deceased's death

236 405C–E.

237 405E–F.

238 1992 1 SA 802 (T).

239 806H.

240 806G.

241 Act 74 of 1977.

242 *Southern Insurance Association Ltd v Bailey* 1984 1 SA 98 (A) 117B; cf *Ngubane v South African Transport Services* 1991 1 SA 756 (A) 781F–G.

243 806H–I.

244 1993 4 SA 344 (Tk).

his earnings as a soldier of MK were illegal because the African National Congress (ANC), of which MK formed part, was then banned in Transkei. Mall AJ took into account that the ANC had been unbanned before the commencement of the trial, and that the earnings of the deceased, had he lived, would consequently have been lawful from that time on.[245] The court emphasised that earlier decisions in which damages had been refused on account of illegality had been based on public policy, and "the doctrine of public policy ought not to be stretched beyond what is necessary for the protection of the public".[246]

In *Minister of Police, Transkei v Xatula*[247] Goldin JA, after an examination of South African, English, Canadian and Australian authority, held that a dependant is, in principle, entitled to recover damages for loss of support from a person responsible for the wrongful killing of her breadwinner notwithstanding that the income from which the deceased provided support was illegally earned: the focus of concern is the liability of the deceased to support his family, not the nature of the source from which his earnings were made. Thus a father could not refuse to pay maintenance by pleading that his available funds were derived from an unlawful activity. And, since the breadwinner is dead, there can be no question of his benefiting from his own illegal conduct. Decisions that have reached the opposite conclusion are "contrary to the nature and ambit of the [dependant's] action".[248] The decision in *Mba*[249] was accordingly overruled and the judgment in *Santam Insurance Ltd v Ferguson* not followed. The court, however, added the *caveat* that appropriate contingencies such as the possible incarceration of the breadwinner must be taken into account in assessing the *quantum* of the dependant's damages.[250] For the reasons adumbrated above the decision on appeal in *Xatula* is strongly to be welcomed.

4 CONCLUSION

Whether the Supreme Court of Appeal will follow the line of reasoning adopted in the new cases or continue to apply the old criterion of the enforceability of the underlying income-earning transactions, remains to be seen. But it seems that South African law is at last on the road to compensating earners of illegal income and their dependants, at least in part, and that the general principle that damages should be awarded for loss of earning capacity is finally asserting itself in this respect. One can but hope that the retrograde judgments of the Appellate Division in *Dhlamini* and *Ferguson* will meet their *quietus* when next the Supreme Court of Appeal is required to pronounce on the recoverability of damages in a case in which the breadwinner's income was being illegally earned.

245 348H–J.
246 349C–E.
247 1994 2 SA 680 (TkA).
248 683I–684E.
249 1981 1 SA 122 (Tk).
250 684D–F, H–I and 685E–F; cf Dendy "Loss of support" 251.

Naamsvoering en die behoefte aan 'n sosio-juridiese identiteit: 'n Regsantropologiese en menseregtelike perspektief*

JMT Labuschagne
MA DPhil LLD
Professor in Regspluralisme en Regshermeneutiek, Universiteit van Pretoria
bygestaan deur
P Bakker
BLC LLB
Voormalige assistent lektor, Universiteit van Pretoria

SUMMARY

Naming and the need for a socio-juridical identity: An anthropo-legal and human rights perspective

The individual's right to, as well as the state's interest in, a name identity is continuously being scrutinised worldwide. In this article the South African law in this regard is expounded, evaluated and compared to various other legal systems. Both past and projected changes are explained against the background of universal anthropo-legal proeesses operative in the soeio-legal value struetures of human soeiety, as well as against the eurrent human rights dispensation.

1 INLEIDING

Die individu se reg op, asook die gemeenskap en die staat se behoefte aan, 'n naam- en aanspreekidentiteit kom in 'n toenemende mate wêreldwyd onder die vergrootglas. Die relatief onlangse artikel deur Sonnekus[1] is, sover ons kennis strek, die eerste omvattende bydrae oor hierdie regsproblematiek in Suid-Afrika. 'n Belangrike rede vir die hedendaagse belangstelling in die kwessie van naamsvoering hang grootliks saam met die menseregtelike aandrang op gelyke behandeling van die geslagte en op individuele outonomie. In die lig hiervan maak

* Dank word hiermee uitgespreek teenoor die Universiteit van Pretoria wat 'n deel van dié navorsing aan die School of Law van die New York Universiteit en die College of Law van die University of Arizona (Tuscon) in die VSA in 1996 finansieel moontlik gemaak het. 'n Verdere deel van hierdie navorsing is in 1997 met finansiële ondersteuning van die Alexander von Humboldt-Stiftung en die Universiteit van Pretoria aan die Ludwig-Maximilians-Universität in Münehen, Duitsland, onderneem. Die menings hierin uitgespreek is egter nie noodwendig dié van genoemde instansies nie.

1 "Naamsvoering binne die familiereg – versoenbaar met fundamentele menseregte?" 1993 *TSAR* 608.

vroue al hoe meer aanspraak op 'n reg om 'n keuse uit te oefen oor die van (familienaam; geslagsnaam; toenaam) wat hulle na huweliksluiting gaan gebruik.[2] Die stygende getal egskeidings, tweede en verdere huwelike en buiteegtelike geboortes het daartoe aanleiding gegee dat 'n behoefte by veral moeders ontstaan het om veral die vanne van hulle kinders te verander.[3]

Amerikaanse howe het beslis dat 'n vader 'n billike prosesreg het om in kennis gestel te word van prosesse waarin sy kinders se name moontlik verander kan word.[4] Die fundamentele regte van die kind, insluitende dié van die buiteegtelike kind, tree in toenemende mate op die voorgrond.[5] Artikel 28(1)(a) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 bepaal tans uitdruklik dat elke kind 'n fundamentele reg op 'n naam het.

Individueel-menslike identiteit funksioneer op (ten minste) drie vlakke of in drie dimensies. In die eerste instansie het elke mens 'n biogenetiese identiteit, wat beskryf kan word as sy/haar kern- of pitidentiteit.[6] Dit word op verskeie wyses in die reg aangewend om 'n dader of ander betrokkene se identiteit te bepaal, soos by vingerafdrukke, bloed- en (ander) weefseltoetse.[7] Tweedens het elke mens 'n geestelike identiteit. Dit sluit in sy/haar kognitiewe kwaliteite, emosionele samestelling en lewenswaardes. Derdens het 'n mens ook 'n sosio-juridiese verwysings- of naamidentiteit, waarmee hy/sy in die sosiale en regsverkeer geïdentifiseer kan word.[8] Hierdie identiteitsdimensies of -vlakke van die mens funksioneer nie noodwendig afsonderlik van mekaar nie, maar is (of kan) interaktief en wedersyds komplimenterend wees.

Pacheco[9] wys daarop dat tradisies ten aansien van naamgewing aansienlik van kultuur tot kultuur verskil. Dit word naamlik onderlê deur voorvaderlike,

---

2 Kyk hieroor MacDougall "The right of women to name their children" 1985 *Law and Inequality* 91; Hough "Equal protection of the sexes in Kentucky: The effect of the *Hummeldorf* decision on a woman's right to choose her surname" 1982 *Northern Kentucky LR* 475.

3 Doll "Harmonizing filial and parental rights in names: Progress, pitfalls, and constitutional problems" 1992 *Howard LJ* 227; Dannin "Proposal for a model name act" 1976 *Journal of Law Reform* 153 167; *In re Saxton* 309 NW 2d 298 (Minn 1981), cert denied, 355 US 1034 (1982) bespreek deur ene BSS "Like father, like child: The rights of parents in their children's surnames" 1984 *Virginia LR* 1303.

4 Kyk by die beslissing van die Arkansas Supreme Court in *Carroll v Johanson* 263 Ark 280, 565 SW 2d 10 (1978) en die beslissing van die Illinois Supreme Court in *In re Marriage of Preston* 102 ILL 2d 303, 456 NE 2d 85 (1984) bespreek deur Shawler "Surname selection for the child of divorced parents: Honor the father vs the child's best interests" 1985 *Southern Illinois Univ LJ* 335. Kyk verder MacDougall 93.

5 Kyk BVerfG, Beschl v 5/3/1991, JZ 1991, 769 en Coester "Reform des Kindschaftsrechts" 1992 *Juristenzeitung* 809 815.

6 Griffiths, Miller, Suzuki, Lewontin en Gelbart *An introduction to genetic analysis* (1996) 4; Labuschagne "Menseregtelike en strafregtelike bekamping van groepsidentiteitmatige krenking en geweld" 1996 *De Jure* 23 35–39.

7 Kyk hieroor Labuschagne "Strafbewysregtelike aspekte van buite-gereg telike self-inkriminasie" 1980 *TSAR* 58 61–62; "Verpligte bloedtoetse by vaderskapgedinge?" 1993 *TSAR* 482.

8 Dannin 155. Vgl Adler *Der Namen im deutschen und österreichisehen Recht* (1921) 1: "Der Name hat die Ausgabe, den einzelen Menschen kurz zu bezeichen und ihn zugleich von allen anderen zu unterscheiden."

9 "Latino surnames: Formal and informal forces in the United States affecting the retention and use of the maternal surname" 1992 *Thurgood Marshall LR* 12.

religieuse en linguistiese gebruike. Volgens Thornton[10] vervul 'n naam, en in besonder 'n van, ten minste drie funksies ten aansien van kinders. Eerstens voorsien dit 'n kind van 'n identiteitskontinuering. Tweedens manifesteer 'n kind se van 'n binding of verhouding met sy (biologiese of psigologiese) ouers en identifiseer hom/haar as deel van 'n bestaande kerngesin. Indien hy/sy 'n ander van as sy ouers en ander gesinslede het, sou hy/sy probleme met integrasie in die gesinseenheid kon hê. Laastens sou 'n van welwillendheid en aanvaarding in die breëre gemeenskap kon bewerkstellig en later behulpsaam wees met die vestiging van meer beduidende verhoudings binne daardie gemeenskap. Vanne is in baie gevalle 'n bron van trots en prestige.[11] So verklaar Shakespeare in *Othello*:[12] "Good name in man and woman, dear my lord, Is the immediate jewel of their souls."

Dit is dan ook nie toevallig dat die woord "naam" dikwels as 'n sinoniem vir die woord "aansien" in verskeie tale gebruik word nie.[13]

Munday[14] wys daarop dat naamgewingspraktyke nie slegs beduidende kulturele en familiale aanwysers daarstel nie, maar dat 'n individuele naam, wat 'n voornaam insluit, "can both shape personality and influence others in the way they perceive the bearer of the name".[15]

'n Naam word beide as 'n sosiale en 'n juridiese wyse van identifisering aangewend.[16] Die reg erken name bloot as woorde wat 'n individu (of soms 'n groep) identifiseer en beskou die intrinsieke en persoonlike betekenis wat mense aan name heg as irrelevant. In die Kaliforniese saak *Emery v Kipp*[17] word dan ook opgemerk dat 'n naam, vir regsdoeleindes, "is not the person, but only a means of designating the person intended".[18] By die howe in die VSA kan in hoofsaak twee benaderings tot die funksie van 'n naam onderskei word. In die Alabama-saak *Esco v State*[19] word die een benadering, naamlik dat 'n naam die ekwivalent van die betrokke persoon is, soos volg verduidelik:

---

10 "The controversy over children's surnames: Familial autonomy protection and the child's best interests" 1979 *Utah LR* 303 304.

11 Bugliari "Domestic relations: Change of minor's surname" 1958 *Cornell LQ* 144. In die Duitse saak OLG Düsseldorf, Beschl v 30/12/1996, StAZ 1997, 178 is beslis dat 'n adelaanduiding tot die familienaam van 'n kind behoort indien dit 'n bestanddeel van die gemeenskaplike huweliksnaam van die ouers is.

12 Act 3, scene 3, lines 160–161 aangehaal deur Pacheco 1.

13 Kyk ook Arnold "Personal names" 1906 *Yale LJ* 227 232 aangehaal deur Donnin 155 (vn 10): "(T)here can be no more valuable patrimony than a good name: it is, though outside the pale of commerce, one of the most prized attributes of man."

14 "The girl they named Manhattan: the law of forenames in France and England" 1985 *Legal Studies* 331 342.

15 Kyk ook Slovenko "Unisex and cross-sex names" 1986 *Journal of Psychiatry and Law* 249 255: "Names, like clothes, make a statement about the person, intentionally or unintentionally." Dannin 167 wys daarop dat mense soms ook name aanwend om persoonlike waardes en oortuigings uit te druk. Mohammed Ali en Malcolm X, byvoorbeeld, het name aangeneem om uitdrukking te gee aan 'n religieuse en sosiale identiteit. Baie individue, veral ouers, beskou name "as a means of selfexpression" – Dannin 156.

16 Dannin 155. Sien ook *Brian Boswell Circus (Pty) Ltd v Boswell-Wilkie Circus (Pty) Ltd* 1985 4 SA 466 (A); Bander *Change of name and law of names* (1973) 2.

17 154 Cal 83 87, 97P 17 19 (1908) aangehaal deur MacDougall 107.

18 Kyk Dannin 157–159 vir 'n reeks gevalle waar 'n naam juridiese relevansie kan hê.

19 278 Ala 641, 643, 179 So 2d 766, 768 (1965) aangehaal deur Dannin 154.

> "[I]t is well settled that identity of name imports, prima facie, identity of person . . . It would seem to follow that a difference of name imports, prima facie, a difference of person. A change of name, then, it can be argued, always imports, at least prima facie, a difference in identity. To some extent, a change of name always conceals the nominee's identity."

Howe wat dié benadering gevolg het, het beslis dat slegs die presiese naam juridiese waarde het en dat 'n beskrywing of 'n afkorting nie die ekwivalent van 'n naam kan wees nie.[20] Ander howe het weer beslis dat die doel van 'n naam bloot is om 'n persoon te benoem en dat, indien 'n persoon se identiteit duidelik blyk, 'n variasie van sy/haar naam onbelangrik is. In 'n vroeëre Alabama-saak, *Milbra v Sloss Sheffield Steel and Iron Co*,[21] is beslis dat "[j]urisdiction attaches to persons . . . and an error in name is nothing when there is certainty . . ."[22]

Die eersgenoemde benadering is toenemend besig om veld te wen.[23] Oormatige rigiditeit kan onses insiens geregtigheid en sinvolle regspleging ondergrawe. Daarteen moet voortdurend gewaak word.

In 'n kultuur-, godsdiens- en regspluralistiese gemeenskap kan 'n spesifieke naam bewustelik of onbewustelik tot diskriminasie teen die draer daarvan aanleiding gee.[24] 'n Naam kan gevolglik die aanleiding tot die skending van die mensregtelike beginsel van die gelykheid-voor-die-reg wees.

In die onderhawige artikel word die regsantropologiese onderbou van die behoefte aan 'n verwysings- of 'n sosio-juridiese identiteit, dit wil sê 'n naam of aanspreekvorm, onder die loep geneem. Die hedendaagse menseregtekultuur is, soos elders[25] aangedui, juis 'n uitvloeisel van regsantropologiese evolusieprosesse.

2 HISTORIESE AGTERGROND

In dié verband is dit wenslik om die volgende te onderskei:

2 1 Romeins-Europese reg[26]

Volgens Sonnekus[27] was die persoonlike naam in die Romeinse reg 'n sosiale aangeleentheid wat na keuse aangeneem en gewysig kon word. Hierdie siening word bevestig deur Hondius en Loeb,[28] wat ook daarop wys dat anders as menige regsfiguur in Nederland "is de achternaam niet van Romeinse herkomst".

---

20 Dannin 150.

21 182 Ala 622, 630, 62 So 176, 179 (1913) aangehaal deur Dannin 155.

22 Kyk verder *Continental Oil Co v Citizen Trust and Savings Bank* 397 Mich 203, 244 NW 2d 243, 19 UCCRS 1234, 99 ALR 3d 1179 (SC Michigan, 1976) met annotasie deur Tinney.

23 Dannin 155.

24 Pacheco 28.

25 Labuschagne "Eengeslaghuweliike: 'n Menseregtelike en regsevolusionêre perspektief" 1996 *SAJHR* 534 537; "Regsnavorsing: 'n Meerdimensionele en regsevolusionêre perspektief" 1994 *TRW* 91 98–101; "Opvoedkundig-etiese, persoonsgebonde en regsprojektiewe struikelblokke en grense van regsnavorsing" 1997 *THRHR* 571.

26 Kyk hieroor Labuschagne "Ons gemenereg en wetsuitleg" 1984 *De Jure* 364. Die Engelse reg, veral as gevolg van die kontinuering en uitbouing daarvan in die VSA, word in onderhawige verband afsonderlik behandel.

27 609 met verwysing onder andere na C 9 25. Vgl ook Henrich *Der Erwerb und die Änderung des Familiennamens unter Berücksichtigung von Fällen mit Auslandsberührung* (1983) 10.

28 "Naamrecht in beweging: het mag (nog) geen naam hebben" 1983 *NJB* 401 402.

Hulle beweer dat die eerste spore van die huidige geslagsname in die Middeleeue te vinde is. Oorspronklik het mense in die algemeen een individuele naam gehad. Later was dit 'n doopnaam en soms 'n toenaam om hétsy 'n besondere eienskap van die betrokke persoon hétsy sy afstamming aan te dui. Tot in die sestiende eeu kon kinders hulle moeder se naam aanneem, veral as haar familie meer aansien as dié van hulle vader gehad het. Erflike toename het aan die einde van die Republiek, veral in die stede, meer na vore getree. Naamgewing was egter nog steeds 'n willekeurige aangeleentheid. Owerheidsbemoeienis met naamgewing het eers sedert 1811, met 'n dekreet van Napoleon, plaasgevind. Almal wat nog nie 'n geslagsnaam gehad het nie, is gedwing om een te kies. 'n Geslagsnaam wat gekies of gevestig is, kon nie sonder owerheidstoestemming gewysig word nie. Hondius en Loeb[29] wys daarop dat openbare sabotasiereaksies op die verpligting tot geslagsname, soos die aanneem van belaglike name, later diep betreur is, want dié Napoleontiese maatreël is by herstel van soewereiniteit nie in Nederland afgeskaf nie. Trouens, die weiering om 'n geslagsnaam aan te neem, is deur 'n koninklike besluit van 28 November 1825 strafbaar gestel.

Wat Duitsland aanbetref, wys Schwenzer[30] daarop dat tot die agtiende eeu naamsvoering uitsluitlik 'n kwessie van sedes en gebruike was. Aanvanklik het name in die reël uit eenlettergrepige begrippe bestaan. Die naam van 'n kind is dikwels uit die name van beide ouers saamgestel, juis om uitdrukking aan die gebondenheid met albei ouers te gee. Eers in die elfde eeu word hier en daar 'n oorerflike geslagsnaam bygevoeg en in die vyftiende eeu het hierdie gebruik momentum begin kry. Die finale tree na 'n gesamentlike familienaam is egter nog nie geneem nie. Die eerste aanduiding dat die vrou by huweliksluiting die man se naam *moes* aanneem, word sporadies gevind by gebruike onder hoogadel. Sedert die sestiende eeu het dit egter algemeen by die adel voorgekom. In burgerlike kringe het die vrou tot in die sewentiende eeu by huweliksluiting haar eie naam behou. Die bogenoemde adellike gebruik het egter geleidelik algemene toepassing gevind. Die juridiese betrokkenheid by naamsvoering het eers aan die einde van die agtiende en begin negentiende eeu in die Duitssprekende wêreld posgevat.[31]

Wat die naam van getroude vrouens betref, was die algemene reël dat sy haar man se familienaam aangeneem het. In Pruise is egter vir haar ruimte gelaat om haar eie familienaam te behou. Gesien die patriargale grondslag van die destydse familienaam was dit vanselfsprekend dat kinders hulle vader se familienaam sou ontvang. In die negentiende eeuse praktyk blyk egter dat naamsvoering dikwels nog as 'n private aangeleentheid beskou is. So is dit bekend dat die Duitse skrywer Heinrich Heine sy vader se familienaam en sy broer sy moeder se familienaam, naamlik Von Geldern, gebruik het. Later het patrinomie in naamsvoering oorheersend geword.

---

29 402. Sien ook Ficker *Das Recht des bürgerlichen Namens* (1950) 15–17.

30 "Namensrecht im Überblick" 1991 *Zetschrift für das gesamte Familienrecht* 390 391–392. Sien ook Cohn *Neue Rechtsgüter. Das Recht am eigenen Namen. Das Recht am eigenen Bilde* (1902) 10–16; Klippel *Der zivilrechtliche Schutz des Namens* (1985) 39; Henrich 9–10.

31 Sowel die groot natuurregkodefikasies in die Duitse regsgebied as die algemene landreg van Pruise in 1794 en die algemene burgerlike wetboek van Oostenryk in 1811, word hier betrek – Schwenzer 391.

Die geskiedenis van naamgewing in Frankryk kan toegelig word teen die agtergrond van 'n saak wat in die vorige dekade voor die howe gedien het. Op 20 Februarie 1982 is 'n dogter gebore vir Jean Pierre en Marie-Hélène C. Hulle het besluit om haar Manhattan te noem. Manhattan was die titel van 'n lied wat baie gewild was in die jaar van hulle huweliksluiting. Die registrateur (*officier de l'etat civil*) het egter geweier om die kind onder daardie naam te registreer. Toe die ouers geweier het om 'n ander naam te kies, het die *procureur de la République* die hof genader om aan die kind 'n voornaam toe te ken. Die *tribunal de grande instance* het haar ouers se voorname aan haar toegeken en geweier om haar as Manhattan te laat registreer. Die ouers se appèl na hoërhowe was insgelyks onsuksesvol. 'n Wet van 1 April 1803 is hier van toepassing, waarvan artikel 1 bepaal dat slegs voorname wat in die onderskeie kalenders gebruik word of wat behoort aan bekende karakters van die antieke geskiedenis as voorname by registrasie van kinders aanvaar mag word. Die beslissing van die Franse howe in dié saak het bevestig dat die verspotte name wat aangeneem is, tot die 1803-wetgewing aanleiding gegee het.[32]

2 2 Anglo-Amerikaanse reg

Aanvanklik het 'n persoon, soos gebruiklik was in alle rudimentêre gemeenskappe, slegs een naam gehad. Hierdie naam het gewoonlik verwys na 'n plek waar die persoon woon of die beroep wat hy beoefen het of na 'n sekere dier of na een of ander bygeloof of vrees.[33] Die gebruik van familiename het 'n geleidelike evolusieproses ondergaan. Na die inval van die Normandiërs in Engeland in die elfde eeu het die praktyk ontwikkel om 'n tweede naam by te voeg. Die skaarste aan noemname het tot gevolg gehad dat groot getalle persone dieselfde name gehad het. In die landelike gebiede van die destydse Engeland het hierdie familiename dikwels ontstaan deur 'n voor- of agtervoegsel van die vader se naam. Daarbenewens, het persone familiename bekom wat hulle tydgenote ter beskrywing van 'n onderskeidende, persoonlike of fisieke eienskap aan hulle toegeken het. Persone is ook soms vernoem na hulle beroep of amp of hulle plek van herkoms. Familiename was nog steeds bloot aanduidend van individuele identiteit en was derhalwe nie oorerflik nie. Aangesien familiename deur reputasie bekombaar was, het dit voorgekom dat een persoon meer as een familienaam, gelyktydig of opeenvolgend, kon hê.[34] Aan die begin van die veertiende eeu het oorerflike paternale familiename algemeen onder die gegoede grondeienaars voorgekom. Matthews[35] verduidelik soos volg:

> "The land could be claimed and awarded only at the Manorial Court, being held 'by eopy of the Court Roll', which meant that the life tenant's name was inseribed there on permanent record. This system provided a direct ineentive to men to keep

32 Munday 331–333. Pacheco 5 verduidelik dat die Engelse woord "surname" van die oud-Franse woord "surnam" afgelei is. "Sur" verwys na "bo" of "verby" ("above" of "beyond") en "nom" na naam (Latyn: nomen), dit wil sê 'n persoon se "surname" is sy familienaam, sy voorgangersnaam.

33 Bander 1.

34 Thorton "The controversy over children's surnames: Familial autonomy, equal protection and the child's best interests" 1979 *Utah LR* 303 304–305; Pask "A married woman's surname: A matter of choice" 1978 *Saskatchewan LR* 177 178; BSS 1324–1326; Munday 333–335; *Smith v USA Casualty Co* 90 NW 947 (CA New York) 948–949 (1910).

35 *English surnames* (1967) 43–44 met goedkeuring aangehaal deur BSS 1325.

> the same surname that had been put down on the roll for their father or grandfather. And even younger sons having in mind the uncertainty of life might think it just as well to use the name too, even if it was Whalebelly or Chickenhead."

Seuns en dogters het ook soms hulle moeder se familienaam aangeneem met die doel om van haar te erf.[36] Met die uitsondering van Louisiana het die state van die VSA uitdruklik die Engelse gemenereg nagevolg.[37]

In die Engelse gemenereg, asook in die Romeins-Europese reg in die algemeen, kon 'n individu sy naam verander deur bloot 'n ander naam aan te neem. So het Rembrandt, Napoleon, Mark Twain en baie ander beroemde mense hulle naam verander deur dit bloot deur 'n ander te vervang. Slegs indien die naamsverandering om bedrieglike redes plaasvind of die regte (of gevoelens)[38] van andere daardeur nadelig geraak sou word, was dit ontoelaatbaar.[39] In die vroeëre fase van die ontwikkeling van die Engelse gemenereg is 'n buite-egtelike kind as *nullius filius* beskou en kon gevolglik nie die oorerflike familienaam van sy moeder of vader verkry nie. Gesien in die lig van die feit dat die moeder meer ouerlike regte oor hom/haar as die vader gehad het, het 'n buite-egtelike kind later sy/haar moeder se familienaam aangeneem.[40] 'n Minderjarige wat die nodige vlak van rypheid bereik het, kon enige gekose naam aanneem.[41]

In die VSA is die Engelse gemenereg met wetgewing aangevul.[42] Die opkoms van die menseregtelike gelykheidsbeginsel en die groeiende getal egskeidings dra in besonder daartoe by dat die konsep van oorerflike familiename voortdurend onder skoot kom.[43] In die saak *In re Schiffman*[44] het die Kaliforniese hooggeregshof die reël wat aan die vader 'n preferente reg gee om sy familienaam op sy kind oor te dra, afgeskaf. Verskeie howe in ander state het dié beslissing gevolg. In die saak *In re Andrews*[45] merk die hooggeregshof van Nebraska soos volg op:

> "Today's trend is toward parental and marital equality in reference to children, as typified by and reflected in legislative expressions that parental gender is excluded from consideration in determining a child custody issue ... Thus, many courts have held that neither parent has a superior right."

Naamsverandering vind soms ook plaas wanneer persone na 'n ander land emigreer en veral as name in die nuwe omgewing moeilik spelbaar of uitspreekbaar

---

36 BSS 13–25. Vgl Munday 334–335.

37 MacDougall 102–103. Vgl ook ten aansien van Nieu-Seeland Coldwell "The law of children's surnames" 1990 *NZLJ* 231 232.

38 In *In re Taminosian* (97 Neb 514, 150 NW 824 (1915)) het T reeds agt naamsveranderinge ondergaan. Sy aansoek om 'n Moslem-naam aan te neem, sou volgens die hof die sensitiwiteite en gevoelens van sy vrou en sy kinders skend en is derhalwe afgekeur.

39 Bugliari 145; MacDougall 102–110; BSS 1307–1308; Pask 178; *Laks v Laks* 25 Ariz App 58, 540 P 2d 1277, 1279 (CA Arizona 1975); *Secretary of Commonwealth* 366 NE 2d 717 (SJC Mass) 721 (1977); *Jech v Burch* 466 F Supp 714, 717–718 (USDC, Hawai 1979); *Sobel v Sobel* 134 A 2d 598, 600 (SC New Jersey 1957).

40 Thorton 312. Sien ook tav Duitsland Ficker 19–35.

41 Doll 228.

42 *Laks v Laks* 25 Ariz App 58, 540 P 2d 1277, 1279 (CA Arizona 1975); Doll 228.

43 Hording "*Determining a child's surname: Common law v 'best interests' test*" 1983 *Journal of Juvenile Law* 117; MacDougall 113.

44 620 P 2d 579 (Cal 1980); Doll 236.

45 454 NW 2d 488, 491 (Neb 1990) aangehaal deur Doll 237.

is en opname in die nuwe gemeenskap daardeur bemoeilik sou word.[46] In 'n pluralistiese staat kan die aantasting van 'n naamtradisie by 'n sekere segment daarvan tot konflik aanleiding gee.[47]

3 DIE BEHOEFTE AAN 'N SOSIO-JURIDIESE IDENTITEIT

Pacheco[48] beklemtoon dat daar twee kategorieë persone in die naamgewingsproses is, naamlik diegene wat die naam ontvang en diegene wat die naam toeken. Die eerste kategorie sluit in kinders, wat gewoonlik passief in die proses is; vrouens wat weer hulle geboortename wil aanneem; en individue wat 'n naamsverandering vir finansiële, religieuse of politieke redes of bloot vir die genot daarvan ondergaan. Die tweede kategorie is volgens haar aktief. Hulle kan deur liefde of respek, deur 'n gevoel van verpligting of 'n identiteitsgevoel, deur besitlikheid of deur die ego gemotiveer word. Die betekenis van die onderskeid wat sy maak, is nie vir ons heeltemal duidelik nie. Wat egter duidelik blyk, is dat naamgewing of -verandering om 'n verskeidenheid redes kan plaasvind en dat sekere kategorieë persone, soos jong kinders, nie self oor hulle naam besluit nie. Soos uit die verdere bespreking sal blyk, het die staat ook 'n belang by naamsvoering.[49]

'n Sterk paternalistiese ondertoon slaan nog duidelik by naamsvoering deur. So het regter Digges van die appèlhof van die staat Maryland in die VSA nog in 1971 in die saak *West v Wright*[50] van die standpunt uitgegaan dat 'n vader 'n natuurlike reg het dat aan sy seun sy familienaam toegeken word en dat 'n vader sy reg om sy naam in sy seun te verewig slegs verbeur in geval van skadelike of vyandige gedrag ("conduct inimical to") teenoor sy seun.

Die behoefte aan 'n sosio-juridiese noem- of verwysingsidentiteit het 'n vertikale (openbare; owerheidsgerigte) en 'n horisontale (mensinteraktiewe; individueel-gelykheidsgerigte) kant. Klemverskille word egter in regstelsels aangetref.[51] Die identifikasiefunksie van 'n persoon se naam het in die meeste kulture die effek om menslike individualiteit, as deel van die persoonlikheidsreg, te

---

46 Thorton 304.

47 Vgl Pacheco 9–10: "The latina's name is made up of one or more given names together with a two-part surname [consisting of a patronymic and a matronymic], which is more than the traditional Anglo-American first name, middle name, and single surname combination. For the latina, both parts of the two-part surname are considered essential in making her entire family name. The involuntary dropping of either part constitutes an unwanted name change and gives rise to the latina's name issue. There are many American individuals of all traditions, who prefer to regularly use their complete name – the one given at birth, or during christening or formal naming. Among these individuals are perhaps millions of latinas in the United States, including both those who came to the United States from Latin America (i.e. Mexico, Central America, South America and the Caribbean) and those born on the mainland. The latina positions both the paternal name and maternal name, respectively, in the place generally reserved in the North American custom for the single last name."

48 21–22.

49 Kyk ook Nelle "Der Familienname" 1990 *Zeitschrift für das gesamte Familienrecht* 809 810.

50 263 Md 297, 283 A 2d 401, 402 (1971) met beroep op die New Yorkse saak *Application of Yessner* 61 Misc 2d 174, 304 NYS 2d 901, 903 (1969).

51 Kyk Sonnekus 611 ev.

beklemtoon.[52] As gevolg van die manlike geslag se beheer oor familiename het die vrou se belang in 'n deurlopende persoonlike etiket nooit dieselfde respek as dié van die man ontvang nie. Doll[53] merk in dié verband op:

> "Since a woman's name customarily changed upon marriage, the wisdom was that her investment in nominal identity must be less than a man's. Yet, this change can be unsettling, even traumatic, and has profound implications for a woman's sense of self. Moreover, the trend of women retaining birth names, hyphenating, and even fusing names, underscores women's desire for control over their surnames."

Ouers se identifisering met hulle naam of name beklemtoon meteens ook die belangrikheid van die kind se naam. Die kind se naam verteenwoordig sy/haar familie-identiteit, wat tradisioneel 'n sterk paternalistiese inslag het. Die indruk wat hiermee geskep word, is dat die moeder se gesagstatus sekondêr is. Kinders se opvatting oor die sosio-juridiese status van die vrou word derhalwe ook deur gewoontes met betrekking tot naamgewing gevorm.[54] Pacheco toon verder aan dat die aandrang in die VSA op enkelwoord-familiename kulturele identiteit op 'n subtiele wyse ondergrawe.[55] Sy wys vervolgens daarop dat dit individuele outonomie in naamsvoering ontken.[56] Howe in die VSA gaan van die veronderstelling uit dat dit in geval van egskeiding meesal in belang van die kind is om sy/haar vader se familienaam te behou aangesien dit die vader-kind-verhouding kan bestendig.[57] In *Spatz v Spatz*[58] het 'n Nebraska-hof as rede in dié verband aangegee dat "(t)he link between a father and child in circumstances such as these is uncertain at best, and a change of name could further weaken, if not sever, such a bond".[59]

Die owerheid het 'n duidelike belang daarin om op hoogte te bly van sy burgers en regsonderdane. Hoewel administratiewe gerieflikheidsoorwegings[60] nie as motivering kan dien vir die vererwing van die paternale familienaam-tradisie nie, het howe in die VSA daarop gewys dat dit 'n kind in staat stel om van sy afkoms kennis te dra en dat dit verder in belang van historiese en genealogiese

---

52 Sonnekus 610. Kyk ook Lüke "Die persönlichen Ehewirkungen und die Scheidungsgründe nach dem neuen Ehe – und Familienrecht." in Habscheid, Gaul en Mikat (reds) *Festschrift für Friedrich Wilhelm Bosch* (1976) 627 628–629.

53 231.

54 Doll 231–232.

55 35.

56 39: "As language is reflective of those very things which society validates, then we must educate the society to re-create its views of the maternal surname. Names are our language identifiers. Society must not be afraid to expand its beliefs to include as completely as possible the reality of why women and men choose to name themselves. Common law permits the usage of any name as long as the individual is not committing a fraud or other illegal act. However, the problem does not revolve around a lack of laws. The use of only one surname is not embedded in any principle of patriotism or tenet of law. Rather it is an arbitrary practice, which supports the experience of the majority of the citizenry, while removing others from a right to be autonomous in their self-naming."

57 Kyk *In re marriage of Omelson* 112 ILL App 3d 725, 68 ILL Dec 307, 445 NE 2d 951, 959 (ILL App, 1983); *Henne v Wright* 904 F 2d 1208, 1212–1213 (8th Cir 1990).

58 199 Neb 332, 334, 258 NW 2d 814 (1977); Hording 118.

59 Vgl MacDougall 118–120; Diederichsen "Die Neuordnung des Familiennamensrecht" 1994 *NJW* 1089 1091.

60 Vgl Hough 493; Grasmann "Zur Verfassungsmässigkeit des einheitlichen Ehenamens" 1988 *Juristenzeitung* 595 597.

kennis is.[61] Hierdie toedrag van sake is onbevredigend omdat dit slegs een van 'n kind se genealogiese lyne beklemtoon. Die sosio-juridiese naamidentiteit is belangrik vir die opname en bepaling van 'n subjek se regte, soos stemreg en die reg op finansiële en andersydse staatshulp, en sy/haar pligte, soos die plig tot belastingbetaling[62] en militêre diensplig. Die owerheid moet verseker dat 'n naamsverandering nie om bedrieglike redes of vir ander onregmatige doeleindes plaasvind nie. Die owerheid het 'n regmatige belang in die naamsvoering van regsonderdane slegs in soverre dit rasioneel fundeerbaar is.[63] Die owerheid het volgens Pacheco,[64] en tereg ook, geen regmatige belang in die standardisering van die regsonderdane se name nie of om te verseker dat "they all fit into the dominant, format of adopting a single last name".[65] Die staat moet ook verseker dat 'n persoon se reg om sy/haar naam te verander nie onnodig bemoeilik of inhibeer word nie.[66] Verder moet die owerheid waak oor die belange van kinders en ander regsonbekwame persone.[67] Daar word soms beweer dat name in 'n hoogs georganiseerde gemeenskap in 'n sekere mate aangewend word "as a police institution in the interest of society in general, not of the individual".[68] Hoewel hierdie stelling sekerlik nie in 'n algemene sin aanvaarbaar is nie, is dit ongetwyfeld waar dat geregtigheid dikteer dat omstandighede kan bestaan waar individuele belange aan die gemeenskapsbelang ondergeskik gestel moet word.[69]

4 REGTE VAN MEERDERJARIGES TEN AANSIEN VAN NAAMSVOERING

Ingevolge artikel 24(1) van die Wet op die Registrasie van Geboortes en Sterftes 51 van 1992 (hierna genoem "die Wet"), kan 'n meerderjarige persoon[70] by die direkteur-generaal[71] aansoek doen om sy/haar voornaam, waaronder sy/haar

61 Kyk bv *In re Baldini* 17 Misc 2d 195, 183 NYS 2d 416, 417 (City Ct 1959); *Montandon v Montandon* 242 Cal App 2d 886, 892. 52 Cal Rptr 43, 46 (1966); BSS 1328–1329.

62 Kyk BSS 1327.

63 Hough 495.

64 22.

65 Kyk ook Pacheco 22–23: "In fact, when viewed from the perspective of the government's interest in individually identifying its citizens, the latina two-surname formula carries a noteworthy comparative advantage. It facilitates a more precise means of identification among people, because there are two surnames listed in order. This serves as a better check to identify individuals who may have the same first names and patronymic names. For example, in a particular community, there may be many people named Maria Rodriguez (which may be as common a name as Mary Smith in English), but Maria Rodriguez Aguirre allows for a more accurate means of differentiation and identification. In responding to the government's interest in identifying its citizens, it would be more advantageous and accurate to have latinas, and all others, utilize their complete family name. As identities are secured by using names along with social security numbers, addresses, driver's licenses, etc. this means of identification would be no more nor less frustrating to the government than the present system."

66 Anonicm "Parents' selection of children's surnames" 1983 *George Washington LR* 583 590–591.

67 *Henne v Wright* 904 F 2d 1208 (8th Cir 1990) 1212–1213.

68 Dannin 163.

69 Vgl Nelle 811; Diederichsen 1091.

70 'n Persoon wat die ouderdom van 21 jaar bereik het of wat ingevolge die bepalings van a 2 van die Wet op Meerderjarigheidsouderdom 57 van 1972 meerderjarig verklaar is, asook 'n persoon wat 'n huwelik gesluit het terwyl hy/sy onder die ouderdom van 21 jaar is – a 1.

71 Van Binnelandse Sake – a 1.

geboorte geregistreer is, te verander. Die direkteur-generaal kan dan so 'n verandering op die voorgeskrewe wyse aanbring. Artikel 26(1) van die Wet bepaal dat geen persoon, behoudens die bepalings van die Wet of enige ander wet, hom/haar 'n ander van mag toeëien of hom-/haarself by 'n ander van noem of onder 'n ander van deurgaan as dié waaronder hy/sy in die bevolkingsregister opgeteken is of dié waaronder hy/sy permanente verblyf in Suid-Afrika verkry het, tensy die direkteur-generaal dit gemagtig het. Artikel 26(1) is nie van toepassing wanneer 'n vrou na huweliksluiting, insluitend 'n Islamitiese, Indiese en inheemse gewoonteregtelike huwelik, die van van haar man aanneem of na aanname van sy van, 'n van wat sy te eniger tyd voorheen benut het, weer aanneem nie.[72] 'n Getroude of geskeide vrou of 'n weduwee kan 'n van wat sy te eniger tyd voorheen gebruik het, weer aanneem.[73] Andersinds moet die verandering van 'n van by wyse van aansoek deur die direkteur-generaal gemagtig word, indien hy oortuig is daarvan dat 'n gegronde rede bestaan.[74] Verandering van 'n voornaam of van geskied by wyse van kennisgewing in die *Staatskoerant*.[75]

Volgens die Engelse gemenereg, wat ook in die VSA inslag gevind het, kan name (en vanne) sonder spesifieke prosedures verander word, solank dit net nie vir onregmatige doeleindes geskied nie.[76] In *Abdul-Jabbar v General Motors Corporation*[77] het 'n federale appèlhof beslis dat 'n individu se beslissing om 'n ander naam as sy geboortenaam, hetsy om godsdienstige, maritale of ander persoonlike redes, te gebruik, nie as sodanig die afleiding regverdig dat hy die bedoeling gehad het om van sy geboortenaam, of die identiteit daarmee vereenselwig, afstand te doen nie. Aanvanklik was 'n vrou "verplig" om by huweliksluiting haar man se van oor te neem. Later is sy toegelaat om 'n ander van aan te neem, maar dan slegs met haar man se goedkeuring. Hierdie toedrag van sake het mettertyd onder fel kritiek deurgeloop, veral omdat dit diskriminerend en sonder 'n rasionele basis is.[78] Die Maryland Supreme Court, in *Stuart v Board*

72 A 26(1)(a).

73 A 26(1)(b).

74 A 26(2).

75 Art 27. Veranderinge ooreenkomstig a 26(1)(a) en a 26(1)(b) is van hierdie prosedure uitgesluit.

76 Bander 3; Munday 342–343. In *Re Application of Knight* (36 Colo App 187, 537 P 2d 1085, 79 ALR 3d 559, 560–561 (Colorado CA, 1975)) vat Sternberg R die regsposisie soos volg saam: "At common law, a person could adopt another name at will. Statutes setting forth procedures to be followed in changing a name merely provide an additional method for making the change . . . It is more advantageous to the state to have the statutory method of changing names followed . . . and for that reason applications under the statute should be encouraged . . . and generally should be granted unless made for a wrongful or fraudulent purpose . . . While a court has wide discretion in matters of this type, it should not deny the application for a change of name as being improper unless special circumstances or facts are found to exist. Included in these would be 'unworthy motive, the possibility of fraud on the public, or the choice of a name that is bizarre, unduly lengthy, ridiculous or offensive to common decency and good taste'. . . Likewise, there is authority to deny the change if the interests of a wife or child of the applicant would be adversely affected thereby." Kyk ook Draper "Circumstances justifying grant or denial of petition to change adult's name" 70 ALR 3d 562 566–567; *Secretary of the Commonwealth v City Clerk of Lowell* 366 NE 2d 717, 725 (SJC Mass 1977).

77 75 F 3d 1391 1396 (9th Cir 1996).

78 Vgl Lund en Healy "Sex discrimination" 1971 *Annual Survey of Massachussetts Law* 562 571 met goedkeuring aangehaal deur Dannin 166: "[T]he court's request for the husband's assent to the wife's name change has become a standard feature of such

vervolg op volgende bladsy

of Supervisors of Elections,[79] was volgens Gorence[80] die eerste Supreme Court van 'n staat in die VSA wat beslis het dat 'n vrou nie verplig is om by huweliksluiting haar man se van aan te neem nie. In 1975 in die saak *In re Petition of Kruzel*[81] het die Supreme Court van Wisconsin dié voorbeeld gevolg.[82] Ander howe het intussen ook hierdie benadering gevolg.[83] 'n Geskeide vrou kon na egskeiding 'n ander van, insluitend haar nooiensvan, aanneem.[84] In *Petition for Change of Name of Harris*[85] verduidelik regter Neely van die Supreme Court of Appeals van die staat West Virginia die regsposisie soos volg:

> "[A]ny woman who has been divorced, notwithstanding the fact that she has living children by that marriage, may petition either to have her maiden name restored or to change her name to some other name . . . and she has an absolute right to such change if there are otherwise no impediments . . ."

In Nederland het huweliksluiting nie noodwendig tot gevolg dat die vrou haar van inboet nie.[86] Artikel 9 *BW* gee aan die vrou die reg om haar man se van aan te neem of dit voor haar eie te voeg.[87] Die man kan na egskeiding in sekere omtandighede die hof nader om sy vrou te verbied om sy van verder te gebruik. Sonnekus[88] wys daarop dat dit veral die geval is indien die vrou besondere skuld aan die egskeiding gehad het en dit onregverdig sou wees om toe te laat dat sy na egskeiding vir hom 'n verleentheid is.

Artikel 4 van die Deense Naamwet[89] bied aan voornemende huweliksgenote, waarby eengeslaghuwelike[90] ingesluit is, drie keusemoontlikhede ten aansien van 'n geslagsnaam. Die partye kan hulle geslagsname behou of die een party kan dié van die ander aanneem, behalwe as laasgenoemde se geslagsnaam deur 'n voorafgaande huwelik verkry is. In dié geval kan die party om wie se naam

---

proceedings. It is submitted that no interest of the state can be identified in the procedural requirement that a husband assent to the wife's change of name. It is not a valid exercise of judicial discretion to require a woman to bear a name that she does not want, unless there is a demonstrable administrative reason therefor. At present, a woman's child may bear a surname different from his mother's after the mother has undergone a divorce and remarriage: and no detrimental administrative consequences appear to result if the parties to a marriage choose to have different surnames . . . A woman ought to be free to use her maiden name as a matter of right, subject only to her satisfying whatever procedural requirements are deemed necessary for administrative reasons. Enabling legislation is needed and should be enacted to this end."

79 266 Md 440, 295 A 2d 223 (1976).

80 "Women's name rights" 1976 *Marquette LR* 876.

81 67 Wis 2d 138, 226 NW 3d 458, 67 ALR 3d (1975).

82 Gorence 876–877.

83 Kyk MacDougall 95–99; Case "Right of married women to use maiden surname" 67 ALR 3d 1266 1269–1272.

84 Hough 491–493; Sonnekus 617.

85 236 SE 2d 426 429 (1977).

86 A 8 *BW*.

87 Sonnekus 618. 'n Voorgestelde wysiging van a 9 *BW* het ten doel om aan die man die bevoegdheid te gee om sy vrou se van te gebruik. Die menseregtelike gelykheidsbeginsel verg sodanige wysiging – Sonnekus 618.

88 619.

89 Die relevante bepalings van dié wet word saamgevat deur Heide-Jørgensen "Het Naamrecht in Denemarken" 1997 *FJR* 62–64.

90 Nielsen "Denmark: New rules regarding marriage contracts and reform considerations concerning children" 1992 *Journal of Family Law* 309; Labuschagne "Eengeslaghuwelike: 'n Menseregtelike en regsevolusionêre perspektief" 1996 *SAJHR* 534 547.

dit gaan, haar/sy "nooiensvan" weer aanneem, wat dan as die gemeenskaplike naam gebruik kan word. Sou die partye dieselfde geslagsnaam kies, moet die party wie se naam gebruik gaan word daartoe toestem.[91] Volgens artikel 2 van die Deense Naamwet kan 'n geslagsnaam later gewysig word. Dit kan naamlik gewysig word na: (1) die geslagsnaam wat die vader ten tyde van die geboorte van die kind gehad het; (2) die geslagsnaam wat die moeder ten tyde van die geboorte van die kind gehad het;[92] (3) die nooiensvan van die vrou; (4) 'n geslagsnaam wat die ouers na geboorte van die kind aangeneem het; (5) 'n geslagsnaam wat die betrokkene voorheen gebruik het;[93] (6) die huidige geslagsnaam van die stiefvader; (7) die huidige geslagsnaam van die stiefmoeder;[94] (8) die geslagsnaam wat die stiefvader of (9) die stiefmoeder die laaste gebruik het.[95] Artikel 5 van die Deense Naamwet bevat die finale moontlikheid om 'n geslagsvan te wysig. Van dié moontlikheid kan slegs gebruik gemaak word in gevalle waar dit nie moontlik is om dit te verander by wyse van aanmelding in gevolge artikel 2 nie, dit wil sê die nege moontlikhede hierbo genoem. Beskermde name en name in stryd met die goeie sedes kan, byvoorbeeld, volgens artikel 6 nie aangeneem word nie.[96] Persone bo die ouderdom van 18 jaar en getroude persone onder dié ouderdom kan hulle name verander sonder ouerlike toestemming. 'n Naamswysiging ooreenkomstig artikel 5 geskied op aanvraag by die "statsamt", 'n gedesentraliseerde sivielregtelike instansie wat onder die Ministerie van Binnelandse Sake val.

Die Duitse Konstitusionele Hof (Bundesverfassungsgericht; BVerfG) het op 15 Maart 1991[97] die reëling in artikel 1355(2)(2) van hulle Burgerlike Wetboek (*Bürgerliches Gesetzbuch*; *BGB*), waarvolgens die geboortenaam van die man by onstentenis van 'n ooreenkoms tussen die partye, die huweliksnaam by huweliksluiting word, as onkonstitusioneel verklaar. 'n Gemeenskaplike huweliksnaam word tans slegs vir egpare gereserveer. Partye wat buite-egtelik saamwoon en selfs kinders het, is nie geregtig op 'n huweliksnaam nie. 'n Gemeenskaplike familienaam is regspolities nog steeds die ideaal. Partye kan hulle eie familienaam na huweliksluiting behou deur dit te koppel aan 'n gemeenskaplike familienaam wat dan die begeleinaam ("Begleitname") word.[98] Sou die partye geen voorafgaande beslissing ten aansien van 'n gemeenskaplike huweliksnaam

---

91 Vgl Heide-Jørgensen 63: "De reden waarom er toestemming moet worden verleend in gevallen waarin er voor een gemeenschappelijke geslachtsnaam wordt gekozen, is de volgende: als partijen gaan scheiden, kunnen eventuele kinderen geboren uit een nieuw (later) huwelijk, de naam die de moeder e.q. de vader op grond van een eerder huwelijk heeft verworven, verkrijgen. Een kind geboren uit het nieuwe huwelijk kan dus de naam krijgen die zijn moeder op grond van haar eerdere huwelijk heeft gekregen van haar vroegere echtgenoot (lees: huwelijk e.q. registratie). Het is daarom van belang dat een echtgenoot/partner ook toestemming verleent voor dit eventuele gevolg."

92 Dit sluit nie 'n naam verkry op grond van 'n huwelik in nie.

93 Soos begrens in vn 92 hierbo gestel.

94 *Ibid.*

95 *Ibid.*

96 Nadere reëls in dié verband word in a 7–9 gegee.

97 NJW 1991, 1602. Vgl verder Dethloff en Walther "Abschied vom Zwang zum gemeinsamen Ehenamen" 1991 *NJW* 1575.

98 A 1355(4) *BGB*. Vgl Diederichsen 1091 vir meer gedetailleerde inligting. Die moontlikheid van 'n "Begleitname" verval as die huweliksnaam uit meerdere name bestaan. Sien ook Cohn 22.

tref nie, behou hulle hulle eie familiename.[99] Na egskeiding of dood kan die partye of oorlewende, na gelang die geval, weer hulle geboortename of ander naam wat voor huweliksluiting gebruik is, aanneem.[100]

5 NAAMSVOERING VAN KINDERS

Naamgewing van kinders lewer in praktyk die meeste probleme op. Dit is gepas om die regsproblematiek in dié verband aan die hand van ontwikkeling in verskeie regsfamilies aan die orde te stel.

5 1 Suid-Afrikaanse reg

Volgens artikel 28(1)(a) van die Grondwet 108 van 1996 het elke kind vanaf geboorte 'n reg op 'n naam. Artikel 28(1)(h) bepaal dat 'n regsverteenwoordiger vir 'n kind in 'n siviele geding deur die staat op staatsonkoste verskaf moet word indien 'n substansiële onreg daarsonder teen die kind gepleeg sou kon word. Gedingsvoering ten aansien van 'n kind se naam sou duidelik in gepaste omstandighede regsverteenwoordiging ooreenkomstig artikel 28(1)(h) regverdig. Artikel 28(2) bepaal dat die beste belang van die kind in alle aangeleenthede oorheersend is.

Volgens artikel 28(3) is 'n kind vir doeleindes van artikel 28 'n persoon onder die ouderdom van 18 jaar.

Volgens artikel 9(2) van die Wet verkry 'n kind, behoudens die bepalings van artikel 10, die van van sy/haar vader. Aan 'n kind moet benewens 'n van ook 'n voornaam toegeken word.[101] Artikel 10(1)(a) bepaal dat 'n buite-egtelike kind die van van sy/haar moeder verkry. Volgens artikel 10(1)(b) kan so 'n kind op gesamentlike versoek van die moeder en die persoon wat in teenwoordigheid van die persoon aan wie die aangifte van geboorte gedoen is, skriftelik vaderskap erken en die voorgeskrewe besonderhede oor haarself op die aangifte van geboorte aanbring, onder die van van sodanige persoon geregistreer word.[102] 'n Ouer of 'n voog van 'n buite-egtelike kind, wie se ouers na registrasie van sy/haar geboorte met mekaar in die huwelik getree het, kan by die direkteur-generaal aansoek doen om die registrasie van sy/haar geboorte te wysig asof hulle ten tyde van sy/haar geboorte reeds getroud was.[103] Die aangifte van die geboorte van 'n verlate kind moet deur die maatskaplike werker of gemagtigde beampte gedoen word.[104] 'n Ouer[105] van 'n minderjarige kan by die direkteur-generaal om

---

99 A 1355(1)(3) *BGB;* Diederiehsen 1090. Sien verder in die algemeen Sonnekus 619–622.

100 Art 1355(5) *BGB*; Diederiehsen 1092. Kyk ook ten aansien van die Oostenrykse reg Bernat en Jesser "Meier and Mueller, Meier-Mueller or Mueller-Meier: New principles in the law on surnames" 1994 *International Survey of Family Law* 75.

101 A 9(6).

102 Vgl ook a 10(2): "Ondanks die bepalings van subartikel (1) kan die aangifte van geboorte onder die van van die moeder gedoen word indien die persoon in subartikel (1) (b) vermeld, met die toestemming van die moeder skriftelik erken dat hy die vader van die kind is en besonderhede omtrent homself op die aangifte van geboorte aanteken."

103 Vgl ook a 11(2): "Indien 'n buite-egtelike kind se ouers voor die aangifte van sy geboorte met mekaar trou, word aangifte van sodanige geboorte en word die geboorte geregistreer asof die ouers ten tyde van sy geboorte met mekaar getroud was."

104 Na 'n ondersoek ten opsigte van die kind ingevolge die Wet op Kindersorg 74 van 1983.

105 By die toepassing van hierdie artikel beteken "ouer" 'n ouer of voog wat beheer en toesig uitoefen of 'n persoon wat die wetlike of feitelike bewaring van of beheer oor die minderjarige het – a 24(2).

verandering van die voornaam van so 'n kind aansoek doen.[106] Artikel 25(1) van die Wet handel oor die vansverändering van 'n minderjarige en lui soos volg:

> "Wanneer (a) die geboorte van 'n buite-egtelike minderjarige geregistreer is en die moeder van daardie minderjarige trou met iemand anders as die natuurlike vader van die minderjarige; (b) 'n minderjarige se vader oorlede is of sy of haar ouers se huwelik ontbind is en sy of haar moeder weer trou of sy of haar moeder as 'n weduwee of geskeide 'n van aanneem wat sy voorheen gedra het en die vader, waar die huwelik ontbind is, skriftelik daartoe toestem tensy 'n bevoegde hof vrystelling van sodanige toestemming verleen; (c) die geboorte van 'n buite-egtelike minderjarige onder sy natuurlike vader se van geregistreer is en die natuurlike vader skriftelik daartoe toestem, tensy 'n bevoegde hof vrystelling van sodanige toestemming verleen; of (d) 'n minderjarige in die sorg van 'n voog is, kan sy of haar moeder of sy of haar voog, na gelang van die geval, by die Direkteur-generaal aansoek doen om die verandering van sy of haar van na die van van sy of haar moeder, of die van wat sy of haar moeder aldus aangeneem het, of die van van sy of haar voog, na gelang van die geval, en die Direkteur-generaal kan die registrasie van geboorte van dié minderjarige dienooreenkomstig op die voorgeskrewe wyse verander: Met dien verstande dat die man wat met die moeder van 'n minderjarige vermeld in paragraaf (a) of (b) getrou het, skriftelike toestemming tot die verandering moet verleen."

Volgens artikel 25(2) kan 'n ouer of voog op grond van 'n ander rede as dié in artikel 25(1) genoem, by die direkteur-generaal aansoek doen om verandering van die minderjarige se van. By voorlegging van 'n grondige rede kan die direkteur-generaal 'n vansverandering aanbring.[107]

Interessantheidshalwe kan hier genoem word dat by die Hottentotte en Boesmans dogters hulle vader se van en seuns hulle moeder se van aangeneem het.[108] In die inheemse stamreg kan 'n kind meer as een naam hê, afhangende van die lewensfase waarin hy/sy verkeer.[109] Die inheemse stamreg verg egter 'n afsonderlike studie en word gevolglik vir onderhawige doeleindes daargelaat.

5 2 Kontinentale regstelsels

Volgens artikel 1 van die Deense Naamwet verkry 'n kind wat binne huweliksverband of daarbuite gebore word, sy/haar ouers se familienaam indien hulle ten tyde van sy/haar geboorte dieselfde familienaam het. Indien nie, het die ouers, of diegene wat met ouerlike gesag toevertrou is, ses maande tyd om 'n keuse te maak. Die keuse wat gemaak kan word, is tussen die familienaam van die vader of moeder of die moeder se nooiensvan indien sy 'n ander familienaam uit 'n huwelik bekom het. Die geslagsname van die kind hoef nie dieselfde te wees as ander kinders wat uit dieselfde verhouding gebore is nie.[110] Insiggewend van die Deense benadering is dat binne- en buite-egtelike kinders gelyke behandeling ontvang.[111] Indien die ouers nie 'n keuse uitoefen nie, verkry die kind die moeder se familienaam. Indien 'n kind reeds die ouderdom van 12 jaar bereik het,

---

106 A 24(1).

107 By die toepassing van a 25 sluit die begrip "voog" ook in iemand wat die wetlike of feitelike bewaring van of beheer oor minderjarige het – a 25(3).

108 Sehapera *The Khoisan peoples of South Africa* (1930) 115.

109 Vgl bv Mönnig *The Pedi* (1967) 98–128.

110 Heide-Jørgensen 62.

111 Volgens a 3 beklee 'n aangenome kind dieselfde regsposisie as ander kinders. 'n Aangenome kind kan ook sy/haar eie naam behou of beide sy eie en dié van sy aanneemouers – Heide-Jørgensen 63.

kan 'n verandering van sy/haar naam slegs met sy/haar toestemming geskied. By die bereiking van die ouderdom van 18 jaar kan hy/sy sy/haar naam sonder ouerlike toestemming wysig.[112]

Artikel 139 van die Oostenrykse Siviele Kode[113] bepaal dat indien die ouers, ooreenkomstig artikel 93(1), 'n gemeenskaplike familienaam het, 'n kind dit ook verkry. Indien een van die gades 'n opsie onder artikel 93(2) uitgeoefen het, word die naam nog steeds as familienaam beskou, met ander woorde indien M en S in die huwelik getree het en op M se van as gemeenskaplike van ooreengekom is, kry die kinders dit ook, selfs al het S sy oorspronklike van voor of na die familienaam geplaas.[114] Indien die partye besluit om, in ooreenstemming met artikel 93(3), na huweliksluiting verskillende vanne te gebruik, moet hulle voor of ten tyde van huweliksluiting ooreenkom oor die familienaam van 'n toekomstige kroos. Hierdie ooreenkoms moet in 'n amptelike dokument beliggaam word.[115] Sou daar geen sodanige ooreenkoms wees nie, kry die kind sy/haar vader[116] se van.[117] Volgens artikel 165 verkry 'n buite-egtelike kind sy/haar moeder se van ten tyde van geboorte.[118]

Kragtens artikel 1616(1) *BGB* is die huweliksnaam ("Ehename") van sy/haar ouers 'n binne-egtelike kind se geboortenaam ("Geburtsname"). Het die ouers nie 'n huweliksnaam nie, moet hulle by wyse van 'n amptelik-geverifieerde verklaring voor die "Standesbeamte" die naam van een van hulle as geboortenaam van die kind aanwys. Dit geld ook vir hulle verdere kinders.[119] Indien die ouers nie binne een maand na geboorte die aanwysing doen nie, word dié naamgewingsbevoegdheid deur die Voogdyskaphof ("Vormundschaftsgericht") op slegs een ouer oorgedra. Indien dié ouer nie binne 'n vasgestelde tyd die bevoegdheid uitoefen nie, verkry die kind sy/haar familienaam.[120] Artikel 1616a(1) *BGB* bepaal dat indien die ouers 'n huweliksnaam aanneem nadat die kind sy vyfde lewensjaar voltooi het, dit sy/haar geboortenaam slegs kan vervang indien hy/sy die naamsverandering goedkeur. Is die kind onder 14 jaar, word die goedkeuring van die Voogdyskaphof ook vereis. Vir 'n verandering van die huweliksnaam van die ouers of van die familienaam van 'n ouer wat die geboortenaam van die kind geword het, geld dieselfde reëls. 'n Verandering van die familienaam van 'n ouer as gevolg van huweliksluiting raak nie die geboortenaam

---

112 Die gee van of die aanneem van ongebruiklike of verspotte voorname is in Frankryk verbode – Munday 334–340.

113 Verdere verwysings na wetsartikels in die Oostenrykse reg is verwysings na hulle Siviele Kode.

114 Bernat en Jessner 82.

115 A 93(3)(2).

116 Hierdie patriargale benadering word nie deur die Oostenrykse Konstitusionele Hof as ongrondwetlik beskou nie – 1994 JBL 326; Bernat en Jessner 83.

117 A 139(3).

118 Bernat en Jesser 84.

119 A 1616(2) *BGB*. 'n Familiedubbelnaam ("Familiendoppelname") is uitgesluit – OLG Oldenburg, Beschl v 24/10/94, NJW 1995, 537. Sien ook OLG Hamm v 1/3/1995, NJW 1995, 1908. Die Bungesgerichtshof (BGH, Beschl v 4/10/1989, JZ 1990, 93) het beslis dat indien 'n kind gebore word uit 'n Spaans-Duitse huwelik en hy/sy, by gebrek aan 'n gemeenskaplike huweliksnaam, die Spaanse vader se familienaam aanneem, slegs die eerste deel van die Spaanse dubbelnaam ("apellidos") oorgaan.

120 A 1616(3) *BGB*. A 1616(4) *BGB* tref 'n spesifieke reëling vir kinders wat in die buiteland gebore word.

van die kind nie.[121] In beginsel geld dieselfde reëls ten aansien van 'n aangenome kind.[122] 'n Buite-egtelike kind verkry die familienaam van sy/haar moeder ten tyde van geboorte.[123] Ten aansien van die verandering van die moeder se familienaam en die effek daarvan op die kind se naamsvoering geld *mutatis mutandis* dieselfde reëls as by binne-egtelike kinders.[124] 'n Moeder en haar eggenoot kan aan die kind, wat 'n naam ingevolge artikel 1617 *BGB* voer en 'n huwelik nog nie tussen hulle gesluit is nie, die latere huweliksnaam deur 'n amptelike verklaring toeken. Die toestemming van die kind word egter vereis en indien die vader aan die kind sy familienaam toeken, is die moeder se toestemming ook nodig.[125]

In Nederland verkry 'n kind, binne huweliksverband gebore, die geslagsnaam van sy vader, tensy die ouers voor sy/haar geboorte deur middel van 'n akte van naamskeuse of ten tyde van die registrasie van sy/haar geboorte in die akte van geboorte vermeld wie se geslagsnaam die kind moet kry. Die akte van naamskeuse kan te eniger tyd na huweliksluiting gesamentlik deur die ouers opgestel word. Die naamskeuse kan egter slegs gewysig word tot en met die registrasie van die geboorte van die kind.[126] 'n Kind buite huweliksverband gebore behou sy/haar moeder se geslagsnaam, tensy die ouers gesamentlik verklaar dat die kind sy/haar vader se geslagsnaam moet kry. Dit kan egter gebeur nadat die vader 'n akte van erkenning laat opstel het waarin hy vaderskap erken.[127] Indien die akte van erkenning opgestel word wanneer die kind 16 jaar of ouer is, kan hy/sy self sy/haar geslagsnaam kies.[128] Die naamskeuse geld vir al die kinders, met die gevolg dat kinders van dieselfde ouers nie verskillende geslagsname kan hê nie.[129]

5 3 Anglo-Amerikaanse regstelsels

Die tradisionele benadering in die Anglo-Amerikaanse regsfamilie is dat 'n binne-egtelike kind sy/haar vader se van verkry. Nieteenstaande die feit dat dit slegs 'n tradisie is en nie deur die reg afgedwing word nie, word dit deur die meerderheid regsonderdane gerespekteer en toegepas, selfs waar die moeder haar eie familienaam behou.[130] 'n Appèlhof van die staat Florida[131] het nog in 1988 beslis dat wetgewing wat bepaal dat 'n kind die familienaam van die eggenoot van sy/haar moeder verkry indien hulle ten tyde van konsepsie getroud was, nie onkonstitusioneel is nie. Die hof het beslis dat die staat 'n regmatige belang het om in dié verband die gesinslewe binne te dring, aangesien daar 'n staatlike behoefte vir die akkuraatheid en betroubaarheid van essensiële statistiese

121 A 1616a(2) *BGB*.
122 A 1757 *BGB*; Diederichsen 1095.
123 A 1617(1) *BGB*.
124 A 1617(2)–(3) *BGB*. Kyk verder Palandt et al *Bürgerliches Gesetzbuch* (1996) 1637–1638.
125 A 1618(1) *BGB*; Palandt *et al* 1638–1639. Sien ook a 1618(2)–(4) *BGB* waarin sekere prosedures bepaal word.
126 A 1:5 lid 4 en 5 *BW*.
127 A 1:5 lid 2 *BW*.
128 A 1:5 lid 6 *BW*.
129 A Iv lid 1; "Herziening naamrecht", Wet van 1997-04-10, Stb 161. Vir verdere inligting sien Plasschaert "De herziening van het naamrecht" 1997 *FJR* 288.
130 Zitter "Rights and remedies of parents inter se with respect to the names of their children" 40 ALR 5th 697 (1996) 712.
131 523 So 2d 678 (Fla App 4 Dist 1988).

gegewens bestaan.[132] Die California Supreme Court[133] het, daarenteen, beslis dat die vader se voorkeurreg, bo die regte van die moeder, om sy van aan sy kind toe te ken, in stryd met die konstitusionele gelykheidsbeginsel is. Teen die agtergrond van verskeie voorafgaande wetgewingstukke wat gerig is op die bewerkstelling van geslagsgelykheid binne huweliksverband, word die *ratio* vir die hof se beslissing soos volg saamgevat:[134]

> "The Legislature clearly has articulated the policy that irrational sex-based differences in marital and parental rights should end and that parental disputes about children should be resolved in accordance with each child's best interest."

Die beste belang van die kind as kriterium vir bepaling van sy/haar familienaam in geval van verskil tussen die ouers, tree in 'n toenemende mate in die VSA op die voorgrond. Die beste belang van die kind word in finale instansie in die lig van die betrokke omstandighede vasgestel.[135] Regter Braucher van die Supreme Judicial Court van die staat Massachusetts het in 1977 in *Secretary of the Commonwealth v City Clark of Lovell*[136] die regsposisie soos volg verduidelik:

> "We think the common law principle of freedom of choice in the matter of names extends to the name chosen by a married couple for their child. They may change their own names at will, and need not have the same surname. It seems to us to follow that they need not give their child the father's surname, though of course they may. In *Doe v Dunning* [137]... the court saw 'no legal impediment which would prevent married parents from giving the child the mother's surname'."

Uit dié saak blyk ook dat kinders van dieselfde ouers nie noodwendig dieselfde familienaam hoef te hê nie.[138] Ouerlike vryheid by naamgewing van hulle kinders word in verskeie ander sake bevestig.[139] In *Jech v Burch*[140] verklaar hoofregter King van die United States District Court (Hawaii) kategories dat ouers 'n konstitusioneel-beskermde reg het om hulle kind na keuse enige naam te gee en dat die staat geen belang daarin het nie. In *Henne v Wright*,[141] daarenteen, het 'n federale appèlhof in die VSA beslis dat 'n ouer se reg om 'n kind 'n van te gee wat geen verband met 'n ouer het nie, nie 'n fundamentele reg onder die 14de wysiging van die konstitusie beliggaam nie. Die hof pas die sogenaamde "rational basis test" toe en weier om wetgewing van Nebraska wat ouers se reg beperk om 'n van aan hulle kinders toe te ken, as onkonstitusioneel te verklaar. Die hof argumenteer dat erkenning van so 'n reg as 'n konstitusionele reg, die reg op privaatheid onbehoorlik sou uitbrei oor die grense wat tradisie in die VSA gestel het en ook in stryd sou wees met riglyne wat die Supreme Court voorheen daargestel het.[142] In *Secretary of Commonwealth v City*

---

132 Kyk ook MacDougall 99.

133 *In re Schiffman* 620 P 2d 579 (Cal 1980).

134 582; Doll 236 vn 69.

135 Zitter 728–748; Anoniem 595–598; Thorton 308–309; *Hamby v Jacobson* 769 P 2d 273, 279–280 (Utah App 1989); *In re Marriage of Schaefer* 515 NE 2d 710, 713 (ILL App 1 Dist 1987).

136 366 NE 2d 717, 725 (Mass 1977). Kyk ook MacDougall 109; Thorton 306.

137 87 Wash 2d 50, 54 549 P 2d 1, 4 (1976).

138 725.

139 Vgl verder hieroor Nelson "By any other name: Henne v Wright" 1991 *Creighton LR* 1135; MacDougall 110–112.

140 466 F Supp 714, 720–721 (1979).

141 904 F 2d 1208, 1212–1215 (8th Cir 1990).

142 Kyk ook Katz "Parental right to choose a child's surname other than one legally connected to a parent" 1991 *Temple LR* 1095 1096.

Clerk of Lovell[143] het regter Braucher ook beslis dat die kind se van uit 'n koppeling van die vader en moeder se vanne, in enige volgorde, kan bestaan.[144]

Howe in die VSA het beslis dat 'n moeder nie as sodanig die reg het om, sonder die natuurlike vader se instemming, 'n kind uit 'n vorige huwelik se van te verander na dié van haar huidige eggenoot nie.[145] In *Flowers v Cain*[146] verduidelik regter Carrico van die Supreme Court van Virginia dat 'n naamsverandering strydig met die natuurlike vader se wense slegs beveel sal word indien substansiële redes daarvoor aangevoer word en vervolg dan:

> "Generally, a change will be ordered only if (1) the father has abandoned the natural ties ordinarily existing between parent and child, (2) the father has engaged in misconduct sufficient to embarrass the child in the continued use of the father's name, (3) the child otherwise will suffer substantial detriment by continuing to bear the father's name, or (4) the child is of sufficient age and discretion to make an intelligent choice and he desires that his name be changed."[147]

Die beste belang van die kind is deurgaans die kriterium wat deur die howe aangewend word om te bepaal of 'n naamsverandering toegelaat word of nie.[148] Dit is ook die uitgangspunt van die howe in Engeland,[149] Kanada,[150] Australië[151] en Nieu-Seeland.[152]

Die algemene reël in die Anglo-Amerikaanse regstelsels is dat 'n buite-egtelike kind, as uitgangspunt, sy moeder se familienaam verkry.[153] In *Secretary*

---

143 366 NE 2d 717, 725 (Mass 1977).

144 Kyk ook Zitter 717–718; *Cohen v Cohen* 317 NW 2d 381 (Neb 1982) bespreek deur Hording 121–122; MacDougall 98–99.

145 Kyk bv *Kay v Bell* 121 NE 2d 206, 208–209 (CA Ohio, 1953); *Petition for Change of Name Harris* 236 SE 2d 426, 428 (SCA West Virginia, 1977); *Sobel v Sobel* 46 NJ Super 284, 134 A 2d 598, 600 (SC New Jersey, 1957); *In re Marriage of Presson* 102 ILL 2d 303, 465 NE 2d 85 (Illinois SC, 1984) bespreek deur Shawler 335.

146 237 SE 2d 111, 113 (SC Virginia, 1977).

147 Kyk ook *Hall v Hall* 30 Md App 214, 351 A 2d 917, 926 (CSA Maryland, 1976); *Application of Lone* 134 NJ Super 213, 338 A 2d 883, 885 (Hudson Country Court, Law Division, New Jersey, 1975); Doll 242–244; Ludbrook en Kuper "Children's names" 1985 *Legal Action* 140 141.

148 *In re Marriage Schiffman* 169 Cal Rptr 918, 620 P 2d 579, 583–584 (SC California, 1980); *In re Newcomb* 15 Ohio App 3d 107, 472 NE 2d 1142, 1145–1146 (Ohio App 1984); *In re Saxton* 309 NW 2d 298 (Minn 1981), cert denied 455 US 1034 (1982) bespreek in 1983 *William Mitchell LR* 484; Bugliari 149–150; Shawler 335. Vgl Miller HR in *Keegan v Gudhal*, 525 NW 2d 695, 40 ALR 5th 901, 910 (SC South Dakota): "In determining the best interest of the child in a name change dispute, factors for the court to consider include, but are not limited to: (1) misconduct by one of the parents; (2) failure to support the child; (3) failure to maintain contact with the child; (4) the length of time the surname has been used; and (5) whether the surname is different from that of the custodial parent."

149 *Y v Y (child: surname)* [1973] 2 ALL ER 574 (PDA) 578–580; *Re WG* 1976 *Fam Law* 210; *W v A (child: surname)* [1981] 1 ALL ER 100 (CA) 104–106; *D v B (otherwise D) (child: surname)* [1979] 1 ALL ER 92 (CA) 100–101; *R v R (child: surname)* (1982)3 FLR 345 (CA) 347–349.

150 *Wintemute v O'Sullivan (Wintemute)* (1985) 48 RFL (2d) 276 (Alberta QB) 277.

151 *Chapman and Palmer* (1978) FLC 667 (FC Aus, Sydney); *Skrabl and Leach* (1989) FLC 337 (FC Aus, Melbourne).

152 *H v J* (1978) 2 NZLR 623 (SC Auckland); *S v C* (1981) 1 NZFR 13 (HC Auckland); *Douglas v Wharepapa* (1986) 2 FRNZ 644 (FC Napier); *Niel v Ottosen* (1988) 4 FRNZ 701 (FC Auckland).

153 Doll 245–247; *Bobo v Jewell* 38 Ohio St 3d 330, 528 NE 2d 180, 183–184 (Ohio 1988).

of the Commonwealth v City Clerk of Lovell[154] het die Supreme Judicial Court van Massachusetts beslis dat "at least in the absence of objection from the putative father, [the mother] has, in general, the same right to control the initial surname of the child as the parents of a legitimate child".[155] In *Doe v Hancock Country Board of Health*[156] bevestig die Supreme Court van Indiana dié benadering.[157] In *Beyah v Shelton*[158] beslis die Supreme Court van Virginia dat 'n ongetroude vader *locus standi* het om beswaar te maak teen 'n beoogde naamsverandering van sy minderjarige kind. Teen dié agtergrond beslis die Supreme Court van Montana later in *Matter of Iverson*[159] dat die diskresionêre weiering van 'n petisie van 'n moeder vir die verandering van 'n kind se familienaam vanaf dié van sy natuurlike vader in orde was waar laasgenoemde vaderskap erken het, onderhoud vir die kind betaal het en om omgangsregte aansoek gedoen het. Howe in die VSA het beslis dat die biologiese vader van 'n buite-egtelike kind nie geregtig is om sy familienaam vanaf dié van sy moeder na sy eie te verander nie, indien daar nie getuienis bestaan dat dit in die beste belang van die kind is nie en die feit dat die vader 'n onderhoudsbydrae maak, beteken nie dat dit *per se* in die belang van die kind is om sy familienaam te dra nie. Die bewyslas ten opsigte hiervan rus op die vader.[160] In *L v C*[161] het die Family Court van Auckland in Nieu-Seeland beslis dat dit nie in die beste belang van die kind is om in so 'n mate in die moeder se familie geabsorbeer te word dat die indruk daardeur geskep word dat haar stiefvader haar werklike vader is nie. Om haar stabiliteit in die langtermyn te verseker sou dit volgens die hof die beste vir haar wees om bewus te wees van haar afkoms en daarop trots te wees en gevolglik voort te gaan om met haar natuurlike vader te identifiseer. Daarteenoor, het die Superior Court van New Jersey in *KK v G*[162] beslis dat die belange van 'n 6½ jarige kind van ongetroude tienerjarige ouers die beste gedien sou word indien haar stiefvader se van agter dié van haar natuurlike vader geplaas word. Indien 'n kind 'n vlak van voldoende oordeelsrypheid, in die meeste gevalle so tussen die ouderdomme van 12 en 14 jaar, bereik het, behoort swaar gewig aan sy/haar wense toegeken te word.[163]

6 REGSANTROPOLOGIESE EVOLUSIELYNE EN ONTPLOOIENDE MENSEREGTE

Soos by 'n vorige geleentheid[164] aangetoon is, is daar sekere duidelike oorkoepelende evolusielyne in die regsantropologie sigbaar. Vier evolusie-prosesse (of -lynbepalers) is onderskeibaar, naamlik dié van dereligiëring (waarby inbegrepe is deritualisering), dekonkretisering, individualisering en humanisering.

154 366 NE 2d 717 (Mass 1977).
155 726.
156 436 NE 2d 791, 793 (Ind 1982).
157 Kyk ook Doll 257.
158 344 SE 2d 909, 910 (Va 1986). Kyk ook Shawler 339.
159 786 P 2d 1, 2 (Mont 1990).
160 *Matter of GLA* 430 NE 2d 433, 434 (Ind 1982); *Collinsworth v O'Connell* 508 So 2d 744, 746–747 (Fla App1Dist 1987).
161 (1988) 5 NZFLR 193 (Fam C, Auckland) 196.
162 219 NJ Super 334, 530 A 2d 361, 363 (NJ Super Ch 1987).
163 BSS 1351–1354.
164 Labuschagne "Evolusielyne in die regsantropologie" 1996 *Suid-Afrikaanse Tydskrif vir Etnologie (SATE)* 40 42.

Twee subsidiêre prosesse, naamlik (individuele) outonomisering en egalisering, verdien, veral in kontemporêre verband, afsonderlike vermelding. Die hedendaagse menseregtelike bedeling is 'n artikuleringsgevolg van dié prosesse.[165] Die ontwikkeling van die reg met betrekking tot naamsvoering word vervolgens teen dié agtergrond evalueer.

6 1 DIE HEILIGE OERVADER, DIE DERELIGIËRINGSPROSES EN DIE LOTGEVALLE VAN PATRINOMIE

In rudimentêre gemeenskappe is die *pater* (en later sy opvolgers: stamhoof; koning; staat) as heilig en almagtig beleef. Hy is in die reg geprioriseer. Trouens, hy was die reg.[166] Die oorweldigende posisie wat patrinomie, dit wil sê die naamskontinuering van die vader, beklee het, word in die lig hiervan verstaanbaar. In rudimentêre gemeenskappe het 'n vader 'n *ius vitae necisque* oor sy kinders gehad.[167] Hoewel howe in die VSA herhaaldelik geweier het om die vader se naamgewingsreg as 'n konstitusionele eiendomsreg ("constitutional property right")[168] te beskou,[169] het hulle tot redelik onlangs nog daarna verwys as 'n primêre of natuurlike reg.[170] Dit was ook die posisie in kontinentale regstelsels.[171] In sekere buitengewone gevalle, kon 'n kind, blykbaar met die vader se instemming, sy/haar moeder se familienaam aanneem.[172] Die behoefte aan 'n koppeling aan iets heiligs, soos oorspronklik konseptueel in die heilige oervader gesetel, het met die koms van groot wêreldgodsdienste voortgeduur.[173] So wys Slovenko[174] daarop dat ter voldoening aan wat hy "semireligious proscriptions" noem, Katolieke tot op die hede name gebruik wat deur die kerk gesanksioneer is en dat sekere Jode hulle kinders na afgestorwe verwante vernoem.[175] Die

---

165 Kyk Labuschagne "Eengeslaghuwelike: 'n Menseregtelike en regs-evolusionêre perspektief" 1996 *SAJHR* 534 537.

166 Kyk Freud *Totem und Tabu* (1968-uitgawe) 171; Labuschagne 1996 *SATE* 42; Labuschagne "Die heilige oervader in die beskuldigdebank: Opmerkinge oor die strafregtelike aanspreeklikheid van die staat en die sanksiekrisis in die omgewingsreg" 1997 *TSAR* 335.

167 Labuschagne "Aktiewe eutanasie van 'n swaar gestremde baba: 'n Nederlandse hof herstel die *ius vitae necisque* in 'n medemenslike gewaad" 1996 *SALJ* 216.

168 Vgl Doll 229: "The custom of patrilineal succession evolved from the medieval property system, in which the husband controlled all marital property. The budding tradition further continued when Henry VIII required marital births to be recorded under the name of the father. In addition, a married woman in medieval times could not contract or maintain suit in her own name. The male was the legal representative of the family and, as such, enjoyed the unilateral right to name his family. Similarly, it has been suggested that the underlying basis of male control over naming rights is a proprietary attitude towards women and progeny." Vgl ook Caldwell 232.

169 *Fulgham v Paul* 229 Ga 463, 192 SE 2d 376 (Georgia 1972); *In re Thomas* 404 SW 2d 199 (Montana 1966); *Newman v King* 433 SW 2d 421 (Texas 1968); MacDougall 136.

170 *In re Schiffman* 620 P 2d 579, 583 (Cal 1980); *Rio v Rio* 504 NYS 2d 959, 960–961 aangehaal deur Doll 233; Bander 2; BSS 1318.

171 De Jong "Voetje voor voetje" 1981 *NJB* 94; Munday 332.

172 MacDougall 109.

173 Vgl Pacheco 12; Dannin 167.

174 250.

175 Vgl Pacheco 3 ten aansien van die effek van kultuurimperialisme op naamtradisies: "Naming issues have a long history in North America, dating to at least colonial times. Enslaved Africans routinely were renamed by those who bought them, while Native American names quickly came to be shortened, mispronounced or translated into

vervolg op volgende bladsy

dereligiëringsproses, dit wil sê die proses van ontheiliging van die "status en regte" van die oervadersfiguur, het 'n relativeringseffek op patrinomie gehad. Dit het die grondslag vir substansiële vernuwing op die terrein van die naamreg daargestel.[176]

6 2 Die effek van die individualiseringsproses op die regstatus van die vrou en kind

Die vrou het universeel 'n ondergeskikte posisie teenoor die man beklee.[177] By 'n vorige geleentheid[178] is 'n verklaring vir dié toedrag van sake aangebied. Die argumente daarin geopper word nie hier herhaal nie. Die Christelike godsdiens het 'n glos op die antropologies-universele ondergeskikte posisie van die vrou geplaas. Die beroemde Engelse juris Blackstone[179] verduidelik dit soos volg:

> "The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband under whose wing, protection and cover, she performs everything . . ."[180]

Hough[181] wys daarop dat in ooreenstemming met die vroegste Engelse reg 'n vrou nie verplig was om haar man se van aan te neem nie. Sy toon vervolgens aan dat die status wat aan 'n getroude vrou in die feodale tydperk toegeken is, die fiksie geskep het dat "the husband and wife are one . . . [and] the one is the husband".[182] Hierdie toedrag van sake het daartoe aanleiding gegee dat die vrou tesame met haar kinders as 'n aanhangsel van haar man beskou is, ook naamsgewys.[183] Dit was ook die posisie in ander Europese regstelsels.[184] Die vrou en kinders se individualiteit en waardigheid is onderdruk ten gunste van 'n groepsbelang, wat wesenlik 'n patriargale belang was. Die oorweldigende regstatus en prioritisering van die belange van die eggenoot en die vader het met die verloop van tyd plek gemaak nie net vir die regte van die eggenote nie maar ook vir dié

English or French. With the dominance of Anglo-Saxon culture well established from the beginning of the republic, European immigrants from other traditions had similar experiences of renaming, particularly if they hailed from Southern or Eastern Europe. What all of the victims of these practices had in common was their relative powerlessness, on the one hand, and the desire of those representing the dominant culture to force them to conform, on the other."

176 Vgl ook Doll 260.

177 Kyk Labuschagne "Die psigo-kulturele onderbou van effektiewe menseregte: Opmerkinge oor die posisie van die vrou in die inheemse reg" 1995 *Stellenbosch LR* 348; "Geregtigheidsdinamiek van die vroutipiese" 1996 *SAPR/PL* 225 226–227.

178 Labuschagne "Seduksie en geslagsdiskriminasie: Opmerkinge oor die deliktuele beskerming van seksuele integriteit" 1994 *TRW* 162 165–167.

179 *Commentaries* (1765) 430.

180 Vgl ook *I* 1 9 1.

181 490–491.

182 *United States v Yazell* 382 US 341, 361 (1966).

183 Vgl ook BSS 1321; Pask 62. Soos orals in die menslike waarde- en sosiale sisteme die geval is, het daar uitsonderings, veral om doelmatigheids- en oorlewingsredes, voorgekom. Vgl hieroor Teichmann *Illegitimacy: A philosophical examination* (1982) 95 soos aangehaal deur BSS 1345 vn 193: "There are . . . numerous examples of a man taking his wife's surname . . . The idea here is to give continuity to the ownership of the property and to preserve an historic name. Many are the instances hidden under the thick branches of a family tree, in which a man's name has been sacrificed in order that the family themselves, and future ages also, may be deluded into assuming that the male line identity has been kept up from a remote period."

184 Bernat en Jesser 76; Schwenzer 391–392.

van die kind.[185] Die reg op 'n persoonlikheidsmatige individualiteit en selfrealisering, ook met betrekking tot naamsvoering en -gewing, vind in 'n toenemende mate in die sosio-juridiese waardestrukture van die mens neerslag.[186]

Artikel 1(1) van die Duitse Grondwet (*Grundgesetz*; *GG*) sanksioneer menslike waardigheid as onaantasbaar. In ooreenstemming met artikel 2(1) *GG* het iedereen 'n reg op vrye ontplooiing van sy/haar persoonlikheid, in soverre dit nie die regte van ander, die staatsregtelike ordening en die openbare sedes skend nie. Volgens die Duitse Konstitusionele Hof is die hoogste waarde geleë in die vrye menslike persoonlikheid wat met waardigheid toegerus is.[187] Die *BVerfG* beskou die persoonlikheidsreg as 'n dinamiese reg wat voortdurend nuwe velde dek.[188] Blykens artikel 10 van die Grondwet 108 van 1996 het iedereen 'n inherente waardigheid en 'n reg dat sy/haar waardigheid beskerm en gerespekteer word. 'n Algemene persoonlikheidsreg, soos in die Duitse reg, is nie uitdruklik in die Suid-Afrikaanse Grondwet opgeneem nie, hoewel daar aanduidings is dat ons howe so 'n reg onder die reg op waardigheid tuisbring.[189] Die uniekheidskonstitusie van 'n persoon, sy/haar individualiteit derhalwe, en die geregtigheidskonforme verwesenliking daarvan, vorm die juridiese grondslag van die menslike persoonlikheid.[190] Eenvormige naamsvoering, spesifiek binne gesinsverband,[191] sou nie sonder meer aan menslike individualiteit en persoonlikheidsmatige selfverwesenliking reg kon laat geskied nie.

6 3 Die effek van die dekonkretiserings-, outonomiserings- en egaliseringsprosesse op die reg ten aansien van naamsvoering

'n Kultuur waarin aan individue 'n sosio-juridiese identiteit toegeken word, veronderstel 'n vermoë tot 'n gevorderde vlak van abstrakte denke, dit wil sê dit

---

185 Vgl Nelson 1146–1148; Shawler 335; Labuschagne "Ouerlike geweldaanwending as skending van die kind se reg op biopsigiese outonomie" 1996 *TSAR* 577; Eckard "Vroueregte" 1993 *SAPR/PL* 147; Sachsofsky *Das Grundrecht auf Gleichberechtigung* (1991) 1 ev.

186 Vgl BSS 1341–1342: "Parental self-expression is clear where the parents have created a name to give to their child. Giving an existing surname to a child is also an act of self-expression. The parent thereby validates his own sexuality, declares himself to be no longer a child but an adult, and defines himself as having adopted the vital and constitutionally protected role of parent. Bestowing a name on a child serves the same functions in our society as changing one's own name at various stages in life does in other societies. By choosing a new name for a child, the parent expresses his individuality; by giving the child his own name, the parent expresses his relation to the community . . . For both parents, the act of naming a child expresses to the child that he 'belongs' to them, that they in some ways control him and 'direct his destiny' . . . For both parents, the act of naming may signify intangible legacies to the child of the status or ethical values that they received from their own families."

187 *BVerfG*, Urt v 11/6/1958, *BVerfGE* 7, 379 405; *BVerfG*, Urt v 5/6/1973, *BVerfGE* 35, 202 221.

188 *BVerfG*, Beschl v 3/6/1980, NJW 1980, 2070 2071.

189 *Gardener v Whitaker* 1994 5 BCLR 19 (E) 36. Sien ook a 39 (1) van ons Grondwet en Labuschagne "Doelorganiese regsnormvorming: Opmerkinge oor die grondreëls by die uitleg van 'n akte van menseregte" 1993 *SAPR/PL* 127; Botha *Waarde-aktiverende grondwetuitleg: Vergestalting van die materiële regstaat* (LLD-proefskrif, Unisa, 1996) 282–283.

190 Vgl Eckensberger "Der Selbstkonstitution der individuellen Persönlichkeit in der menschlichen Gesellschaft als Grundlage eines Persönlichkeitsrecht" 1987 *Jahrbuch für Rechtssoziologie und Rechtstheorie* 31.

191 Vgl Doll 230; Bernat en Jesser 85.

veronderstel heelwat meer as dit wat sintuiglike identiteit genoem kan word. Die werking van die dekonkretiseringsproses het hierdie konkrete identiteit in so 'n mate erodeer dat na 'n ander verwys kan word sonder dat hy/sy sintuiglik bereikbaar is.[192]

Die werking van die egaliseringsproses[193] in die sosio-juridiese waardestruktuur van die mens het met betrekking tot naamsvoering tot die volgende gelei: (i) Patriliniêre en patriargale prioriteit by bepaling van die familienaam van die kinders is in 'n proses van uitfasering.[194] Reëls word in 'n toenemende mate ontwerp om aan ouerlike outonomie en konsensus uitdrukking te gee.[195] Die egaliseringsproses het gevolglik aktivering van die outonomiseringsproses tot gevolg gehad. (ii) Die egaliseringsproses het ook tot gevolg gehad dat die man en vrou met die tydsgang gelyke status as huweliksvennote verwerf het. Die vrou[196] en man kan in 'n toenemende mate op 'n outonome wyse self besluit of hulle 'n enkele familienaam na huweliksluiting gaan aanneem of nie.[197] (iii) Die werking van die egaliseringsproses (en ook die humaniseringsproses) het geleidelik tot gevolg gehad dat juridiese diskriminering teen buite-egtelike kinders,[198] ten aansien van naamsvoering, in 'n proses van onvermydelike uitfasering geplaas is.[199] (iv) Slovenko[200] is van oordeel dat die (sosio-juridiese) proses van gelykbehandeling van man en vrou ook tot 'n omwenteling in naamsvoering aanleiding gee:

> "The sexual revolution, with its homogenization or neutralization of sex roles, has had a marked impact on naming. With the neutralization of sex roles there has occurred a neutralization in naming. In large measure, the movement for equality of the sexes has been taken to call for a sameness of the sexes, and as a

---

192 Vgl Nelle 810–811.

193 Waarin ook duidelike spore van die humaniseringsproses sigbaar is.

194 Kyk MacDougall 118–119, 146–152; Hoge Raad, 25 Sept 1988, NJ 1989, 740; Hoge Raad, 8 Okt 1980, NJ 1981, 308; EHRM 22 Feb 1994, NJ 1996, 12; Heldrich "Der Familienname des Kindes nach dem Beschluss des BVerfG, NJW 1991, 1602" 1992 *NJW* 294.

195 De Jong 906; Anoniem 584–586; MacDougall 124.

196 Vgl Hough 491: "Thus, *requiring* a wife to adopt her husband's surname is an explicit symbolic statement of the merger of the wife's identity with her husband's. Her symbolic relationship with her parents is terminated and she loses whatever goodwill was associated with her prior name. The strong reaction from both proponents and opponents of the woman's right to use her maiden name, in itself, indicates the importance of a person's surname."

197 Kyk BVerfG, Beschl v 5/3/1991, NJW 1991, 1602; Grasmann 595; Schwenzer 391; Elzinga, Loeb en de Groot "Herziening van het naamrecht: Vaders wil is nog steeds wet" 1985 *NJB* 73 74.

198 Dit geld ook buite-egtelike saamwoonverhoudings – kyk Labuschagne. "Die vermoede *pater est quem nuptiae demonstrant*, sosio-morele transformasie en die reg op nakomskennis" 1996 *Obiter* 30.

199 Dannin 165; MacDougall 123, 152: "One of the spoken and unspoken objections to recognizing a child's right to bear its mother's surname has been that, because customarily nonmarital children are known by their mother's surnames, society will stigmatize marital children as 'illegitimate' if they also carry their mother's surnames. Charlotte Perkins Gilman wrote . . . 'As to illegitimate children, the term will disappear from the language . . . When women have names of their own, names not obliterated by marriage . . . there will be no way of labeling a child at once, as legitimate or otherwise.' Now that women increasingly have names of their own, society cannot, and should not, label children as 'illegitimate' or 'legitimate'."

200 249.

consequence, sameness in naming. The sexes bear unisex or cross-sex names or what might also be called ambisexual (epicene), contrasexual, or androgynous names. The slow march in this practice has become a quickstep."[201]

Selfs al sou persone in professionele en arbeidsverband naamsgewys as 't ware as seksneutraal wou funksioneer, is dit egter 'n vraag of hulle dit sou wou of persoonlikheidsmatig sou kon uitbrei na ander lewenskringe.[202]

7 KONKLUSIE

Naamsgewing en- voering kan onmoontlik 'n mens se identiteitspit, naamlik jou genetiese identiteit, reflekteer. Die menslike afkomslyne is daarvoor te veelvuldig.[203] Trouens, dit is in finale sin onoorsienbaar. Inligting oor 'n persoon se afkoms behoort egter, vir mediese en 'n veelheid ander redes, so akkuraat as moontlik gedokumenteer te word. Die reg op naamsvoering, wat vir doeleindes van sosio-juridiese ordening en funksionering van wesenlike belang kan wees, behoort, soos die effek van die regsantropologiese evolusieprosesse ook duidelik aandui, binne die menseregtelike konsepte van outonomie, gelykheid[204] en waardigheid[205] op 'n geregtigheidskonforme wyse[206] uitgeoefen te kan word. Wat kinders betref, moet die beste belang van die betrokke kind in alle omstandighede deurslaggewend wees, soos ons Grondwet ook uitdruklik sanksioneer.[207] Gedetailleerde en absoluut eenvormige reëls by naamgewing en- voering is onnodig en selfs onwenslik aangesien dit kultuur- en taalvariasies onbillik kan inhibeer.

---

201 Vgl ook Slovenko 252–253: "Many parents (especially mothers) feel that in today's world, a girl bearing a feminine name, or at least an ultrafeminine one, is disadvantaged. In some cases parents give a girl a masculine middle name and a feminine first name, or vice versa, leaving it to the child later on in life to choose which one she will use. This way, parents feel, their daughter will have the best of both worlds. In professional life she is likely to use the masculine name and an abbreviation of the feminine one. Traditionally it was expected that later in life a girl would change her name – to wit, at marriage, at which time a girl took on a new name and a new life – and so it is quite socially acceptable when a woman changes her name."

202 Vgl Karst "'A discrimination so trivial': A note on law and the symbolism of women's dependency" 1974 *Ohio State LJ* 546 550: "Inequality is harmful *chiefly* in its impact on the psyches of the disadvantaged. Once a certain subsistence level is attained, what really matters about inequality is something that happens inside our heads: 'The peculiar evil of a relative deprivation . . . is psychic or moral; it consists of an affront; it is immediately injurious insofar as resented or taken personally, and consequentially injurious insofar as demoralizing.'" 'n Vrou sou sekerlik tog nie geaffekteer voel dat sy 'n kind in die lewe moet bring, moet borsvoed en nie haar man nie! Die gelykheidsbeginsel kan slegs sinvol binne natuurmatige grense funksioneer.

203 Vgl Hondius en Loeb 404.

204 A 9 van ons Grondwet.

205 A 10 van ons Grondwet.

206 Dws met erkenning van die regte van ander en binne die steeds veranderende gemeenskapswaardes.

207 A 28(2).

Minority rights and cultural pluralism – The protection of language and cultural identity in the 1996 Constitution

GE Devenish
BSc LLB LLD TTHD
Erstwhile Head, Department of Public Law, University of Natal (Durban)

OPSOMMING

Minderheidsregte en kulturele pluralisme – die beskerming van taal en kulturele identiteit in die 1996 Grondwet

Hierdie artikel bespreek en ontleed die bepalings van die Grondwet van die Republiek van Suid-Afrika, Wet 108 van 1996, wat handel oor taal en kultuur, in artikel 30 uiteengesit, en die beskerming van kultuur-, godsdiens- en taalgemeenskappe deur artikel 31, sowel as ander verwante bepalings van die 1996 Grondwet. Suid-Afrika is 'n kaleidoskoop van kulturele, linguistiese en godsdienstige heterogeniteit, wat 'n bron van sowel grenslose rykdom as hewige historiese, hedendaagse en toekomstige konflik is.

Die nypende probleem van die tegemoetkoming en beskerming van etniese, godsdienstige en taalminderhede in 'n demokratiese politieke bestel, wat ooreenkomstig die filosofie en praktyk van konstitusionalisme en 'n beregbare handves van regte opereer, het alle ander kwessies in verband met die 1993- en 1996-Grondwet oorskadu. Die oorheersing van hierdie kwessie is begryplik waar ras-, taal- en kultuuronderskeid die bepalende twispunt in die historiese en politieke ewolusie van Suid-Afrika vanaf die aanvang van koloniale vestiging tot die opkoms en val van apartheid was. Aangesien hierdie kwessie verband hou met die beskerming van minderhede, is internasionale reg relevant, waar sodanige beskerming 'n belangrike aspek van dié betrokke regsvertakking is.

Minderheidsregering het gelei na blanke oorheersing wat die politieke aard van die Suid-Afrikaanse samelewing in beide die eras van imperialisme en geïnstitusionaliseerde afskeiding gekenmerk het. Etniese en taalminderhede het die koms van onbeperkte meerderheidsregering patologies gevrees, en die verteenwoordigers van die Nasionale Party het gevolglik daarop aangedring dat, voordat hulle die mag afgee, daar voldoende beskerming vir ras- en kulturele minderhede sou wees.

Die grondwetlike onderhandelinge is gekenmerk deur die regmatigheid en doeltreffendheid van die verskillende middele wat gebruik kon word om die beskerming van minderheidsbelange te waarborg. Die beskerming van etniese, godsdienstige en taalminderhede is verder een van die oudste kwelpunte van die internasionale reg. By die Verenigde Volke bestaan daar trouens die standpunt dat minderhede nie sommer weggewens kan word nie en dat state, in hulle eie belang en in die belang van internasionale vrede, die probleme van minderhede op hulle grondgebiede realisties moet aanpak.

Suid-Afrika is tans in die nuwe konstitusionele en politieke bedeling besig om na 'n multikulturele en veeltalige gemeenskap te ontwikkel. Dit vereis 'n verandering vanaf die oorheersende tweetalige, Calvinistiese en Eurosentriese bedeling van die apartheidsera, wat deur kultuur- en taalimperialisme gekenmerk is, na kultuur-, godsdiens- en taalverskeidenheid.

'n Ware pluralistiese samelewing word natuurlik behoef. Dit is egter so dat daar 'n afdoende verband tussen minderheidsbeskerming en die heersende vlak van demokratiese regering in 'n land bestaan. Kulturele pluralisme impliseer 'n sekere graad van differensiële

behandeling van minderheids- en inheemse groepe om hulle besondere omstandighede en behoeftes tegemoet te kom en om ware gelykheid voor die reg en respek vir hulle tradisies te verseker.

Die probleem is dat een van die gevolge van apartheid was dat enige vorm van differensiële behandeling met onmiddellike agterdog beskou word. Nou dat apartheid deel van Suid-Afrika se politieke en konstitusionele geskiedenis is, sal 'n meer volwasse en minder emosionele benadering in verband met die kwessie van kulturele pluralisme waarskynlik gevolg word. In die internasionale reg en politiek is daar 'n beweging weg van die assimilasie van minderhede en wel na die erkenning van kulturele pluralisme as verkieslike doel. Dit moet natuurlik verstaan en bevorder word op 'n wyse wat die soewereiniteit en integriteit van nasionale state respekteer. Die tegemoetkoming van taal- en kultuurverskeidenheid tesame met die sosiale en ekonomiese rehabilitasie van benadeelde gemeenskappe stel die grootste uitdagings aan die nuwe grondwetlike bedeling in Suid-Afrika. Die onderhawige artikel oorweeg die verskillende meganismes wat die 1996 Grondwet in verband met bogenoemde verskaf.

1 INTRODUCTION

This article discusses and analyses the provisions of the Constitution of the Republic of South Africa, 1996[1] dealing with language and culture, set out in section 30, and with the protection of cultural, religious and linguistic communities, incorporated in section 31. Other, cognate provisions of the 1996 Constitution are also examined.

South Africa is *par excellence* a kaleidoscope of cultural, linguistic and religious heterogeneity, which is a source both of infinite richness and of intense historical, contemporary and potential conflict. The acute problem of accommodating and protecting ethnic, religious and linguistic minorities in a democratic body politic, operating in accordance with the philosophy and practice of constitutionalism and a justiciable bill of rights, eclipsed all other issues in relation to both the 1993 Constitution[2] and the 1996 Constitution. The predominance of this issue is understandable since racial, language and cultural cleavage has been the definitive polemic in the historical and political evolution of South Africa from the inception of colonial settlement to the rise and demise of apartheid. As the above rights involve the protection of minorities, international law is relevant,[3] since such protection is an important aspect of this branch of the law.

Minority rule resulted in the white hegemony that characterised the political nature of South African society in both the era of imperialism and that of institutionalised segregation. Ethnic and linguistic minorities pathologically feared the advent of untrammelled majority rule, and National Party representatives therefore

1 Act 108 of 1996.

2 Constitution of the Republic of South Africa, Act 200 of 1993.

3 See Dugard "The influence of apartheid on the development of the United Nations Law governing the protection of minorities" (unpublished paper, 1989). Since 1947 the protection of minorities has been a subject of investigation and research by the United Nations Sub-commission on the Prevention of Discrimination and the Protection of Minorities. Information in this regard may be found in Thornberry *International law and the rights of minorities* (1991) ("Thornberry") 124–132. In more recent times the Working Group on Indigenous Populations, which is a subsidiary organ of the Sub-commission, has extended the ambit of the study to include the needs of indigenous peoples. See Hannum "New developments in indigenous rights" 1988 *Virginia Journal of International Law* 649 657–662.

insisted that before they relinquished the reins of power there should be adequate protection for racial and cultural minorities. The constitutional negotiations were characterised by discussion about the legitimacy and effectiveness of the various devices which could be employed to guarantee the protection of minority interests. Furthermore, "the protection of ethnic, religious and linguistic minorities is one of the oldest concerns of international law".[4] Indeed, at the United Nations the viewpoint exists that "minorities [cannot] simply be wished away and that States, in their own interest and in the interests of international peace, [need] to grapple realistically with the problems of minorities on their territories".[5]

As a whole, the fundamental rights embodied in Chapter 2 of the 1996 Constitution accord protection to minorities in general. So, for example, the equality provision encapsulated in section 9 guarantees equality of treatment to groups of people who were in the past marginalised by virtue of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. As far as freedom of religion, belief and opinion are concerned, further and more specific protection is provided by section 15. In relation to education, section 29(2) provides that "[e]veryone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable".

In regard to language, section 6 recognises eleven official languages, in addition to promoting non-official languages such as those of "the Khoi, Nama and San". Furthermore, respect must be promoted and ensured for certain other languages commonly used by communities in South Africa, including "German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu"; and for Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa. Protection is even afforded the "sign language" of the deaf. There is no doubt that the drafters of the Constitution took the issue of minority protection in the Constitutional Assembly very seriously indeed. Some would say that what emerges from the Constitution is a veritable Tower of Babel, at least as far as language is concerned!

2 THE MEANING AND SIGNIFICANCE OF CULTURE

The renowned nineteenth-century British anthropologist Sir Edward Burnett Tylor introduced the term "culture" in the way social scientists employ the term today in his pioneering book *Primitive culture*.[6] Tylor defined culture as "that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society".[7] This conception of culture served social scientists and anthropologists beneficially for fifty years.[8] With the increasing maturity and sophistication of anthropological science, further reflections upon the nature of the subject matter and concepts led to a multiplication and diversification of definitions of culture. The *Encyclopaedia*

4 See Thornberry 1.
5 Thornberry 387.
6 (1871).
7 1.
8 *Encyclopaedia Britannica* vol 16, "The concept and components of culture" 874.

Britannica[9] defines culture as "behaviour peculiar to Homo Sapiens, together with material objects used as an integral part of this behaviour, specifically, culture consists of language, ideas, beliefs, customs, codes, institutions, tools, techniques, works of art, rituals, ceremonies, and so on".

The word "culture" is also used in a colloquial sense to refer, *inter alia*, to activities in such "fields as art, literature and music".[10] This is the meaning of the word in Schedule 5 of the Constitution, in the category "Provincial cultural matters". But a different use of the word is found in sections 30 and 31. For social scientists, as is evident from Tylor's definition, a people's culture consists of all the ideas, objects and ways of doing things created by the group, and includes arts, beliefs, customs, inventions, language, technology and traditions.[11] Culture consists of learnt ways of acting, feeling and thinking, rather than biologically determined ways.[12] Tylor's definition above involves three of the following important characteristics[13] of culture:

(1) Culture is acquired by people through a process of enculturation.

(2) A person acquires a culture as a member of society. Social life would be impossible without the understandings and practices shared by all people.

(3) Culture is a complex whole. Its units are called cultural traits.

The *raison d'être* of the collective right to culture is the protection of groups of people against unequal treatment on account of their culture.[14] Within any society there are manifestations of different cultures. Very often a dominant culture emerges in a heterogeneous community, resulting in the need for the protection of other prevailing cultures. The belief that a person's own culture is superior to all other cultures precipitates ethnocentrism, which in turn can result in political domination and cultural imperialism. The political phenomenon of colonialism was based on the implicit assumption that the indigenous cultures of Africa and Asia were morally and socially inferior to those of Western Europe. Today, in the wake of the global process of decolonisation and the complete eclipse of imperialism, it is accepted, as Dlamini observes,[15] that in general no one culture is superior to another. Axiomatically, the right to culture establishes the right to be different.[16] Such a right involves a jurisprudential dilemma, for to notice differences involves the "risk of reinforcing negative stereo-types",[17] whereas ignoring differences may negate the ways in which individuals may find themselves situated, and "undermines the value they may have to those who cherish them as part of their own identity".[18]

---

9 *Ibid.*

10 *The world book encyclopaedia* (1992) vol 4 490.

11 *Ibid.*

12 *Ibid.*

13 *Ibid.*

14 See Dlamini "Culture, education, and religion" in Van Wyk, Dugard, De Villiers and Davis (eds) *Rights and constitutionalism: The new South African legal order* (1994) 573 ("Dlamini") 574.

15 Dlamini 575.

16 See Sachs *Advancing human rights in South Africa* (1992) 160.

17 Davis, Cheadle and Haysom *Fundamental rights in the Constitution* (1997) ("Davis, Cheadle and Haysom") 283.

18 Minow "The Supreme Court 1986 term-forward: Justice engendered" 1987 *Harvard LR* 10 12.

3 RECOGNITION OF CULTURAL DIVERSITY AND MINORITY PROTECTION IN INTERNATIONAL LAW

The League of Nations Covenant, adopted after the First World War, made no specific mention of minorities. It did, however, supplement its founding text with a series of minority agreements.[19] The United Nations Charter did not mention minorities either, nor did it have supplementary agreements attached to it, as was the position with the League,[20] since a "different psychology"[21] prevailed after the Second World War, which was to herald the establishment of the United Nations and the emergence of human rights as an issue of fundamental international significance. This was to be epitomised by the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1966 ("the ICCPR"). Article 27(1) of the Universal Declaration provides that "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the articles and to share in scientific advancement and its benefits". Article 27 of the ICCPR stipulates that people belonging to ethnic, religious or linguistic minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

The underlying purpose of article 27 of the ICCPR is to protect cultural diversity while at the same time supporting the evolution of a common culture.[22] If applied and interpreted together with article 26, which is the ICCPR's non-discrimination provision, it constitutes a formidable weapon that can be employed by minorities to ensure and maintain both their identity and their equality.[23] It should be noted that protection is given to individuals, not to groups as such. The ICCPR protects individuals who belong to minority communities and as such it has been subject to a measure of misplaced criticism.[24] It must, however, be distinguished from the collective right of self-determination, the full import of which is discussed below.[25]

---

19 See *Protection of linguistic, racial and religious minorities by the League of Nations, provisions contained in the various international instruments at present in force* (Geneva, August 1927), League of Nations Publication IB Minority 1927. IB 2.

20 The United Nations did, however, set up a Sub-commission on the Prevention of Discrimination and the Protection of Minorities. This is a subordinate body to the United Nations Commission on Human Rights. See Thornberry 125.

21 Thornberry 118.

22 Cf Dlamini 575, in commenting upon art 27(1) of the Universal Declaration of Human Rights.

23 See Thornberry 387: "A 27 of the Covenant . . . is a weak article, although an interpretation of it is offered in the present text which gives it more substance and meaning. Its lack of specificity means that, even though it may impose positive obligations on States to support minority identity, the article leaves a wide discretion to States on the modalities of its application." Three cases in which it has been successfully applied are *Lovelace v Canada* (No 24/1977), *Lubicon Lake Band v Canada* (No 167/1984) and *Kitok v Sweden* (No 197/1985). These three cases provided redress for indigenous people.

24 See Currie "Minority rights, education, culture, and language" in Chaskalson *et al* (eds) *Constitutional law of South Africa*(1996) ("Currie") 35–10. Cf Sieghart *The international law of human rights* (1995) 377, where it is submitted that, although art 27 is couched in terms pertaining to "persons", "it may be said to be a collective right in so far as its exercise is protected 'in community with the other members' of the 'minorities' referred to". This interpretation in the *Lovelace* case (No 24/1977) was decided by the Human Rights Committee. See Davis, Cheadle and Haysom 293.

25 See, in this regard, the general comment adopted by the Human Rights Committee under art 40 of the ICCPR, No 23 (50) (art 27) UN Doc CCPR/C/21/Rev 1/add 5 (1994-04-26).

Indeed, the definition and protection of minorities has become one of the fundamental, albeit controversial, issues in international law and politics. The potentially destructive forces that can emerge or erupt from excessive and unrestrained ethnic nationalism or religious fanaticism is a "spectre haunting the contemporary international legal order".[26] Ethnic minorities have in the name of self-determination waged bloody, passionate and relentless struggles to realise their ideals, resulting in either the disintegration of nation states or endemic instability and conflict in others. In recent times the following countries, *inter alia*, have been affected in this way: the former Soviet Union, the former Yugoslavia, India, Cyprus, Liberia, Nigeria and Lebanon.[27]

Where endeavours have been made in nation states forcibly to suppress manifestations of ethnic nationalism, violence has erupted and has inevitably led to the displacement of people on a large scale and to unconscionable violations of human rights which threaten international law and order. It is for this reason that the United Nations and international law are profoundly concerned with the realistic protection of minority rights. Language and religion are invariably the root causes of these internecine conflicts. Canada, Sudan and Lebanon are some contemporary examples.

International law has over the past 50 years endeavoured to respond to this problem by developing guarantees designed to protect minorities without facilitating nation-state disintegration. International experience indicates that the effective protection of minorities requires two kinds of legal protection. First, measures must be adopted to secure equal treatment for such groups. Secondly, there must also be measures aimed at preserving their identity. More is required than merely ensuring formal equality. Even members of a majority, as is patently the position in South Africa, need more than a guarantee of formal equality; substantive equality is necessary. A fortiori, the same applies to disadvantaged minority groups.[28]

Other important international instruments were also to give expression to the recognition and protection of cultural rights. Thus, article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights of 1966 declares that states should recognise the right of everyone "to take part in cultural life". The International Labour Organisation's Convention on Indigenous and Tribal Populations of 1957[29] endeavours to protect the cultural values of indigenous and tribal populations. This was a consequence of the historic process of decolonisation by the imperial European powers in the wake of the rise of Asian and African nationalisation after the Second World War. The indigenous people of Africa and Asia were perceived as having cultures worthy of protection in the face of Western cultural imperialism, which in the form of colonialism had treated people of colour and their cultures as inferior. It was essentially for this

26 Currie 35–37.

27 See Lerner "The evolution of minority rights in international law" in Brolman *et al* (eds) *Peoples and minorities in international law* (1993) 77 78.

28 See *Minority Schools in Albania* case 1935 PCIJ (ser A/B) No 64 20. Measures for the protection of minorities must be designed to ensure a "genuine and effective" equality.

29 107 of 1957.

reason that the United Nations adopted the International Convention on the Elimination of All Forms of Racial Discrimination,[30] which obliges those states that are signatories to it to recognise the right of every person, irrespective of race, colour or national or ethnic origin, to equality in relation to cultural rights.

The underlying purpose of these various conventions was to recognise the infinite richness of cultural diversity, and to prevent the cultural domination of minority, or less viable, indigenous cultures. Obviously, these conventions were not intended to prevent cultural cross-pollination and the evolution of a common culture or of new cultures, and the mutual enrichment of cultures. It is regrettable that the European Convention on Human Rights, one of the most successful working models of a human-rights institution, does not contain a "minorities" article.[31]

If minorities are to be accorded certain protection in international law, it is necessary to define the term "minority". There is, however, no binding definition of this term in international law.[32] A workable and influential definition of a minority has been formulated by Capotorti, the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.[33] According to Capotorti's definition, a minority is

> "[a] group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language".[34]

For South African purposes, this is a useful definition. There is a quantitative as well as a subjective element to it.

4 THE POSITION IN OTHER COUNTRIES SUCH AS INDIA AND CANADA

The process of decolonisation was to bring independence to heterogeneous countries like India, which had to grapple with the challenges posed by the diversity and richness of its cultural anatomy and the demands of minorities. These states invariably rely on the internationally recognised principle of territorial integrity of states.[35] This found expression in article 29(1) of the Indian Constitution, which provides that any section of the population residing in the territory of India or any part thereof having a distinct language, script or culture of its own has the right to conserve it. Article 29(2) states that no citizen should be denied admission to any educational institution maintained by the state or receiving aid out of state funds on the grounds only of religion, race, caste or language. Article 30 goes even further, and provides that religious and linguistic minorities are guaranteed the right to establish and administer educational institutions of their own choice. The state, in granting aid to such institutions, is

30 A 5.
31 Thornberry 397.
32 See Shaw "The definition of minorities in international law" in Dinstein and Tabory (eds) *The protection of minorities and human rights* (1992) 1; Thornberry 164–172.
33 Currie 35–38.
34 Capotorti *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (1991) UN Sales no E.91 XIV.2, 7.
35 This principle is set out in the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) 1960.

precluded from any discrimination against these institutions on the grounds that they are under the control and management of a minority, of either a religious or a linguistic nature. The Indian Supreme Court has been sympathetic to claims of protection brought in terms of articles 29 and 30 of the Indian Constitution, and has consistently upheld the rights of cultural and linguistic minorities encapsulated in the Constitution.[36] Judgments which reflect this empathetic judicial attitude towards the cultural protection of minorities include State of Bombay v Bombay Education Society;[37] Rev Father W Proost v State of Bihar;[38] DAV College Bhatinda v State of Punjab;[39] and Ahmedabad St Xavier College Society v State of Gujarat.[40] All of these cases involve the protection of Christian minorities in a country that is overwhelmingly Hindu in religious belief and culture.

The Canadian experience in relation to the protection of the cultural identity of linguistic and ethnic minorities is relevant because Chapter 2 of our 1996 Constitution is based to a considerable extent on the Canadian Charter, and the conflict that has occurred between French and English culture is not dissimilar to the conflict South Africa has experienced in the past between the English and Afrikaans linguistic communities. The Canadian Charter makes provision for equality in general under the law in section 15(1), but in sections 16–20 it provides for the equality of the French and English languages. The intention and effect of these provisions is to ensure the preservation of cultural identity, which formal recognition cannot achieve. The French-speaking Canadians in Quebec wished to ensure that they were not in any way assimilated into the dominant English culture of Canada as a whole.[41] Canada is, however, not merely a bilingual country, but a multilingual one, since there are also minority languages, as explained below.

The relationship between international human-rights law and the constitutional law of Canada is well illustrated by the events of 1976, when Canada ratified the ICCPR, which provides for equality and non-discrimination in articles 2(1) and 26, and (as discussed above) for the right of ethnic, religious and linguistic minorities "to enjoy their own culture, to profess and practise their own religion, or to use their own language" in article 27. As a result of the ratification of the ICCPR, Canada was obliged to bring its municipal law into line with the provisions of the ICCPR.[42] With the adoption of the Charter, section 15(1) was included as the municipal equivalent of articles 2(1) and 26 of the ICCPR. The rights protected in sections 16 to 20 of the Charter are the equivalent of the rights embodied in article 27 of the ICCPR. The Canadian experience in this regard is to some extent relevant in relation to the South African Constitution of 1996, since the latter provides in section 39(1) that when interpreting the Bill of Rights, a court, tribunal or forum

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

36 Dlamini 577.
37 AIR 1954 SC 561.
38 AIR 1969 SC 465.
39 AIR 1971 SC 1731.
40 AIR 1974 SC 1389.
41 See Woehlring "Minority cultural and linguistic rights and equality rights in the Canadian Charter of Rights and Freedoms" 1985 *McGill LJ* 52.
42 Dlamini 578.

(b) must consider international law; and

(c) may consider foreign law.

Section 27 of the Canadian Charter stipulates that it should be construed in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. Since the term "multicultural" is used, the Charter should, by clear implication, be interpreted to protect and enhance linguistic and cultural rights other than those expressly mentioned. This obviously means that Canada is not merely a bilingual country, but a multilingual one. This corresponds to some extent to the position in South Africa, which under apartheid was essentially a bilingual country, but is now in terms of the 1996 Constitution a multilingual one. In Canada the equality provision is complemented by the provisions designed to protect minorities. Multiculturalism requires a commitment to the politics of tolerance, and the courts have to make an effort to overcome the inarticulate premisses that often motivate judges drawn from the elite strata of the dominant cultures. Ultimately, what is required is that the judiciary itself should in its composition reflect the multicultural composition of the population as a whole, in order for it to be perceived as legitimate in the eyes of minority groups.

5 THE RECOGNITION OF CULTURE IN SOUTH AFRICA

The right to freedom of association embodied in section 18 of the 1996 Constitution protects the freedom of every person to associate with others according to his or her free choice, and therefore encompasses the right to participate in the cultural life of a person's choice.[43] It was therefore, at least technically, not necessary for Chapter 2 of the Constitution to include a separate right to participation in cultural life. There was, however, a cogent emotional and psychological need to give expression to this right to satisfy demonstrably the concerns of minorities in South Africa.

South Africa is one of the most cosmopolitan countries in the world. It reflects an exotic tapestry of cultures, languages and religions. Besides the inordinate variety of indigenous cultures and the richness and variety of African languages, which is reflected in the official recognition of nine indigenous languages, South Africa is characterised by the infusion and presence of both Western and Oriental culture. Anglo-American culture and the influence of the English language reflects an international cultural dimension. The vibrant Afrikaans language and culture have an influence, found not only in the white community but also, very significantly, in the coloured community, and to a lesser extent in the African communities of the Free State and the Northern, Western and Eastern Transvaal. South Africa is therefore exceptionally rich in cultural, linguistic and religious heterogeneity, which unfortunately can also be a source of conflict and tension.

Cultural and language issues are of inestimable importance to South Africans. Afrikaners waged a heroic and protracted struggle for the recognition of their language and culture against British imperial hegemony after the Anglo-Boer War, which ignited the flames of Afrikaner nationalism and later spawned policies of institutionalised discrimination, out of which apartheid emerged. Under the aegis of the policy of separate development or "grand" apartheid, nascent

43 Basson *South Africa's interim Constitution: Text and notes* (1994) ("Basson") 47.

black ethnic nationalism was maliciously exacerbated as part of a divide-and-rule strategy pursued in order to ensure white Afrikaner hegemony. Differences in African languages and culture were exploited to the disadvantage of the intrinsic merit of those cultures. The advent of a genuine democratic dispensation for South Africa and the official recognition of nine indigenous languages should meaningfully facilitate the rehabilitation of indigenous African cultures.

Co-existence within the rich tapestry of cultural diversity in South Africa requires an understanding of the different cultures and mutually manifested tolerance. Apartheid has spawned a legacy of ignorance and misconception about the indigenous African cultures, which has resulted in profound resentments. South Africa can learn from the way in which other countries with heterogeneous communities have grappled with these potentially divisive issues. Unfortunately, apartheid has understandably resulted in a reaction against the recognition of any manifestation of plural diversity involving "differential treatment of groups".[44]

6 AN ANALYSIS OF SECTION 30 – LANGUAGE AND CULTURE

Section 30 addresses two kindred rights – each, however, with its own peculiar jurisprudential considerations. The first of these relates to the right to use the language of one's choice, and the second is concerned with the right to participate in the cultural life of one's choice. It is necessary to address these issues separately.

Language, like the cognate phenomenon of culture, is an integral component of personality. The protection of language rights secures more than merely the technical facility to communicate: it guarantees and secures cultural viability and continuity. Other sections of the Constitution also address the issue of language. In particular, section 6(2), (3), (4) and (5), set out immediately below, need to be considered:

> "Languages
>
> 6 (1) . . .
>
> (2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
>
> (3) (a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.
>
> (b) Municipalities must take into account the language usage and preferences of their residents.
>
> (4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.
>
> (5) A Pan South African Language Board established by national legislation must –
>
> (a) promote, and create conditions for, the development and use of –

44 Thornberry 392.

(i) all official languages;
(ii) the Khoi, Nama and San languages;
(iii) sign language; and
(b) promote and ensure respect for –
(i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and
(ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa."

It would place an intolerable financial burden on the state to provide an effective multilingual service for the people of South Africa in eleven official languages. Indigenous languages like Zulu and Xhosa are more likely to enjoy practical recognition at provincial, rather than national, level. English is likely to emerge as the *lingua franca* in South Africa as a whole, regardless of the official position, and the official use and relative importance of Afrikaans is likely to decline in importance. Afrikaans is likely, however, to continue to be used and recognised widely both by whites and blacks.

The 1996 Constitution has retained only the right of national and provincial governments to designate certain languages "for the purposes of government". It has not retained the provision in the 1993 Constitution which stated that "[r]ights relating to language and the status of languages existing at the commencement of this Constitution shall not be diminished".[45] This was obviously because it would have perpetuated "the pre-eminence of English and Afrikaans"[46] in the post-apartheid era. Against this background, the drafters did, however, qualify the power to designate government languages or languages of government usage. This is effected by (a) providing that no government, provincial or national, can designate only one language,[47] (b) stipulating that all governments must monitor and regulate the usage of official languages,[48] and (c) proclaiming that all official languages enjoy parity of esteem and equitable treatment.[49]

It is important to note that section 6 addresses the status of languages, whereas section 30 addresses the "the right to use . . . language". The latter is an individual or subjective right, not a collective right, whereas the former adverts to the constitutional position of the language itself, as opposed to the rights of users of the language.[50] As such, it can be designated as a collective right. The circumstances will determine which of these rights can be invoked in a particular case. There is no explicit guarantee, under either section 6 or section 30, of the right to use the language of one's choice in a court of law. This is, however, conceivably implied and dealt with under the right to a fair trial.[51]

It is also important to note that section 30, which is a general right, does not limit language usage to official languages and therefore must be perceived as a wider right to employ languages other than those designated as official. Unlike

45 S 3(2) of Act 200 of 1993.
46 Davis, Cheadle and Haysom 280.
47 S 6(3)(a).
48 S 6(4).
49 *Ibid.*
50 Davis, Cheadle and Haysom 280.
51 See s 35(3)(k) and (4) of the 1996 Constitution.

section 6, section 30 is subject to limitation as delineated in section 36(1), which, inter alia, requires the limitation to be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

The considerable financial burden placed on the state by the requirement of language equality will be felt particularly at provincial level, where it is likely that indigenous languages will receive recognition. Such recognition could, however, greatly facilitate the further development of language and culture. The development of indigenous languages and cultures is essential for the self-respect and esteem of African people.

Section 30 must be construed together with section 29(2), which confers upon every person the right to receive education in the official language or languages of his or her choice where this is reasonably practicable.[52]

7 AN ANALYSIS OF SECTION 31 AND RELATED ISSUES

According to section 31(1)

> "[p]ersons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
>
> (a) to enjoy their culture, practise their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society".

This section constitutes an endeavour to bring greater lucidity to the relationship between "individual and collective rights to culture".[53] Section 31 is distinguishable from section 30 of the 1996 Constitution and from section 29 of the 1993 Constitution because it "introduces a collective dimension".[54] The right protected is therefore one which inheres in a collection of people designated as a community. In its wisdom, the Constitutional Assembly elected to adopt the more widely recognised negative formulation of the right than a positive formulation of it.[55] This formulation has its genesis in article 27 of the ICCPR.[56] As section 31 is based to a considerable extent on the wording of article 27, it is beneficial to examine the meaning and application of that article in international human-rights law. Indeed, this is obligatory by virtue of the interpretation provision in Chapter 2 of the 1996 Constitution.[57] This is precisely what the Constitutional Court did in Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995.[58] In this case, certain members of the Gauteng legislature had, in

52 There is some controversy as to whether the right to receive instruction in the language of a person's choice is a language right or a cultural right. See Davis, Cheadle and Haysom 281. See also the *Belgian Linguistics Case No 21* EHRR 252 and the Canadian cases *Lavoie v AG Nova Scotia* 1988 47 DLR (4th) 586 (NSTD) and *Commission des coles Pransaskoises v Saskatchewan* 1988 3 WWR 354 (SaskQB).

53 Davis, Cheadle and Haysom 291.

54 *Ibid.*

55 *Ibid.*

56 Generally on the ICCPR, see Dugard "International human rights" in Van Wyk, Dugard, De Villiers and Davis (eds) *Rights and constitutionalism: The new South African legal order* (1994) 171 174ff.

57 S 39(1), which stipulates that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law".

58 1996 3 SA 165 (CC).

accordance with a provision of the 1993 Constitution,[59] petitioned the Speaker of the legislature, requiring him to request the Constitutional Court to resolve a dispute relating to certain provisions of the contentious School Education Bill of 1995. The petitioners contested the constitutionality of, inter alia, clauses 21(2) and 21(3) of the Bill, which addressed the formulation of a religious policy by the governing body of a public school aimed at the development of a national democratic culture of respect for South Africa's diverse cultural and religious traditions. The petitioners submitted that section 32(c) of the 1993 Constitution created a positive obligation on the State to accord to every person the right to require the State to establish, where practicable, educational institutions based on a common culture, language or religion as long as there was no discrimination on the ground of race.

In construing these provisions, Sachs J paid due regard to, inter alia, article 27 of the ICCPR, as well as other relevant international human-rights instruments. It can reasonably be inferred that the sentiments expressed by Sachs J in his judgment will be of assistance in construing and comprehending the import and significance of section 31 of the 1996 Constitution, although it had not been enacted at the time.[60] It is, however, important to note that section 31(2) of the 1996 Constitution qualifies this right by stipulating that it is subject to the other rights encapsulated in Chapter 2. In particular, it is subject to the all-important right to equality.

The majority of the court (per Mahomed DP) held that the language of section 32(c) of the 1993 Constitution did not oblige the State to establish educational institutions based on commonality of culture, language or religion, but that a person could merely invoke the protection of the court where this freedom was threatened. Much would depend on what was practicable in the circumstances.[61]

The rights to language and culture are articulated in section 31 as individual rights that inhere in "[p]ersons belonging to a cultural, religious or linguistic community", and are not expressed as group or ethnic rights. These rights are, however, "group-oriented" by their very nature, since individuals share their language and culture with other people constituting a group or community. Such a group need not be an ethnic group, but may be a religious or cultural group that cuts across racial and language divides. This right to language and culture must inevitably give rise to a consideration of the concept of community. Therefore, individuals do not exist and operate in a cultural, linguistic or religious vacuum and their rights do not exist *in abstracto*.[62]

The 1996 Constitution establishes a liberal and, to some limited extent, a social democracy, involving a creative tension between the claims of individuality and of commonality. The Constitution therefore caters for both individual and collective self-identities. In *Liberalism, community and culture*[63] Kymlicka informs us that in a liberal democracy cultural membership is important in

59 S 98(9) of Act 200 of 1993.
60 Davis, Cheadle and Haysom 291.
61 Para 9 173F–J. Chaskalson P, Ackermann J, Didcott J, Kentridge AJ, Langa J, Madala J, Mokgoro J and O'Regan J concurred. Kriegler J and Sachs J delivered concurring judgments.
62 Thornberry 12.
63 (1989) 166–167.

pursuing our essential interest in leading a good life.[64] In South Africa since April 1994, however, there has emerged an intense contestation over the notion of community. In many of the rural communities, particularly in KwaZulu-Natal, power has historically vested in the indigenous chiefs. This meant that the political and social system was underpinned by an oligarchic structure which was in conception and practice the very antithesis of liberal democracy. This remains one of the unresolved problems of constitutionalism in South Africa, namely how to resolve the conflicting demands of modernisation on the one hand, and indigenous communalism on the other, which manifests itself under the aegis of culture. Nevertheless, in general, communitarian theories of cultural membership can be perceived as variants of liberal democracy since they provide space for rights and individuality within the confines and context of communities, which exercise a restraining influence on revolutionary transformation by authoritarian means and display a commitment to incremental change.[65]

8 INDIVIDUAL AND GROUP RIGHTS, AND THE RESOLUTION OF CONFLICTS BETWEEN RIGHTS

In general, individual rights should be supportive of the protection of group rights. Circumstances may, however, require a balancing of rights depending on the context in which the rights are applicable. An example of this is the Canadian case of *Reference Re: Electoral Boundaries Commission Act (Sask)*,[66] in which group interests influenced the scope of a right guaranteed to individuals under the Canadian Charter. In dealing with the issue of electoral distribution, the court examined the extent to which the right to vote set out in section 3 of the Charter permitted deviation from the "one person, one vote" rule. In this regard, the Supreme Court of Canada declined to follow the ruling in *Reynolds v Simms* [67] where the United States Supreme Court required that votes be counted equally. The former emphasised "effective representation" as the essential purpose of the right to vote rather than "mathematical parity".[68]

The South African Bill of Rights, like other such instruments, embodies opposing normative commitments that must inevitably give rise to conflicting applications of rights. Therefore, in South Africa, for instance, conflicts could arise between freedom of expression and privacy, or between the recognition of customary law and equality.[69] There is no explicit hierarchy of rights, and except where the text itself indicates how conflicts are to be resolved (as is the position with section 15(3), which insulates family laws with an essentially religious content from being challenged in terms of the equality guarantee encapsulated in

64 He argues that cultural membership has an independent value, since individuals choose their life plans within "cultural narratives which are at least partly inherited" (165). Where, however, the cultural "structure is under threat by majoritarian decision-making, special measures, including restrictions on the rights of non-members, may be necessary to protect the context of choice of members of disadvantaged communities" (183).

65 Connolly *Identity, difference, democratic negotiations of political paradox* (1991) 88.

66 1991 81 DLR (4th) 16.

67 377 US 533 (1964).

68 See the judgment of McLaughlin J, writing for the majority, 39. See further Minow "Putting up and putting down" 1990 *Osgoode Hall LJ* 409.

69 See Cachalia "Citizenship, Muslim family law and a future South African Constitution: A preliminary enquiry" 1993 *THRHR* 392.

section 9) both conflicting rights enjoy equal status; as a result the courts must effect a balancing of these in the context of the Constitution as a whole. Although, symbolically and implicitly, equality as the first enumerated right appears to enjoy a hierarchical advantage in relation to other rights, this excludes a process of balancing of either an "ad hoc" nature under the limitation clause or a "definitional" nature in determining the scope of the given rights.[70] In the process of balancing rights, the courts fulfil a sociological[71] and moral function. In doing so, however, their task is to "generously accommodate cultural liberty while assuring [that culture] is not involved as a cheap excuse for every conceivable form of self-indulgence".[72]

9 THE POLITICAL AND SOCIAL SIGNIFICANCE OF THE RECOGNITION OF MINORITY RIGHTS

In a pluralistic body politic, the realistic and balanced recognition of minority rights in a heterogeneous community is essential for political stability. What is required is both a process of nation-building and the recognition of cultural diversity. The persecution, or mere disregard of the rights of cultural and linguistic minorities must inevitably lead to political destabilisation. International politics and law are also concerned with the protection of minorities for both pragmatic and humanitarian reasons because "[this] question has never contained itself entirely within national boundaries".[73] Therefore, it is widely recognised that fair and equitable treatment of minorities and their justifiable needs is "an essential factor for peace, justice, stability and democracy",[74] both within states and in international relations. This obviously applies also to the South African situation. The Constitution as a whole is designed to ensure that minority interests are fairly accommodated, without emasculating the legitimate rights of the majority. In his celebrated speech to the South African Parliament on 2 February 1990, former President FW de Klerk enumerated his government's essential objectives in the process of negotiation as being "a new democratic constitution; universal franchise; no domination; equality before an independent judiciary; the protection of minorities as well as of individual rights".[75]

---

70 See Davis, Cheadle and Haysom 287. Canadian and American cases provide a great deal of assistance in this regard. See *Jehovah's Witnesses v King County Hospital* 390 US 598 (1968) (ruling by Supreme Court against parents who refused to allow a blood transfusion for their child on religious grounds); *Wisconsin v Yoder* 406 US 205 (1972); *Estate of Thornton v Caldor* 472 US 703 (1985); *Goldman v Weinberger* 106 SC 1310 (1986) (refusal to sanction the wearing of yarmulkes by adherents of the Jewish faith during military service); *R v Keegstra* 1990 3 SCR 697.

71 The jurisprudence of the courts is likely to become a sociological one. This "minimises framers' intents, literalism of language, the uses of history and judicial precedents. It stresses an awareness of the importance of facts in constitutional litigation, *the need to consider the social consequences of alternative rulings open to the court, and the obligation to identify, balance and adjust the opposed societal interests or values involved in a particular case*" (emphasis added). See Antieau *Constitutional construction* (1982) 197.

72 Tribe *American constitutional law* 2 (1988) 1269, quoted by Davis, Cheadle and Haysom 291.

73 Thornberry 1.

74 See para 30 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE), reprinted in 1990 *International legal materials* 1305.

75 *Debates of Parliament* 2 February 1990 col 15.

The protection of minorities has been effected through, *inter alia*, the establishment of eleven official languages and the recognition of other languages, the provisions of the Bill of Rights protecting individual rights, the creation of provinces, and the powers vested in provincial and local-government structures. What is required is the correct balance between the protection of minority interests and the exercise of power by an elected majority within the parameters of a rigid constitution and the philosophy of constitutionalism.[76]

The 1993 Constitution made provision for an institutionalised form of coalition government at both national and provincial level. This took the form of governments of national and provincial unity. Therefore, the minority political parties of the National Party under FW de Klerk and the Inkatha Freedom Party (IFP) under Chief Buthelezi were involved in the Government of National Unity. This afforded a measure of protection to minority political and cultural formations during the period of transition. This is not the position in the 1996 Constitution, where provision is made for executive government premised on majority rule. This means that coalition governments will no longer be institutionalised after the next general election in 1999, and that in future the political party which wins a general election will constitute the government of the day and will not be obliged to invite the defeated minority parties to participate in government, as was the position in terms of the 1993 Constitution. Coalition government can therefore emerge in the future only if there is a hung parliament, that is a parliament in which no single political party has an absolute majority, or if the winning party decides to invite members of opposition parties to participate in government.

The 1993 Constitution made provision to a considerable extent for a consociational model of government. This involves four elements: grand coalition; mutual veto; proportionality; and segmental autonomy.[77] The absence of an institutionalised coalition government in the 1996 Constitution represents an important shift towards majoritarian rule in an adversarial context. Consociational government, with the important exception of Switzerland, which is held out as its prime example, is usually a transient political phenomenon, designed to meet the exigencies of a particular political situation.[78] The innovation of cultural councils provided for section 185(1)(c) of the 1996 Constitution as part of the function of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is, however, a manifestation of segmental autonomy which, as indicated above, is one of the characteristics of consociationalism.

The recognition of cultural minorities involves both equality of treatment and the right to identity of such communities. Thornberry explains that the latter is not a truly collective right under modern law, "but, at most, effects a compromise between group rights and individual rights".[79]

---

76 The need to provide constitutional protection for the rights and interests of racial minorities induced the National Party government to request the South African Law Commission to investigate and research mechanisms for the recognition and sanction of so-called "group rights". Ultimately, the Commission was to reject the concept and institutionalisation of group rights, and to reach the conclusion that the "needs of individuals who are members of different linguistic, cultural and religious groups" would be adequately protected by "individual rights in a bill of rights". See South African Law Commission *Interim report on group and human rights* (1991) 679–680.

77 See Boulle *South Africa and the consociational option* (1984) ("Boulle") 45ff.

78 Boulle 54ff.

79 Thornberry 392.

10 THE LIMITATIONS THAT CAN LEGITIMATELY BE IMPOSED IN RELATION TO MINORITY RIGHTS

In general, fundamental rights are not absolute or illimitable. This applies to the rights adumbrated in sections 30 and 31 of the 1996 Constitution and in article 27 of the ICCPR. The latter makes no specific provision for limitation, but states argue by analogy that limitations upon article 27 should be permitted on the same basis as in the case of the right to religious freedom. In relation to the latter, article 18(3) of the ICCPR states that "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". The limitation provision contained in section 36(1) of the 1996 Constitution permits limitations that are "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". Therefore, if public safety, order, health[80] or morals were indeed threatened, minority rights could be limited if the above criterion and the other requirements of section 36 were met.

The rights embodied in sections 30 and 31 may not be exercised in a way that violates or erodes the other rights entrenched in the Bill of Rights. The same principle applies to the rights protected by article 27 of the ICCPR.[81] Thus, for example, the fundamental right to gender equality embodied in section 9 cannot be undermined under the aegis of cultural rights. The position in indigenous law is contentious and problematic. It can be cogently argued by protagonists of the unqualified retention of indigenous law and custom that the eradication of the subordinate position of women in this system would jeopardise the structure and nature of this legal system, which has its foundations in patriarchy, and thereby induce political instability in the rural areas of South Africa, where the institutions of chieftainship and indigenous law are still influential. This is, indeed, a jurisprudential and political conundrum. Whether some form of deconstruction of indigenous law and custom is possible needs to be carefully researched.

The limitation of cultural rights and practices by virtue of considerations of morality is problematic, bearing in mind that the content of such morality should not be influenced exclusively by Western concepts and practices. In this regard, it may be asked to what extent the practice of polygamy should enjoy protection as a manifestation of culture. The practice of polygamy also undermines the principle of gender equality found in section 9 of the Constitution. The maintenance of gender equality would be a more legitimate argument for the denial of the

---

80 Thus, the controversial practice of female circumcision, widespread in parts of Africa, is often opposed because it is perceived as a threat to the health of those subjected to it. See Engle "Female subjects of public international law: human rights and the exotic other female" 1992 *New England LR* 1509 1513–1515 for a discussion of this issue.

81 This is the view of the Human Rights Committee General Comment (1994-04-26) par 8. See, in this regard, *Campbell and Cosans v United Kingdom* 1982 4 EHRR 293, in which the European Court of Human Rights applied a similar interpretation to art 2 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The court declared that, despite the obligations of the state to "respect the right of parents to ensure . . . education and teaching in conformity with their own religious and philosophical convictions", this right may be exercised only in a manner compatible with other basic rights. Only those philosophical convictions "worthy of respect in a democratic society" and not "incompatible with human dignity" qualified for protection of the right (305).

recognition of polygamy than the *contra bonos mores* approach adopted in *Seedat's Executors v The Master (Natal)*,[82] where Innes CJ held that such marriages are "fundamentally opposed to our principles and institutions".[83]

After the long and devastating years of apartheid South Africa needs a process of nation-building and national unity. The recognition of cultural diversity and identity is not necessarily incompatible with such unity. It does, however, require the inculcation of political and religious tolerance, and statesmanship of an exceptional order.

11 THE ISSUE OF SELF-DETERMINATION

This is a seminal issue both in international law and politics and in South African politics and constitutional law. Self-determination came to the fore in the wake of the consequences of the First World War, with the disintegration of imperial states in Eastern Europe and Asia Minor.[84] This right enjoys wide contemporary recognition and is defined in an international instrument as a right of "all peoples . . . freely to determine, without external interference, their political status and to pursue their economic, social and cultural development".[85] Self-determination is usually defined as a right of peoples, not of minorities.[86] Nevertheless, the concepts of self-determination and minority rights are so intertwined that "whenever a state is forged, the result is the creation of minorities".[87] Accordingly, the process of the decolonisation of the empires of Western Europe resulted in the creation of nation states in Asia and Africa that were, invariably, culturally and linguistically heterogeneous. Nevertheless, these new states vehemently denied the possibility of secession by alienated or disaffected communities, since their colonial boundaries were regarded as sacrosanct in terms of the immanent doctrine of territorial integrity.[88]

The meaning of the term self-determination will depend on the context in which it is used. It can be used when a community desires to effect a change in the international status of the state in which they live. This may occur, for instance, in the context of decolonisation, when a subjected and colonised people wishes to secure its independence from the imperial or metropolitan power that governs it. This is indeed what happened in Asian and African states after the

---

82 1917 AD 302 309.

83 This was confirmed in *Ismail v Ismail* 1983 1 SA 1006 (A) 1026A–C. Western concepts of morality, based on the Judeo-Christian ethical code, differ from those of other cultures in this regard. This was recognised in *Alhaji Mohamed v Knott* 1969 1 QB 1, in which the court declared valid a Muslim marriage in Nigeria of a 13-year-old girl. The court (*per* Lord Parker CJ) held: "When . . . [the court *a quo* says] that 'a continuance of such an association notwithstanding the marriage would be repugnant to any decent-minded English man or woman', they are, . . . and can only be, considering the view of an English man or woman in relation to an English girl and our Western way of life" (15F–G).

84 Thornberry 38.

85 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (GA Res 2625 (XXV) 1970) sv "*The principle of equal rights and self-determination of peoples*".

86 Thornberry 13.

87 *Ibid.*

88 The rule of territorial integrity is set out in the Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Res 1514 (XV) 1960).

Second World War. It can also occur in the context of a process of internal disintegration, when a community desires to secede from a single state. This is the position in Quebec, for instance. Those groups in South Africa who desire a "volkstaat" consider this to be a long-term option. Self-determination can also find expression within a composite state by means of a territorial or corporate federal structure.[89] Self-determination in international law must be perceived in the context of the principle of territorial integrity. Dissident groups insisting on secession as the only outlet for self-determination have posed a threat to the continuation of the concept, and the protection, of minority rights in general in international law.[90]

Self-determination is an important part of the political nomenclature in South Africa. Apartheid was, however, a patent denial of the self-determination of African people.[91] The policy of "grand" apartheid or internal decolonisation was an artificial endeavour to accord self-determination on an ethnic basis to African people in South Africa using the discredited bantustans. Self-determination was a seminal issue in the process of political and constitutional negotiation. This applied both to the right-wing political parties and to the IFP. Although the ANC's historical struggle was premised on self-determination, it rejected most vehemently any endeavour to entrench "racial group rights".[92] Section 31(1)(b) does, however, allow members of a community to "form, join and maintain cultural, religious and linguistic associations and other organs of civil society". This is an important development and should greatly facilitate the preservation of minority cultures and languages.

12 CULTURAL COUNCILS

Provision was made for the establishment of a Volkstaat Council in the 1993 Constitution.[93] In theory, a "volkstaat" can be either completely independent[94] or, more probably, a manifestation of corporate federalism within an overarching federal or quasi-federal structure. In such a case, the federal units are not territorially based, so that various groups or communities inhabiting the same region

89 See Rosas "Internal self-determination" in Tomuschat (ed) *Modern law of self-determination* (1993) 225 230.

90 See Buchheit *Secession: The legitimacy of self-determination* (1978); Kamanu "Secession and self-determination: An OAU dilemma".

91 Thornberry 9 states: "The problem of apartheid is ultimately that of self-rule or self-determination for a *people*, rather than the protection of a minority."

92 See Sachs *Protecting human rights in a new South Africa* (1990) 150.

93 S 184A of Act 200 of 1993.

94 In this regard, the so-called Israeli option is sometimes mentioned, in terms of which a designated territory would be set aside so that people favourably disposed towards the volkstaat could "emigrate" to that territory. Within a certain period of time, say five or ten years, there would then be a majority of such people, which would allow a democratic volkstaat to be set up. In such a state, Afrikaner Volkstaters would be in the majority, but they would not discriminate against other people within the boundaries of the volkstaat. They would use their majority to run the state, which would be politically though not economically independent of the rest of South Africa, along Afrikaner Christian-nationalist lines. Cf comments made by Dr F Hartzenberg in 1994 to the effect that the volkstaat would come into operation within two years, while the new Constitution was being finalised ("AVF leader confident of volkstaat success" *Natal Mercury* 1994-06-01).

attend to their own domestic interests in accordance with "the subsidiary principle, but naturally co-operate with each other on matters of common concern".[95] This approach was conceived and practised in the erstwhile Austro-Hungarian Empire, where a constitutional and political solution had to be found to enable divergent cultural and religious groups such as Czechs, Germans, Hungarians and Slovaks to co-exist. The eminent political philosopher K Friedrich argued as follows in this regard:[96]

> "Altogether the most important argument for corporate federalism is that it does away with the entire problem of territorial districting which can then be tackled as a strictly administrative problem without attention having to be given to the complicating issue of population distribution and its cultural and linguistic requirements and aspirations."

Although corporate federalism is no panacea, it may provide a means of accommodating the desire for a volkstaat, and the Volkstaat Council provides the opportunity to investigate the political feasibility of the idea. A contemporary example of corporate federalism is found in Belgium. In this regard Bognador,[97] in comparing Switzerland with Belgium, observes: "The Swiss Confederation is based upon cantons, upon territory – it is a territorial state, not, as with Belgium, a state based on religion." The Constitution of the Republic of Ireland also reflects corporate federalism, where culture replaces territory as the institutional basis. In sections 3 and 59 of the Constitution of Belgium, provision is made for cultural councils that control certain functions and activities of the Dutch, French and German communities which occupy Belgium.[98] This is a manifestation of "person-oriented units",[99] closely related to corporate federalism.

The establishment of Cultural Councils for the collective exercise of language, religious and cultural rights was a crucial breakthrough in the constitutional negotiations that preceded the adoption of the 1996 Constitution.[100] This also involves a commission for the promotion and protection of cultural rights. In this regard, the negotiators were giving expression to Constitutional Principle XXXIV set out in Schedule 4 to the 1993 Constitution, which deals with self-determination, so fervently desired by the members of the Freedom Front. The desire and passion for a volkstaat on the part of right-wing Afrikaners has to some extent been sublimated by the prospect of cultural councils. Valli Moosa has stated that the Constitutional Assembly dealt with cultural aspirations in a "democratic and pragmatic manner" within the concept of a single nation with a single sovereignty.[101] The Volkstaat Council, constituted by parliamentary process after the election of April 1994, released a report in which it argued for "a constituent state that will function as a federated unit" within the broader Republic of South Africa.[102] Nothing was to come of this, and in its place provision

95 Kriek, Kotze, Labuschagne, Mtimkulu and O'Malley *Federalism* (1992) ("Kriek *et al*") 22.

96 Friedrich "The polities of language and corporate federalism" in Savard and Vignealt (eds) *Multilingual political systems, problems and solutions* 223.

97 (1988) 75.

98 Kriek *et al* 24.

99 *Idem* 23.

100 See "Agreement on cultural councils" *Constitutional Talk* 1996-04-22–1996-5-18.

101 *Idem* 3 3.

102 See "CA to Debate Volkstaat Council Report" *Constitutional talk* 1995-06-09–1995-06-29 8.

has been made for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. Cultural councils give expression to the concept of segmental autonomy, which is one of the features of consociationalism.[103] This can also be described as a form of corporate federalism, as discussed above.

13 THE PROVINCIAL SYSTEM

The 1996 Constitution makes provision for a quasi-federal system of provincial devolution of legislative and executive power.[104] This federal element in the government established by the Constitution by its very nature accommodates and promotes diversity of culture, religion and language. Different patterns of economic and social activity emerge in a federation able to meet the needs of a heterogeneous community and the preferences it precipitates. From this flows the prospect of creative experimentation with different and innovative policies to meet the needs of citizens in a particular region. As Etienne Mureinik perceptively observed, "federations energize the democratic process by making it possible for a cause lost in one [region] to be carried in another".[105] This promotes and sustains public awareness and involvement in crucial debates relating to the economy and to public policy.

The Constitutional Court in *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries*, Allowances and Other Privileges to the Ingonyama Bill of 1995[106] adopted a liberal interpretation of the legislative competences of the provinces listed in Schedule 6 to the 1993 Constitution. This is an indication that a quasi-federal system is not necessarily incompatible with effective and meaningful provincial government and devolution of powers. Furthermore, the Constitution has merely created an institutional skeleton which, by means of incremental changes and growth, must develop to meet the peculiar needs of a diverse and heterogeneous community with a population of nearly 40 million people in a vast geographical subcontinent, where provincial decentralisation, asymmetry and the recognition of cultural and linguistic diversity is essential.

14 TRADITIONAL LEADERS

Chapter 12 of the 1996 Constitution deals with traditional leaders. It provides for the recognition of their role and status as well as for the recognition of customary law. Provision is also made for the establishment of councils of traditional

---

103 See Boulle 51.

104 Rautenbach and Malherbe *Constitutional law* 2 (1996) 259 observe that in Watts's chapter entitled "Is the new Constitution federal or unitary?" in De Villiers (ed) *Birth of a constitution* (1994), three designations were used: "federal political system", "regionalised unitary system" and "hybrid system". See also Klaaren "Federalism" in Chaskalson *et al* (eds) *Constitutional law of South Africa* (1996) 5–1, who uses the expression "a federal system with unitary features". Basson 185 states: "It would appear as if the [1993] Constitution provides for . . . a system which is neither fully federal nor fully unitary."

105 *The Star* 1993-11-05.

106 1996 4 SA 653 (CC).

leaders to be set up and regulated by national and provincial legislation. The traditional leaders had asked for very much more.[107] They asserted that, contrary to the agreement reached at Kempton Park, a proposed Council of Traditional Leaders had not taken part in the constitution-making process.[108] They requested that the traditional authorities remain as primary structures of local government in the rural areas, which would include democratically elected councillors, as provided for in section 182 of the 1993 Constitution. That provision read:

> "The traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government referred to in Chapter 10, shall *ex officio* be entitled to be a member of that local government, ... and shall be eligible to be elected to any office of such local government."

Accordingly, the traditional leaders desired heads of traditional authorities to be *ex officio* members of district councils. This was not to materialise. They requested also that the Bill of Rights should only apply vertically, between the state and the individual. In this regard, they were singularly unsuccessful. Horizontality is clearly provided for in section 8, which stipulates that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state". The leaders of the traditional authorities are very unhappy about this state of affairs. Chief SC Mhinga, General Secretary of the Council of Traditional Leaders (Contralesa) commented as follows:[109]

> "The [1993] Constitution did recognise and protect traditional authorities, but the recent drafts of the new Constitution leave much to be desired. ... Our Communities are worried."

Thus, although Chapter 12 grants recognition to traditional leaders "according to customary law",[110] they will play no role in government *ex officio* after the 1999 general election, as was the position under the 1993 Constitution, where at local-government level they occupied positions *ex officio*. This is a victory, albeit a controversial one, for democracy. The viewpoint that "traditional leaders should be included with other provincial leaders in the Senate and should participate in creating laws"[111] was not accepted. It is apparent that the Constitution to some extent lacks legitimacy among certain traditional leaders, particularly those in KwaZulu-Natal. The Constitutional Assembly opted for a completely democratic constitution and refused to agree to a situation in which traditional leaders would be members of legislative and executive bodies *ex officio*. This is not the position with the ill-fated Draft KwaZulu-Natal provincial constitution, under which the traditional leaders indeed occupy such positions.[112]

---

107 See "Traditional leaders put their case" *Constitutional Talk* 1996-04-22–1996-05-18 3.

108 *Ibid.*

109 *Ibid.*

110 S 211(1) of Act 108 of 1996.

111 See "A place for tradition" *Constitutional Talk* Working Draft Edition 28.

112 See s 4(4) of Chapter 12 ("Local Government") of the Provincial Constitution of KwaZulu-Natal, which reads as follows:
"Primary local governments shall be democratically elected, provided that –
(a) any traditional authority shall be regarded as a primary local government, organised in terms of traditional and customary law within the Region concerned, on the same level as municipalities or rural councils;
(b) the boundaries of the jurisdiction of the traditional leader concerned, and the powers and functions of local government vested in such traditional leaders in terms of traditional and customary law, are preserved to the extent that is reasonable;

continued on next page

International law provides protection for indigenous people by virtue of the Indigenous and Tribal Populations Convention, prepared by the International Labour Organisation.[113] Paragraph 22 of the Declaration of the World Conference to Combat Racism and Racial Discrimination[114] expressed concern about the rights of indigenous populations. Thornberry[115] points out that there is an instructive difference between the language of paragraph 21 on minorities and the paragraph on indigenous populations: whereas the former paragraph insists on the phraseology of rights of "persons belonging to" minorities, paragraph 22 refers to indigenous populations as whole groups or entities.[116] Self-determination in international law is a right of "all peoples". Objections were raised and reservations expressed in relation to the term "peoples" as far as indigenous populations were concerned "because it might lead to assumptions about self-determination, secession, and separatism".[117] This would undermine the fundamental of territorial integrity referred to above.

15 PROGNOSIS

The IFP constitutes a political minority in the body politic of South Africa. It is, however, at the time of writing the majority party in the province of KwaZulu-Natal, which drafted an abortive provincial constitution that was rejected by the Constitutional Court.[118] The IFP has its roots in the conservative and indigenous Zulu culture of the rural areas of the province. The political and constitutional accommodation of the IFP is one of the intractable problems with which South African leaders have to grapple. The previous endemic, now nascent, violence in the province is an indication of the potential that this issue has for the destabilisation of the political order in South Africa. It requires to be handled with great political wisdom and sensitivity.

The use and importance of Afrikaans as a national official language is, however, likely to diminish considerably in contrast to the indigenous languages,

---

(c) a specific law of the Province shall enable the members of a traditional community to establish within the area of jurisdiction of such community a council of which no less than fifty per cent of its members shall be elected for the administration of the community concerned, as determined by such community; and

(d) in any primary local government council established for rural areas, other than those of traditional authorities, persons, their dependants, and legal persons who own or lease land or pay levies or tax to such a council, shall be guaranteed a representation of at least thirty per cent of the seats of such a council for the local government's terms of office, following the first elections after the adoption of this Constitution."

113 Thornberry 334ff.

114 A/CONF.119/26.

115 Thornberry 389.

116 This paragraph reads: "The rights of indigenous populations to maintain their traditional economic, social and cultural development and to use and further develop their own language, [and] their special relationship to their land and its natural resources should not be taken away from them; the need for consultation with indigenous populations as regards proposals which concern them should be observed."

117 Thornberry 379.

118 See *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996* 1996 4 SA 1098 (CC) par 47.

which are likely to increase in use and importance. It is essential that the use and development of the indigenous languages be encouraged in the interest of nation-building and individual self-esteem of African people in South Africa. Language and cultural tolerance is indispensable for harmonious human relationships and the materialisation of human rights in South Africa. The development of the Afrikaans language gave Afrikaners national self-confidence and esteem. In the new South Africa this should be replicated for the indigenous languages. Their use, recognition and development are likely to increase significantly both nationally and, in particular, in the provinces in which those languages are written and spoken. English is and will remain the *lingua franca*, and its importance will increase rather than decrease.

Section 31 of the 1996 Constitution must be read with section 29, dealing with education, which confers upon everyone the right "to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable". It is not clear whether this right applies horizontally. Will people be able to insist that their language should be used in the market-place as well as in state institutions which render them a service?

The future of indigenous law and custom is uncertain and problematic. These systems are patriarchal and as such make inroads into gender equality, which is guaranteed by section 9 of the Constitution. The eradication of all vestiges of gender inequality in such law and custom would, it seems, imperil the entire structure of the system. Some form of deconstruction may, however, be possible.

South Africa is emerging in the new constitutional and political dispensation as a multi-cultural and multi-language community. This requires a transformation from the predominantly bilingual, Calvinistic and Eurocentric dispensation of the apartheid era, which was characterised by cultural and linguistic imperialism, to cultural, religious and language diversity. What is also required is an authentically pluralistic society "which aims at uniting different ethnic groups in a relationship of mutual interdependence, respect and equality, while permitting them to maintain and cultivate their distinctive ways".[119] There is, however, a cogent connection between minority protection and the level of democratic government that prevails in a country. Therefore, if an authentic democracy takes root in the native soil of South Africa, minority protection will be strongly underpinned. If, on the other hand, South Africa slides into a state of anarchy and chaos and a system of dictatorial government emerges, the rights of minorities will be greatly affected by this, in a highly detrimental manner. Cultural pluralism implies a certain degree of differential treatment of minority and indigenous groups to accommodate their peculiar circumstances and needs, and to ensure genuine equality in law and respect for their traditions. One of the consequences of apartheid, however, was that any form of differential treatment is viewed with immediate suspicion. Now that apartheid is part of South Africa's political and constitutional history, a more mature and less emotional approach is likely to be taken in relation to the issue of cultural pluralism. In international law and politics there is a move away from the assimilation of minorities towards the recognition of cultural pluralism as a desirable goal. This, of course,

119 UN Sales No 71 XIV 2, quoted by Thornberry 4.

must be understood and propagated in a way that respects the sovereignty and territorial integrity of national states.[120] The accommodation of cultural and language diversity, and the social and economic rehabilitation of disadvantaged communities, constitute the greatest challenges facing the body politic in the new constitutional dispensation in South Africa.

HUGO DE GROOT-PRYS

Die Hugo de Groot-prys van R1 000 word elke jaar deur die Vereniging Hugo de Groot uitgeloof aan die outeur wat die beste bydrae oor die Grondwet van die Republiek van Suid-Afrika 108 van 1996 vir publikasie in die THRHR *aanbied. Die redaksiekomitee behartig die beoordeling na afloop van die kalenderjaar. Die redaksiekomitee behou hom die reg voor om die prys nie toe te ken nie indien die bydraes wat ontvang is, na sy mening toekenning nie regverdig nie.*

120 Thornberry 391. Cf Moskowitz *The politics and dynamics of human rights* (1968). In this regard Moskowitz is somewhat pessimistic, observing that "no country has yet evolved an internal order which stands for a true pluralism in which human rights are subject only to the minimum restraint required by the public order. Everywhere where ethnic diversity clashes with the ideal of national homogeneity, only iron restraint and the relentless probing from within and without can stay the hand of oppression which always reaches out to crush those of another race, creed, or other language. More than a century and a half of effort to transfer the struggle of ethnic loyalties from the field of battle to the conscience of the citizen has had but little effect on the practices of Governments".

Die regsimplikasies van elektroniese handeldryf ("E-Commerce") met besondere verwysing na die bewysreg

DP van der Merwe
B Iuris LLD
Professor in Straf- en Prosesreg, Universiteit van Suid-Afrika

SUMMARY

"The legal implications of E-Commerce with specific reference to the law of evidence."

The phenomenon of electronic commerce (e-commerce) has serious implications for the present South African legal system. One of the internationally agreed upon prerequisites for successful e-commerce is the necessary legal and regulatory infrastructure. Because of the emphasis of Roman-Dutch law on corporeal objects it will not be able to cope well with a marketplace dealing with virtual shops in virtual malls. The present article explores recent technological developments such as "convergence" (*inter alia* between the computer and communication technology such as cellphones and satellites) as well as virtual shops, such as "Amazon.com"'s hugely successful virtual bookstore. An attempt is then made to gauge the impact of these developments on South African law, especially the law of evidence, which is used to dealing with physical contracts and signatures. From a survey of international and supra-national legal developments it would seem that the "electronic signature" (a form of encryption) presents a possible solution. However, it still needs to be incorporated into our law by means of specific legislation. Certain initiatives from the government and the private sector in South Africa seem positive in this regard.

1 INLEIDING

Dit is so dat tegnologiese ontwikkeling dikwels ook 'n impak op die reg het. 'n Tipiese voorbeeld is die Internet – 'n netwerk van netwerke wat die hele wêreld elektronies verbind en Marshall McCluhan se "global village" uiteindelik waar maak. Soos hieronder sal blyk, vind die meeste regsontwikkeling in verband met die Internet tans oorsee plaas en is Suid-Afrika (en Afrika) besig om vinnig agter te raak. Daar word reeds gepraat van 'n informasiegaping wat ontstaan het tussen eerste- en derdewêreld lande en dit kan Afrika ook swaar tref.

Die een ontwikkeling op Internetgebied wat die saak nou op die spits gaan dryf, is die sogenaamde "electronic commerce", afgekort as "e-commerce". Vir doeleindes van hierdie artikel sal die uitdrukking "e-handel" vir hierdie proses van elektroniese handeldryf gebruik word. Daar bestaan algemene konsensus dat een van die onontbeerlike voorwaardes vir e-handel 'n toepaslike regulatoriese infrastruktuur is. Die infrastruktuur sal ook internasionaal moet kan werk aangesien hierdie tipe handel werklik wêreldwyd kan geskied, mits daar wedersydse erkenning en respek vir die plaaslike regstelsels van die twee partye is.

Soos hieronder sal blyk, het die Romeins-Hollandse reg se sterk fokus op stoflike sake dit vir daardie stelsel baie moeilik gemaak om aan te pas by die jongste ontwikkelinge. Nie alleen het geld as betaalmiddel vir alle praktiese doeleindes gedematerialiseer nie, maar selfs die handelsware waaroor dit gaan sal nou in "virtuele winkels" in "virtuele wandel-halle" uitgestal en gekoop kan word. Die presiese regsaard van inligting en immateriële goedere het weer onder die loep gekom. Daarbenewens is daar die geweldige pas van tegnologiese ontwikkeling waar nuwe konsepte soos "convergence" ("konvergensie" vir doeleindes van hierdie artikel) en "internetdiensverskaffers" ook nuwe hoofbrekens aan die reg verskaf.

Die uitleg van hierdie artikel is kortliks soos volg: na 'n inleiding, sal die tegnologiese ontwikkeling behandel word. Daarna sal die klem val op regsvergelyking, op sy beurt gevolg deur die posisie in Suid-Afrika. Ten slotte sal gepoog word om in die gevolgtrekking 'n kompas te verskaf vir ons regstelsel se vaart deur hierdie stormagtige waters.

2 TEGNOLOGIESE ONTWIKKELINGE

Harley Wright[1] skryf dat die konvergensie (ineenvloei) van tegnologie daartoe gelei het dat stemme ook opgaan vir die konvergensie van die reg. In die Gevorderde Nagraadse Sertifikaatprogram in Telekommunikasie en Inligtingsbeleid wat deur Unisa se Departement van Kommunikasie aangebied word, word "konvergensie" gedefinieer as "the merging of telephone, broadcasting and computing technologies, industries and cultures". 'n Voorbeeld hiervan is die Internet – 'n sogenaamde "netwerk van netwerke" wat met behulp van 'n persoonlike rekenaar bedryf word. Die rekenaar word deur middel van 'n modem aan die telefoonnetwerk verbind en stel die gebruiker in staat stel om teks, beelde en selfs video te versend aan al die ander persone wat ook via 'n modem aan die netwerk gekoppel is.

'n Relatief onlangse ontwikkeling op hierdie gebied is die uitruil van data tussen sellulêre telefone en rekenaars. Hierdie proses geskied deesdae ook dikwels met infrarooiskakeling sodat geen lastige kabels saamgedra hoef te word nie. Daarbenewens is die hoofmedium van data-oordrag ook besig om te ontwikkel – van die radiogolftorings wat ons oral soos paddastoele sien opspring het, tot die nuwe moontlikheid van satellietkoppeling. In 'n onlangse tydskrifartikel[2] word daar beweer dat nuwe satellietnetwerke soos dié van Iridium en Globalstar dit moontlik sal maak om vanaf enige plek in die wêreld kontak te maak – of dit nou van die Suidpool of die middel van die Stille Oseaan is. 'n Interessante aanhaling beweer dat Globalstar met besondere belangstelling na Afrika suid van die Sahara kyk asook na "other locales where local telephone companies are riddled with corruption and inefficiency or where landbased systems get too pricey . . .". Indien hierdie situasie nie verander nie sal die tegnologie- en inligtingsgaping dus ook die ekonomiese gaping tussen Afrika en ander kontinente laat vererger. Indien die kakao-boer in Ghana aan die ander kant maklik in "realtime"[3] kan vasstel wat wêreldpryse vir sy produk tans beloop, sal

1 "Law, convergence and communicative values on the net" 1996 *Journal of Law and Information Science* 54.

2 *Time* 1998-11-23.

3 'n Rekenaarterm wat daarop dui dat dinge feitlik oombliklik plaasvind sonder 'n vertraging, met 'n gepaarde berging van data wat later eers teruggespeel word.

hy nie sy oes teen 'n uitbuitprys hoef te verkoop nie. Hierdie is maar net een voorbeeld van die menigvuldige voordele van e-handel.

Die punt word egter ook deeglik benadruk dat soiets nie sonder wyse wetgewing en 'n verantwoordelike en versiende regering sal gebeur nie. Daar sal ontslae geraak moet word van

> "government rules dating back to 1965 when 11 nations handed Intelsat a virtual monopoly over the satellite business. Governments viewed satellite communications as either a luxury to be taxed to subsidize phone service or as a threat to their power. It wasn't until January 1, 1998 that the World Trade Organisation bowed to the inevitable and opened the world's skies to satellite competition".

Dit is die storie wêreldwyd. Indien lande se regulatoriese en regtelike onderbou nie in plek is nie, sal die onbetwyfelbare voordele van e-handel ook nie na daardie land toekom nie.

Een van die suksesverhale van handeldryf op die Internet was die verkoop van boeke deur middel van 'n "virtuele boekwinkel", soos van die nuutgestigte firma "Amazon".[4] Amazon het na bewering 2,5 miljoen titels beskikbaar en bied besparings van tot 40% op 400 000 van sy titels. Boeke kan gesoek word volgens die normale bibliografiese metodes van titel, outeur, onderwerp of trefwoord, maar ook volgens ouderdomsgroep (kinderboeke), topverkopers, letterkundige pryse, ensovoorts. Die boeke word per kredietkaart bestel en per koerier afgelewer. Die boeke kan binne 15 dae teruggestuur word teen volle terugbetaling van die koopprys.[5]

Die sukses van Amazon het ook 'n meer tradisionele groep boekhandelaars (Bertelsmann) aangespoor om die Internet as elektroniese bemarker te betree. Dit wil voorkom asof boeke, musiek en (natuurlik) rekenaarprogrammatuur goed oor die Internet verkoop.

Uit die aard van die saak is 'n groot probleem die heen en weer stuur van groot bedrae geld. Met e-handel se voorganger "EDI" (Electronic Data Interchange) was dit makliker aangesien albei partye voor die tyd aan mekaar bekend was en al die tegniese aangeleenthede in 'n onderlinge EDI-kontrak kon reël. Met e-handel staan die winkel egter wawyd oop vir enigiemand, op enige plek in die wêreld, wat sou belangstel om iets te kom koop. Tot dusver is van die koper verwag om sy kredietkaartnommer via die Internet te verstrek, 'n uiters gevaarlike praktyk. Heelwat jong "hackers"[6] en "crackers"[7] skep behae daarin om met knap speurwerk of met gevorderde tegnologie hierdie kredietkaartnommers by hulle versameling te voeg en (dalk) later te gebruik.[8]

Dit blyk dat die oplossing lê in 'n ander tegnologie, naamlik enkripsie ("versyfering" is waarskynlik beter Afrikaans). Die een toepassing hiervan, die sogenaamde "elektroniese handtekening", het groot implikasies vir die bewysreg.

---

4 Te vinde by www.amazon.com.

5 "Cyberspace bookstore" *Financial Mail* 1997-12-12.

6 Benaming vir 'n rekenaarkundige wat toegang verkry tot rekenaarnetwerke net vir die "glorie" daarvan.

7 Benaming vir 'n rekenaarkundige wat kwaadwilliglik toegang verkry tot, en skade bereken aan, rekenaarnetwerke.

8 Miskien agv hierdie vrese, waarborg die boekhandelaar Amazon dat hy verliese sal dek wat 'n klant agv oneerlike handel met sy kredietkaart ly, indien dit nie deur 'n versekeraar gedoen word nie. Ongelukkig strek die dekking net tot 'n maksimum van $50.

Baie vereenvoudig, kom die proses kortliks op die volgende neer: Die hele dokument wat "onderteken" moet word, word na 'n onleesbare versyferde weergawe omgeskakel. Hierna word dit "onderteken" deur 'n spesiale kriptografiese sleutel, dikwels vervat in 'n sogenaamde "slim kaart". Die hele proses verbind die inhoud van die dokument onlosmaaklik met die "ondertekening" daarvan. Die hele dokument met sy stertjie van ondertekening is dan gereed om elektronies versend te word (tipies via die Internet as deel van 'n e-handelstransaksie).

Daar is twee wyses van interaksie tussen die sleutel en die dokument. Met sogenaamde "simmetriese versyfering" moet beide versender en ontvanger in besit wees van 'n gemeenskaplike geheime ontsyferingsleutel sodat die een kan versyfer en die ander kan ontsyfer. Daar is heelwat probleme met hierdie prosedure. Dit is in die eerste plek baie moeilik om die sleutels by betrokkenes uit te kry sonder dat dit moontlik deur derde partye onderskep word, welke derde party dan (bedrieglik) die rol van een van die kontraktante kan speel. Hierdie oplossing kan nog werk tussen twee partye wat redelik gereeld met mekaar sake doen, maar is onprakties met die tipiese Internet e-handelsituasie waar een verkoper sy goedere aan die hele wêreld aanbied.

In laasgenoemde situasie kan "assimetriese versyfering" 'n beter oplossing bied. Hier het die versender twee sleutels, 'n openbare sleutel en 'n private sleutel. Die private sleutel is net aan hom bekend (of is binne sy eksklusiewe beheer) en hy gebruik dit dan om sy boodskap te versyfer en dit dan digitaal te "onderteken". Sy openbare sleutel is wiskundig verwant aan die private sleutel alhoewel die een nie deur 'n derde party van die ander afgelei kan word nie. Hierdie openbare sleutel kan dan aan moontlike klante bekend gemaak word (byvoorbeeld via die Internet) en deur die klant gebruik word om die versyferde boodskap te ontsyfer en ook terselfdertyd vas te stel of dit werklik deur die beweerde versender afgestuur is. Daar is egter nog een probleem – om die openbare sleutel persoonlik aan die afsender te verbind. Hiervoor word van 'n sogenaamde sertifiseringsowerheid ("certification agency") gebruik gemaak wat 'n persoonlike verhouding met die afsender moet hê en derhalwe sy dokument kan waarborg. Hierdie sertifiseringsowerhede kan deur die regering daargestel word, kan vanaf die privaatsektor kom[9] of 'n groot instansie soos 'n bank kan besluit om sy eie sertifiseringsowerheid te wees. Indien hierdie owerhede vanuit die privaatsektor kom, moet die regering gewoonlik sorg vir 'n lisensiëringsowerheid om op sy beurt die sertifiseringsowerhede te beheer en oor hulle toesig te hou!

Hierdie gebied is selfs nog meer ingewikkeld as wat hierbo aangedui is, maar dit behoort reeds duidelik te wees dat talle van die funksies van die ou menslike (of holografiese) handtekening selfs beter vervul kan word deur 'n digitale handtekening. Laasgenoemde hou ook sekere onverwagse voordele in, soos byvoorbeeld die beskerming van die privaatheid van die ondertekenaar, iets wat 'n poskaart of 'n oopgestoomde koevert nooit sal kan doen nie.

3 REGSVERGELYKING

Oorsee het die kwessie van e-handel reeds heelwat aandag ontvang van wetgewers in Europa, die Verenigde State en Asië. Dit lyk byna asof internasionale

9 Bv die Verity-groep van wie SACA (South African Certification Agency) die plaaslike agent is, of the plaaslike Thawte-groep van Kaapstad.

handelsblokke besig is om te ontstaan rondom 'n gemeenskaplike stel tegniese standaarde, maar ook rondom regstelsels wat in staat is om die nuwe tegnologiese ontwikkelinge juridies te hanteer.

In die Verenigde State is een van die jongste stukke wetgewing die Illinois Electronic Commerce Security Act, wat teen 1 Julie 1999 in werking tree. Die doel van hierdie wet is:

> "To remove existing legal barriers to electronic commerce, facilitate the legal trustworthiness of electronic communications and specify the rules that apply to electronic commercial transactions."

'n Afskrif van die wet, sowel as kommentaar van die Illinois Commission on Electronic Commerce and Crime (die eintlike skeppers van die wet) is op die Internet te kry.[10] Dit is interessant dat die hantering van misdaad as 'n noodsaaklike komponent van e-handel gesien word. Die ander regsgebied wat van kardinale belang is, is natuurlik die kontraktereg. Een van die grootste praktiese probleme in verband met 'n "virtuele kontrak" is natuurlik die "ondertekening" daarvan. Hier kom die bewysreg ter sprake en in 'n kombinasie van bewysreg en enkripsie het die sogenaamde "digitale handtekening" tot stand gekom. Die begrip word meer volledig hieronder by die Suid-Afrikaanse reg behandel.

Baie van die ander Amerikaanse deelstate het ook intussen wetgewing in hierdie verband aangeneem. Die staat Utah was in 1995 die eerste wetgewer, (nie net in die Verenigde State nie, maar ook in die wêreld) om wetgewing aangaande digitale handtekeninge aan te neem.[11] Utah was ook die eerste staat om wettiglik 'n digitaal-ondertekende dokument te erken. Deur middel van 'n digitaal-ondertekende deklarasie het die goewerneur, Michael O Leavitt, die 19de November as "Digital Signature Signing Day" geproklameer. (Dit lyk terloops na die ideale manier om openbare geloofwaardigheid te gee aan 'n nuwe tegnologie waaroor mense nog skepties mag wees.) Die Utah-wet het ook as voorbeeld vir baie van die ander Amerikaanse deelstate gedien.[12] Kalifornië se oorspronklike poging op hierdie gebied was baie op dié van Utah geskoei maar die jongste weergawe beperk die tegnologie tot transaksies waarby openbare liggame betrokke is.[13]

In 'n poging om sake in die Verenigde State te harmoniseer, het 'n komitee van die American Bar Association begin om "Digital Signature Guidelines" te formuleer.[14]

Europa is in hierdie opsig gelukkig om 'n sentrale "wetgewende" gesag te hê in die vorm van die Europese Unie (EU) te Brussels. Normaalweg werk die "direktiewe" van die EU soos volg: Na die publikasie van 'n direktief kry die onderskeie lidlande 'n sekere tydperk om die land se huishoudelike wetgewing in ooreenstemming te bring met die EU-posisie. Op 13 Mei 1998 het die EU die finale weergawe van sy "Directive on Electronic Signatures" vrygestel. Hierdie direktief vereis van alle lidstate om hulle wetgewing teen Januarie 2001 in plek te hê. Die direktief meld ook spesifiek dat uiteenlopende wette op hierdie gebied

10 By die adres *http://www.mbc.com* van die Amerikaanse prokureursfirma McBride, Baker en Coles van Chicago wat in rekenaarwetgewing spesialiseer.
11 By *http://www.commerce.state.ut.us/web/commerce/digsig/act.htm.*
12 Sien *ITEC Law Alert* 1998-02-03.
13 Smedinghoff *Online law* (1996) 54.
14 *Online law* 54.

'n ernstige struikelblok teen e-handel kan skep. Dit bepaal onder andere dat 'n digitale handtekening nie regsgeldigheid ontsê kan word bloot op grond daarvan dat dit in elektroniese formaat is nie. Aan die ander kant stel die direktief redelik hoë standaarde aan die konsep van 'n digitale handtekening.

'n Tipiese voorbeeld van nasionale wetgewing in hierdie verband kan gevind word in België se konsepwetgewing in verband met sertifiseringsowerhede.[15] Daar is ook heelwat nuttige definisies in die konsep. "Digitale handtekening" word byvoorbeeld soos volg gedefinieer:

> "digitale handtekening: het resultaat van de omzetting van een digitale gegevensverzameling met behulp van een private sleutel, derwijze dat de identiteit van de titularis van de private sleutel en de integriteit van de digitale gegevens nagegaan kunnen worden met behulp van een overeenkomstige publieke sleutel vergezeld van het certificaat van een certificatie-autoriteit . . ."

Die "sertifikaat" van die sertifiseringsowerheid word soos volg gedefinieer:

> "certificaat: een bevestiging, verzekerd door de digitale handtekening van een certificatie-autoriteit, van een of meer informatiegegevens die door haar zijn vastgesteld, onder meer van het verband tussen een natuurlijke persoon, een privaat- of publiekrechtelijke rechtspersoon, een overheidsbestuur of een feitelijke vereniging en de publieke sleutel ervan".

Die sertifiseringowerheid se definisie moet met die voorgaande saamgelees word:

> "certificatie-autoriteit: een natuurlijke persoon of een rechtspersoon die de certificaten opmaakt, aflevert en beheert".

Volgens artikel 4 van hierdie wetsontwerp besluit die Belgiese regering oor die voorwaardes wat op 'n nuwe sertifiseringsowerheid van toepassing sal wees, welke waarborge dié sal moet voorsien, wat die minimumvoorwaardes vir aanspreeklikheid sal wees, ensovoorts. In artikel 4(k) word voorwaardes gestel aangaande die minimumstandaarde van geheimhouding en integriteit waaraan die owerheid sal moet voldoen. Artikel 9 bepaal dat die owerheid 'n elektroniese register sal moet hou wat vir almal elektronies toeganklik moet wees maar wat nie deur buitepartye verander kan word nie (dit klink na 'n uitdaging vir "hackers!). Artikel 14 maak voorsiening vir die terugtrekking van sertifikate en bepaal dat dit onmiddellik op die register aangebring moet word. Artikel 17 bepaal dat aan 'n sertifikaat van 'n buitelandse sertifiseringsowerheid dieselfde krag gegee moet word as aan een van 'n plaaslike sertifiseringsowerheid, op voorwaarde dat die buitelandse sertifikaat van 'n EU-lidland afkomstig is, of ten minste vanaf 'n land kom wat die "Verdrag voor Europese Economische Ruimte" onderteken het. Artikel 19 handel met die moontlike aanspreeklikheid van 'n sertifiseringsowerheid.

In Nederland is daar ook lankal reeds besin oor die betekenis van die begrip "handtekening" vir doeleindes van e-handel. In 'n artikel deur Syx[16] onderskei die skrywer tussen 'n dogmatiese en 'n pragmatiese benadering. Volgens die dogmatiese siening kan 'n mens die funksie en vorm van 'n handtekening nie van mekaar skei nie. Slegs dit wat letterlik met die hand geskryf is kan as "handtekening" deurgaan. Hiermee word digitale handtekeninge natuurlik onmiddellik uitgeknikker. Die pragmatiese benadering hou egter meer belofte in. Hiervolgens is dit waardevol om funksie en vorm van mekaar te skei – die waarborge deur

15 Sien afdeling II hierbo vir 'n verduideliking van die rol van hierdie tipe liggaam.
16 1986 *Computerrecht* 153.

die tradisionele handtekening bly bewaar selfs al word daar as gevolg van tegniese vernuwing nie meer letterlik met die hand geskryf nie. Trouens, die nuwe vorm van "handtekening" kan selfs meer waarborge van egtheid ensovoorts bied as die tradisionele handtekening.

In die Ooste kan Singapoer uitgesonder word as rolmodel wat regsontwikkeling rondom e-handel aanbetref. Die inisiatiewe daar poog om van die land 'n sogenaamde "Electronic Commerce Hotbed" te maak.[17] Hierby het die regsontwikkeling nie agterweë gebly nie. Singapoer het byvoorbeeld hul Wet op Bewysreg in 1997 gewysig om die toelating van elektroniese dokumente in die hof te magtig. In Julie 1998 is die Electronic Transactions Act (ETA) uitgevaardig om die regsgrondslag vir digitale handtekeninge te lê en aldus ook regstatus te verleen aan kontrakte wat elektronies gesluit word. Daarbenewens verskaf die Computer Misuse Act strafregtelike beskerming aan sekere kritiese rekenaarstelsels. Ten einde die kapitaal te beskerm wat belê is in intellektuele goedere het Singapoer ook aangesluit by die Bernse Konvensie en by die WTO[18] se TRIPS[19]-ooreenkoms. (Sien daaroor ook meer hieronder.)

Hier is voorwaar 'n voorbeeld van samewerking tussen regering en privaatsektor wat navolgenswaardig is. Dit blyk ook dat die regering 'n streng hand oor die Internet hou deur diensverskaffers te lisensieer.[20]

4 DIE POSISIE VAN INTERNASIONALE LIGGAME

Aangesien die Internet min respek vir landsgrense het, word steeds meer aanvaar dat oplossings vir regsprobleme wat uit die gebruik van die Internet voortvloei internasionaal moet kan werk. Dit beteken dat internasionale organisasies (veral die Verenigde Nasies) 'n steeds belangriker rol begin speel in hierdie verband.[21]

Aldus het UNCITRAL[22] reeds Illinois se Electronic Commerce Security Act[23] gebruik as basis vir sy internasionale model vir wetgewing in hierdie verband. Volgens UNCITRAL se Uniform Rules word 'n handtekening byvoorbeeld definieer as

> "[a]ny symbol used or security procedure adopted by or on behalf of a person with the intent to identify that person and to indicate his approval of the information to which it is appended".

Die WTO het ook 'n lewendige belangstelling in ontwikkelinge op die e-handel front. Hierdie internasionale organisasie is veronderstel om uitvoering te help gee aan, en "governance" te verskaf met betrekking tot die beleid wat deur die OECD[24] vasgestel sal word. Daar is egter kritiek teen die OECD se samestelling aangesien dit slegs die 29 mees ontwikkelde lande insluit. UNCTAD[25] lê meer klem op die belange van ontwikkelende lande.

---

17 Kyk gerus na die kleurvolle uiteensetting by *http://www.ec.gov.sg/*.
18 World Trade Organisation.
19 Trade Related (Aspects of) Intellectual Property Rights.
20 Leng "Internet regulation in Singapore" 1997 (2) *Computer Law and Security Report* 115.
21 Dienooreenkomstig word internasionale verdrae, die volkereg, die internasionale privaatreg ens ook al hoe belangriker.
22 United Nations Commission on International Trade Law. Die Engelse benaminge word in die hoofteks gebruik weens groter herkenbaarheid.
23 Sien bespreking hierbo.
24 Organization for Economic Co-operation and Development.
25 United Nations Conference on Trade and Development.

Een van die mees dinamiese onlangse ontwikkelinge, wat ook vir Suid-Afrika implikasies inhou, het van die kant van die OECD gekom. In Oktober 1998 het 'n "OECD Ministerial Conference on Electronic Commerce" in Ottawa, Kanada, plaasgevind met die subtema "A Borderless World: Realising the Potential of Global Electronic Commerce".[26] Die vier hooftemas van die konferensie was

- Building trust for users and consumers
- Establising ground rules for the Digital Marketplace
- Enhancing the information infrastructure for electronic commerce
- Maximising the benefits.

Suid-Afrika is by die konferensie verteenwoordig en minister Jay Naidoo het die soeklig laat val op die moeilike posisie wat 'n kontinent soos Afrika beklee met betrekking tot internasionale e-handel, waar beslissings dikwels namens ons gemaak word sonder 'n geleentheid vir insette deur die betrokkenes.

Ander interessante hoogtepunte van die konferensie was sekere deklarasies aangaande "Privacy, Consumer Protection, Authentication and Taxation". Van hierdie aspekte is veral "authentication" 'n absolute noodsaak, aangesien die tradisionele waarborge van 'n holografiese handtekening wegval met e-handel. Die kwessie word onder Bewysreg hieronder bespreek wanneer die regsposisie in Suid-Afrika onder die loep geneem word.

Geen internasionale oorsig sou volledig wees sonder om die sogenaamde "Uruguay Round TRIPS agreement" te noem nie. Dit vloei uit die WTO se struktuur en verplig alle lidlande van die WTO om hierdie ooreenkoms in hul eie lande te implementeer. Die Uruguay-ooreenkoms is basies 'n verfyning van vorige verdrae oor intellektuele eiendom soos die Bernse en Parys Konvensies. Hieruit blyk ook die belang van intellektuele eiendom in hierdie dae van dematerialisering van die mees waardevolle bates waarmee die wêreld werk – die sogenaamde "Inligtingseeu".

5 DIE POSISIE IN SUID-AFRIKA

5 1 Nuwe inisiatiewe

In Suid-Afrika is daar gedurende 1998 drie onafhanklike inisiatiewe geloods wat elk 'n bydrae behoort te lewer om Suid-Afrika se agterstand op die gebied van e-handelsreg te help uitwis. Hierdie afdeling van die artikel sal eerstens 'n kort oorskou van elk gee en dan ook probeer bepaal hoe sekere regsgebiede in Suid-Afrika deur e-handel geraak mag word.

In die eerste plek het die Regskommissie 'n subkomitee aangestel om ondersoek in te stel na die moontlikheid van wetgewing om rekenaarmisdaad te help bekamp. Hierdie komitee het reeds ten tyde van die skrywe hiervan 'n "issue paper"[27] gelewer waarop kommentaar ontvang is en wat spoedig na konsepwetgewing aangaande rekenaarmisdaad in Suid-Afrika behoort te lei. Uit die gepubliseerde dokument blyk dit dat daar in twee fases te werk gegaan is. In die eerste plek word gepoog om spoedig wetgewing daar te stel wat rekenaarbetreding deur "hackers" en "crackers" strafbaar stel, om sulke betreding met 'n verdere

26 Die verrigtinge en van die ondersteunende dokumentasie kan verkry word by *http://www.ottawaoecdconference.org*.

27 Te sien by *http://www.lawcomm.co.za*.

oogmerk (byvoorbeeld bedrog of diefstal) afsonderlik strafbaar te stel en laastens om die verandering van 'n program op 'n ongemagtigde wyse (bv deur 'n rekenaarvirus) ook strafbaar te stel. Dit word ook oorweeg om dalk 'n spesifieke misdaad te skep vir mense wat doelbewus 'n virusprogram skep, in hul besit het of opsetlik versprei. Die laaste deel van die eerste fase sal wees om prosedurele en bewysreëls daar te stel wat afdwinging van die substantiewe reëls moontlik maak. Die tweede fase sal dan handel met die Internet en e-handel.

Tweedens het die privaatsektor 'n organisasie tot stand gebring met die naam van ECASA.[28] Hierdie komitee werk deur middel van subkomitees, waarvan twee van belang is vir e-handelsreg. Hulle is die komitee wat kyk na privaatheid, egtheid en sekuriteit en die komitee wat kyk na rekenaarmisdaad, elektroniese kontrakte en verwante regsgebiede. Besonderhede aangaande die organisasie is op die Internet te vinde,[29] terwyl die komitees ook hul besprekingsgroepe elektronies voer.[30]

In die derde plek is daar 'n interessante nuwe inisiatief vanaf die kant van die staatsdepartemente van Kommunikasie en van Handel en Nywerheid. Dit is geskoei op die patroon van die 1998 OECD-konferensie, waarna reeds hierbo verwys is. Aldus is daar ook die vier werkgroepe van "Building Trust", "Establishing the ground rules", "Enhancing the information infrastructure" en "Maximising the benefits – social and economic impact". Daar is egter ook 'n vyfde groep bygevoeg: "Contractual and Legal Issues" wat van groot belang vir die e-handelsreg behoort te wees. Die voorsitter van die hele poging sal die Direkteur-Generaal van Kommunikasie wees.[31] Die inisiatief het sterk verteenwoordiging van ander relevante staatsdepartmente soos die Departement van Arbeid, Verdediging, asook Buitelandse en Binnelandse Sake. Daarbenewens is ander organisasies soos die Staatstenderraad, die Raad op Finansiële Dienste, die Reserwebank, ensovoorts, ook daarop verteenwoordig.

As katalisator by die hele proses is CISDA[32] goed geplaas. Hierdie organisasie is aan die WNNR gekoppel en het die nodige tegniese en ander vaardighede om al hierdie inisiatiewe te help ko-ordineer.

5 2 Effek op bestaande regsgebiede

5 2 1 Bewysreg

Die bewysreg is van die allergrootste belang vir suksesvolle e-handel. Tradisioneel het die menslike (of holografiese) handtekening op 'n gewone papierdokument[33] 'n verskeidenheid van funksies vervul. In die eerste plek verseker dit die integriteit van die dokument (indien daar byvoorbeeld enige wysigings op die dokument is moet dié ook deur die ondertekenaar parafeer word). In die tweede plek dien dit as egtheidsbewys ("authentication"), wat beteken dat die persoon van wie se hand die dokument kom bo twyfel vasstaan. Derdens toon die handtekening 'n verbintens deur die ondertekenaar met die voorafgaande feite wat in die dokument voorkom. Daar word in die veld van rekenaarsekerheid in hierdie verband gepraat van "non-repudiability", wat beteken dat 'n ondertekenaar nie meer kan kop uittrek indien hy eers sy geskrewe onderneming gegee het nie.

---

28 Electronic Commerce Association of South Africa.
29 By *http://www.ecasa.org.za.*
30 Sluit aan deur 'n boodskap per e-pos aan *Majordomo@ecasa.hivemind.net* te stuur.
31 Ten tyde van die skrywe hiervan, Andile Ngcaba.
32 Centre for Information Development in Africa.
33 Bekend as "hard copy" in rekenaartaal.

In hierdie verband ontstaan die vraag hoe die Suid-Afrikaanse gemenereg, sonder enige nuwe wetgewing, die kwessie van digitale handtekeninge sal hanteer. Daar is 'n aantal Suid-Afrikaanse beslissings, meesal oor testamente, wat dalk in hierdie verband leiding kan gee.

Ordonnansie 15 van 1845 (K) het die volgende vereis vir 'n geldige testament. Dit moet naamlik

> ". . . be executed in the manner hereinafter mentioned; that is to say it shall be or shall have been signed at the foot or end thereof in a will or other testamentary writing by the testator or by some other person in his presence or by his direction . . . and such signature shall be or shall have been made or acknowledged by the testator . . . in the presence of two or more competent witnesses present at the same time, and such witnesses shall attest and subscribe and shall have attested and subscribed the will in the presence of the person executing the same; and where the instrument shall be or shall have been written upon more leaves than one, the party executing the same and also the witnesses shall sign or shall have signed their names upon at least one side of every leaf upon which the instrument shall or shall have been written".

In die ooreenstemmende bepalings van Natal, die Vrystaat en die Transvaal word daar egter ook voorsiening gemaak dat onderteken kan word deur middel van 'n "merk". Uit die Vrystaatse Ordonnansie[34] blyk dit dat die bedoeling hiermee waarskynlik was om voorsiening te maak vir ongeletterde mense wat nie hul eie naam kon skryf nie. Die Ordonnansie bepaal naamlik dat die merk gemaak moet word "in the presence of and attested by a justice of the peace and two witnesses". (Hiervan kan 'n mens die afleiding maak dat elektroniese versyfering en/of die klik van 'n muis waarskynlik nie as 'n "merk" in die sin van die Ordonnansie gesien sou word nie.)

Een van die eerste beslissings waarin hierdie wetgewing ter sprake gekom het was *Van Vuuren v Van Vuuren*.[35] Die meerderheidsuitspraak het bevind dat 'n testament ongeldig is indien die testateur en een van die twee getuies slegs die eerste bladsy van 'n testament parafeer het, maar die tweede bladsy volledig onderteken het. Regter Bell het egter 'n lang afwykende minderheidsuitspraak gelewer waarin hy bevind het dat die Kaapse Ordonnansie analoog was aan Britse wetgewing, waarvolgens 'n paraaf of enige ander merk voldoende sou gewees het. (Volgens hierdie meer liberale siening sou selfs 'n digitale handtekening miskien analoog genoeg wees aan "any other mark" om aanvaarbaar te wees.)

Hierdie meer liberale siening het die oorhand gekry in *In re Trollip*[36] waar afgewyk is van die meerderheidsuitspraak in die *Van Vuuren*-beslissing. Daar is bevind dat die parawe van 'n erflater en getuies op die eerste bladsy van 'n testament wat aan die einde volledig geteken is, heeltemal voldoende was.

Die Wet op Testamente[37] het egter in 1953 weer eens (soos die ou Kaapse Ordonnansie) enige verwysing na 'n "merk" uitgelaat. In *Dempers v The Master (1)*[38] het waarnemende regter-president Hart gekyk na woordeboekdefinisies, byvoorbeeld:

---

34 11 van 1904.
35 2 Searle 116.
36 12 SC 243 (1895).
37 7 van 1953.
38 1977 4 SA 44 (SWA).

> "'Sign' bears the following meanings: 'To attest or confirm by adding one's own signature; to affix one's name to a document etc.; to affix one's signature to; to write or inscribe one's name as a signature'" (*The Oxford Dictionary*);

en "handtekening" kom neer op:

> "The name or special mark of a person written with his or her own hand as an authentication of some document or writing; The action of signing one's name or of authenticating a document by doing so."

In die *Webster's dictionary* kom die volgende voor:

> "Sign – to affix a signature to; to subscribe in one's own handwriting."
>
> "Signature – the name of any person written with his own hand on a document."

(Die uitdrukking "with his own hand" sal waarskynlik digitale handtekeninge uitsluit.)

Die liberale benadering het egter tog aan die einde geseëvier. In *Ex parte Singh*[39] het regter Vermooten in fyner besonderhede na die *Trollip*-beslissing se behandeling van die woord "sign" gekyk:

> "The requirement is that the testator and witnesses shall 'sign', not write, their names. What is the original meaning of the term 'sign'? It is a 'mark', from the Latin *signum*. To sign one's name, as distinguished from writing one's name in full, is to make such a mark as will represent the name of the person signing the document. For that purpose it is no more neeessary to write one's surname in full than it is to write one's Christian names in full."

(Die uitdrukking "make such a mark as will represent the name of the person signing" lyk weer meer belowend vir die idee van 'n digitale handtekening, behalwe vir die feit dat 'n fisiese merk nie gemaak word nie maar slegs sekere elektroniese veranderinge teweeggebring word. Die wetgewer het waarskynlik ook slegs 'n fisiese merk deur ongeletterdes in gedagte gehad.)

Regter Vermooten het ook na die beslissing van *Jhajbay v Master*[40] gekyk, waar die hof 'n selfs meer liberale houding ingeneem het, deur slegs op die bedoeling van die ondertekenaar te fokus:

> "In my view, in the Wills Act 7 of 1953, 'sign' includes the accustomed mode of signature of a witness, as well as any other mode adopted by him (not being a mark) to write or sign his name. It may or may not be his full name. The intention of the witness in writing or signing is the criterion. If he intends his mode of writing or signing his name to represent his signature, it is effective as such."

(Hierdie subjektiewe toets van bedoeling is baie bemoedigend vir die aanvaarding van digitale handtekeninge. Iemand wat 'n dokument versyfer deur middel van sy private of openbare sleutel het duidelik die bedoeling om 'n digitale handtekening aan te bring, in die sin dat hy homself met die dokument identifiseer.)

Regter Vermooten het derhalwe nie die *Dempers*-beslissing gevolg nie en bevind dat blote parafering van die testament voldoen aan die vereistes van die Wet op Testamente mits die persoon bedoel het dat dit sy handtekening moet verteenwoordig. Hierdie siening word ook deur Sonnekus ondersteun.[41]

Dit is dan die huidige stand van sake in so verre dit die Suid-Afrikaanse howe betref. Alhoewel daar aanleiding is om 'n digitale handtekening te aanvaar[42] is

---

39 1981 1 SA 793 (W).
40 1971 2 SA 370 (D).
41 1978 *TSAR* 175.
42 Indien dit vir testamente geld, behoort dit ook vir ander dokumente en sertifiserings te geld.

die saak nog glad nie finaal uitgemaak nie. Indien die howe sou konsentreer op die bedoeling van die "ondertekenaar" sal digitale handtekeninge heel moontlik volgens die bestaande reg aanvaarbaar wees. Indien 'n fisiese merk egter vereis sou word om 'n handtekening daar te stel, sal spesifieke wetgewing noodsaaklik wees om digitale handtekeninge vir die Suid-Afrikaanse reg aanvaarbaar te maak.

Handtekeninge is weliswaar die belangrikste aspekte van die bewysreg met betrekking tot e-handel, maar basiese dinge soos die toelaatbaarheid van enige dokument wat op rekenaar gestoor word is steeds problematies in die Suid-Afrikaanse reg. Met betrekking tot die siviele reg is daar die Wet op Rekenaargetuienis[43] maar daar is nog heelwat probleme met die toepassing hiervan.[44] In strafsake lyk dinge effens beter weens beslissings soos *S v De Villiers*[45] waar die Namibiese hof nie veel probleme gehad het daarmee om rekenaaruitdrukke, wat as eg sertifiseer is, toe te laat nie. Die hof het dit naamlik as "duplicate originals" beskou.

5 2 2 Strafreg

Dit is opmerklik by van die regsvergelyking hierbo dat 'n rekenaargeletterde strafreg ook deel behoort te vorm van die infrastruktuur vir e-handel. Die wegbereiding vir die Illinois wetgewing wat hierbo bespreek is, het byvoorbeeld gekom van die Illinois Commission on Electronic Commerce *and Crime*.[46] Dit spreek vanself dat 'n gepaste strafregstelsel sal bydra tot die klimaat van vertroue wat noodsaaklik is vir suksesvolle e-handel.

Die strafreg is ook nie in die bevoorregte posisie van die privaatreg, waar nuwe beginsels deur middel van analogie deur die buigsame Romeins-Hollandse reg ontwikkel kan word nie. Weens die legaliteitsbeginsel, ook bekend as "*nullum crimen sine lege*",[47] kan die strafreg nie op hierdie wyse uitgebrei en aangepas word nie. Dit wil dus lyk asof Suid-Afrika wel dringend wetgewing op hierdie gebied nodig het. Gelukkig is die Regskommissie reeds fluks aan die werk hieraan, soos blyk uit die bespreking hierbo. 'n Turksvy sal waarskynlik wees om die prosedurele maatreëls in ooreenstemming te hou met die Suid-Afrikaanse Grondwet.[48] Dit is besonder maklik om getuienis van rekenaars af te laat verdwyn. Rekenaars mag ook voorsien word met data vanaf 'n buitelandse bediener, iets waaraan die ondersoekbeampte niks kan doen nie. Selfs indien die betrokke data op 'n rekenaar gevind word mag dit versyfer wees en het die eienaar van die rekenaar dalk gerieflik "vergeet" hoe om dit te ontsyfer!

5 2 3 Kontraktereg

Die meeste tipes kontrakte kan natuurlik mondeling gesluit word, maar dit is net soveel makliker om die kontraksbedinge en die betrokkenes se instemming daartoe, te bewys indien daar met 'n ondertekende skriftelike kontrak gewerk word. Die rol van die handtekening is reeds volledig bespreek by die afdeling oor bewysreg hierbo.

'n Ander vraag is wanneer 'n sogenaamde "cyber contract" presies tot stand kom. Indien 'n produk op die Internet te koop aangebied word sal dit gewoonlik

43 Wet 57 van 1983.
44 Sien bv Van der Merwe *Computers and the law* (1986) in hierdie verband.
45 1993 1 SASV 574 (Nm).
46 My beklemtoning.
47 Geen misdaad sonder (voorafgaande) wetgewing nie.
48 108 van 1996.

nie as 'n finale aanbod gesien word, in die sin dat aanname 'n volledige kontrak tot stand bring nie. Myns insiens kan daar ook nie 'n analogie getrek word met betrekking tot die telefoon nie, waar kennis van aanname onmiddellik 'n geldige kontrak tot stand bring. Die Internet (tensy in sy "chatline"-modus) is eintlik 'n asinkrone[49] medium waar die boodskap nie onmiddellik oorgedra word nie. Dit word eers in sogenaamde "packets" opgebreek en swerf dan die hele wêreld vol, totdat dit by sy eindbestemming weer aanmekaar gesit word. Dit kan vinnig gebeur, maar kan ook 'n dag of meer neem om sy bestemming te bereik. Om hierdie rede is die analogie van 'n posstuk beter en sal die kontrak eers tot stand kom wanneer die persoon wat 'n aanbod[50] aanneem, sy e-pos van aanvaarding wegstuur.

In die kontraktereg bestaan daar ook twyfel of 'n blote klik van die muis of die oopskeur van die "shrink-wrap" verpakkingspapier waarin 'n rekenaarprogram verseël is, 'n geldige kontrak tot stand sal bring. In 'n onlangse artikel aanvaar Pistorius[51] dat so 'n kontrak wel geldig mag wees, maar wys ook daarop dat die verbruiker nie gelyke beskerming geniet soos in die Verenigde State van Amerika nie, waar hierdie tipe kontrakte in gebruik is. Dit is te betwyfel of die blote muisklik as 'n "handtekening" gesien sal word, maar die kwessie is nog onseker (sien die uitvoerige bespreking hierbo.)

Ten slotte, moet dit in gedagte gehou word dat daar verskillende kontraktuele gevolge mag wees afhangende daarvan of 'n "saak" of 'n "diens" deur die bemarker gelewer word. In die Verenigde State is hierdie kwessie al heelwat debatteer, naamlik of byvoorbeeld 'n rekenaarprogram 'n "good" of 'n "service" is.[52] Vir doeleindes van hierdie artikel is daar egter van die standpunt uitgegaan dat ons met sake werk (alhoewel hulle soms 'n bietjie onliggaamlik lyk). Die grens tussen die sakereg en die immaterieelgoederereg gaan waarskynlik in die toekoms nog heelwat probleme oplewer.

5 2 4 Belastingreg

In Suid-Afrika word belasting meesal bepaal volgens die "verblyf" of "bron van inkomste" toetse. Met e-handel word hierdie toetse redelik wankelrig. Om staat te maak op geografiese afbakenings en fisiese teenwoordigheid help nie veel met 'n proses wat internasionaal gevoer word nie en waar daar geen fisiese kontak meer is by handel of dienslewering nie. Op die oomblik betaal Suid-Afrikaners wat boeke koop deur *www.amazon.com* waarskynlik nie enige Suid-Afrikaanse belasting nie, terwyl daar waarskynlik 'n Amerikaanse belasting in die prys van elke boek ingebou is. (Die rykes word dus ryker en die armes nog armer!)

'n Ander probleem is dat internasionale maatskappye eenvoudig hul winste kan laat skuif na daardie wêrelddeel waar die belastingprentjie op sy rooskleurigste is. Die OECD is besig om na hierdie saak te kyk en, soos met menige Internetprobleem, sal enige oplossing 'n internasionale een moet wees.

Daar bestaan ook tans 'n sterk drukgroep wat argumenteer dat e-besighede 'n "belastingvakansie" gegun moet word om nie die gans wat die goue eiers lê

---

49 Dinge gebeur nie op dieselfde tyd nie.

50 Wat, soos hierbo genoem, gewoonlik iets meer as net 'n Internet-advertensie moet wees.

51 "The enforceability of shrink-wrap agreements in South Africa" 1993 *Merc LJ* 8.

52 Sien Alheit *Issues of civil liability arising from the use of expert systems* (LLD-proefskrif Unisa 1997) en veral die gesag op 107 aangehaal.

dood te maak nie. 'n Moontlike oplossing mag dalk wees om die belastingfokus te skuif vanaf direkte belasting (op persone en maatskappye) na indirekte belasting (op goedere, byvoorbeeld verkoopbelasting). Daar sal egter nog steeds die een of ander vorm van internasionale verrekening moet plaasvind om te verhoed dat die lande wat vroeg ontwikkel het op die gebied van e-handel ander lande droogsuig.

5 2 5 Outeursreg[53]

Reeds uit internasionale ooreenkomste soos die Uruguay TRIPS ooreenkoms hierbo genoem, blyk die belang van die reg op intellektuele eiendom (ook bekend as immateriële goedere) vir die Internet. Die WTO se Algemene Raad het drie gespesialiseerde subrade, naamlik die "Council on Trade in Goods", die "Council on Trade in Services" en die "Council on Trade-Related Aspects of Intellectual Property Rights". Aangesien "goods" volgens die Romeins-Hollandse reg in Suid-Afrika tot stoflike sake beperk is, lyk dit asof die inligtingindustrie meesal sy heenkome by die derde raad moet vind.

Deel van die probleem om iets oor die Internet te verkoop is die feit dat die meeste Internetverbruikers verwag dat alles wat op die Internet aangetref word "shareware" of "freeware" is. Veral vir die verkopers van rekenaarprogrammatuur en musiekopnames kan dit nogal 'n ontnugtering wees. Effektiewe outeursregbeskerming (beide tegnies en regtens) lyk dus na 'n voorwaarde vir suksesvolle e-handel.[54]

Gelukkig is hierdie één gebied waar Suid-Afrika redelik op die stand van sake gebly het met ontwikkeling. Die Wysigingswet op Outeursreg[55] het die ou Outeursregwet[56] op datum gebring met betrekking tot die beskerming van rekenaarprogrammatuur. Tevore is programmatuur wél beskerm as letterkundige werke as gevolg van die beslissing van *Northern Office Microcomputers v Rosenstein*,[57] wat ook sy tyd redelik vooruit was. Die jongste wysigings aan die wet gaan meesal oor vermoedens ten gunste van die outeursreghouer, verhoogde strawwe vir skendende kopieerders, ensovoorts.

Uiteindelik mag die uitslag van 'n geding nog steeds afhang van die rekenaargeletterdheid van die voorsittende beampte. Aldus het die regter in *Pastel Software v Pink Software (Pty) Ltd*[58] die sogenaamde "look and feel" -toets van die Amerikaanse reg (myns insiens) nie korrek toegepas nie. Weens hierdie gebrek aan tegnologiese ervaring by die regbank is die neiging om al hoe meer kontraktueel voorsiening te maak vir mediasie of arbitrasie indien 'n dispuut sou ontstaan. Digitale outeursreg het ook sy eie unieke probleme.[59]

---

53 Alhoewel hierdie net een aspek van die reg op intellektuele eiendom is, is dit die belangrikste. Tyd en ruimte laat nie toe dat bv op patentreg en handelsgeheime ingegaan word nie.

54 Dit is ook insiggewend dat deel van Singapoer se regsarsenaal vir e-handel 'n verbeterde outeursreg insluit – sien die bespreking hierbo.

55 125 van 1992.

56 98 van 1978.

57 1981 4 SA 123 (K).

58 399 JOC (Judgments on Copyright) of sien die bespreking in 1998 *SALJ* 180 192 (vn 59 hieronder).

59 Sien Van der Merwe "Copyright and computers with special reference to the Internet – from penmanship to peepshow" 1998 *SALJ* 180.

Ten slotte is daar die gevaar dat lande wat nie gelykwaardige outeursregbeskerming aan 'n potensiële handelsvennoot se burgers kan bied nie, uitgesluit kan word van verdere handel met daardie land, of nog erger, met daardie groep van lande. Hier dink 'n mens veral aan groeperings soos die Europese Unie.

6 GEVOLGTREKKING

Alhoewel die Romeins-Hollandse reg in die verlede baie goed aangepas het by nuwe handelsontwikkeling, kan dié regstelsel dalk in die toekoms vir Suid-Afrikaners 'n blok om die been word. In talle opsigte het dit té parogiaal geword vir 'n land wat probeer om deel te word van die globale handelsdorp. Alhoewel die Romeins-Hollandse reg op die oomblik nog byhou weens sy besondere aanpasbaarheid (behalwe in die geval van die strafreg) soek Suid-Afrika na nuwe oplossings vir nuwe probleme en sal dié waarskynlik net deur wetgewing kan kom.

Selfs al sou wetgewing dan uitgevaardig word om vir e-handel voorsiening te maak, sal bloot plaaslike wette nie veel meer effektief as die gemene reg wees nie. Suid-Afrika moet sy sake in orde kry, 'n elektroniese handelsblok met sy nabye bure in Afrika vorm, regsbeginsels tussen hulle onderling versoen op hierdie gebied en dan vennootskappe sluit met sterk oorsese handelsgroepe soos Noord-Amerika, die Europese Unie, die Stille Oseaanrant, ensovoorts.

Die totstandkoming van sulke wette kan nie net aan die regering oorgelaat word nie (alhoewel bestaande inisiatiewe in hierdie verband verblydend is). Handeldryf is 'n privaatsektor-aangeleentheid en sakemanne behoort hulle insette te lewer met betrekking tot e-handel. Hier kan organisasies soos ECASA en ander dinkskrums van groot waarde wees.

In my view, this analysis [of a fundamental right] must be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore . . . be placed in its proper linguistic, philosophic and historical context.

Dickson CJC in the Canadian case of R v Big M Drug Mart *1985 1 SCR 295; (1985) 18 DLR (4th) 321 359–360.*

Little witnesses: A suggestion for improving the lot of children in court

Karen Müller
BA (Hons) LLB
Principal Lecturer, Vista University, Port Elizabeth

Mark Tait
B Iuris LLB MBL
Senior Lecturer, Vista University, Port Elizabeth

OPSOMMING

Klein getuies: 'n voorstel vir die verbetering van die lot van kinders in die hof

Getuienisaflegging is 'n spannende ervaring vir 'n getuie, veral 'n kind wat van aangesig tot aangesig kom met sy/haar aanvaller. Om dié situasie te beredder, is artikel 170A van die Strafproseswet 51 van 1977 op die wetboek geplaas. Hierin word voorsiening gemaak vir die aanstelling van 'n tussenganger en vir die kind om te getuig vanuit 'n vertrek buite die hof deur middel van elektroniese hulpmiddele.

Die artikel se bewoording en praktiese toepassing skep egter probleme. Só word daar byvoorbeeld nie voorsiening gemaak dat 'n kind vanuit 'n afsonderlike vertrek kan getuig sonder die hulp van 'n tussenganger nie. Veral in die geval van ouer kinders kan dit nuttig wees indien wel moontlik.

Die vereiste vir die aanstelling van 'n tussenganger, naamlik dat die hof moet bevind dat die kind blootgestel sal word aan "onredelike geestesspanning of -lyding", is ook maklik vatbaar vir verskillende interpretasies en is derhalwe problematies.

Hierdie artikel ontleed artikel 170A en sy toepassing, en maak sekere voorstelle vir die wysiging van die artikel ten einde dit meer doelmatig te maak ter beskerming van kindergetuies tydens die hofproses. Die artikel sluit egter af deur daarop te wys dat artikel 170A, selfs in die voorgestelde gewysigde vorm, nie die kern van die probleem, naamlik die adversariese stelsel, kan aanspreek nie.

1 INTRODUCTION

Giving evidence in a court is a stressful experience for a witness. He will have to give evidence in the presence of a group of people, previously unknown to him, often about embarrassing and intimate details. If he is the complainant in a criminal matter, he has the further arduous task of having to give evidence in the presence of the accused. He is then cross-examined by the accused's representative or, even worse, by the accused himself. Cross-examination is often hostile, and is frequently used in order to confuse the witness and undermine his credibility. Furthermore, the courtroom setting is an alien one, with the role-players wearing long black robes and adopting a procedure not easily understood by the lay person. The language used is formalistic, at times archaic and very specialised. Where the witness is a child, these factors will have an even more dramatic effect than on an adult.

The adversarial nature of the court procedure is also regarded as a major hurdle for the child witness, since it condones aggressive cross-examination of the child, sometimes by the very person who has committed alleged criminal acts against the child. This has been described by many child-care workers and psychologists as a secondary form of abuse.[1] The problem is highlighted by Spencer and Flin,[2] who cite the example of an eight-year old girl who had to give evidence against the television actor Peter Adamson after the latter was charged with indecently assaulting her and another little girl. The child was so upset by the prospect of appearing in court that she attempted suicide.

The general practice in the South African courts used to be for child witnesses to give evidence in ordinary courtrooms in the presence of the accused.[3] South Africa follows the adversarial procedure, which entitles the accused to be present at his trial and to cross-examine any witness who gives evidence against him. By implication, he is entitled to have the accusations against him made face to face.[4] The South African Law Commission in 1989 instituted an investigation into the plight of the child witness, and came to the conclusion that children were being traumatised by the criminal procedures followed in our courts, which left child witnesses "afraid, uncertain and confused".[5] A possible solution proposed by the Commission[6] was to allow a child witness to testify in a special courtroom where the child would be assisted by a psychologist or a psychiatrist, and the evidence would be given from behind a one-way mirror, protecting the child from having to face the accused. Cross-examination of the child would take place through the medium of the person assisting the child, enabling questions to be conveyed to the child in an objective and non-aggressive manner. This proposal resulted in the Criminal Law Amendment Act,[7] which inserted section 170A into the Criminal Procedure Act.[8]

Section 170A provides for the appointment of an intermediary through whom examination and cross-examination of the child witness will be conducted, and enables the child to give evidence without having to face the accused. The section provides as follows:

> "Evidence through intermediaries
>
> (1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary.
>
> (2) (*a*) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.

---

1 Tedesco and Schnell "Children's reactions to sex abuse investigation and litigation" 1987 (11) *Child abuse and neglect* 267 268.
2 Spencer and Flin *The evidence of children: The law and psychology* (1990) 11.
3 South African Law Commission *Protection of the child witness* Working Paper 28 Project 71 (1989) ("SALC *Protection*") 3.
4 SALC *Protection* 4.
5 *Idem* 14.
6 *Idem* 21–22.
7 Act 135 of 1991, s 3.
8 Act 135 of 1991, s 3.

(*b*) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his evidence at any place –

(*a*) which is informally arranged to set the witness at ease;

(*b*) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(*c*) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his testimony.

(4) (*a*) The Minister may by notice in the *Gazette* determine the persons or the category or class of persons who are competent to be appointed as intermediaries.

(*b*) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him as the Minister, with the concurrence of the Minister of Finance, may determine."

2 THE POSITION IN PRACTICE

The present position is that a child witness will give evidence in court, unless it appears that the child will be exposed to undue mental stress or suffering, in which event the court will invoke section 170A. In terms of this section a child is entitled to give evidence in a place other than the courtroom. In practice, the child witness gives evidence in a room separate from the courtroom. This room is usually, though not always, attached to the courtroom. In Port Elizabeth, for instance, the room allocated to the magistrate for his entrance has been converted into a room from which children testify.

The room is meant to be informally arranged and suitably equipped. In the various centres a number of organisations have taken time and effort to decorate this room in a child-friendly manner so that the children can be set at ease. A video camera is mounted on a wall of the room and videotapes both the child and the intermediary as the evidence is being led. No other person is allowed in the room with the child and the intermediary.[9]

The intermediary is provided with earphones which enable her to follow the proceedings in the courtroom and then to relay the questions to the child. The child's answers will be captured on the live video link and relayed to the courtroom. The child does not see the courtroom or any person in the courtroom when giving evidence.[10] The courtroom is provided with a television monitor on which the members of the court will be able to view the child and the intermediary and hear what is being said. The video is live, which means that the members of the court will see and hear the child and the intermediary as they speak. A videotaped recording is not made of the child giving evidence. The evidence is, however, recorded using the audio-electronic recording system ordinarily employed in the courts.

Section 170A does not specifically refer to the use of cameras to shield the child. Subsection (3)(c) provides that the court must "see and hear, either directly or

9 Müller "The child witness in the South African law of procedure" 1995 (4) *Expert evidence* 52 ("Müller *Child witness*") 53.

10 *Ibid.*

through the medium of any electronic or other devices". This would include a screen-type arrangement with one-way glass or a separate room linked by closed-circuit television. In fact, section 170A has been interpreted so widely that in 1995 a young child in East London gave evidence from home which was relayed to the court by means of a live video link.[11] In practice, the Department of Justice has set up a closed-circuit television system in most centres which operates from a room next to the courtroom.

3 A CRITICAL ANALYSIS OF SECTION 170A

Although the introduction of section 170A has alleviated some of the stress experienced by child witnesses, it is nevertheless our submission that this section is still deficient in a number of respects. Some of these are set out below.

3 1 Discretion of the court

Section 170A(1) uses the expression "the court may". This implies that the court has a discretion to allow the appointment of an intermediary, and that the appointment is not automatic. In practice, this means that the prosecution will have to make an application to the court for the appointment of an intermediary. In terms of subsection (3) the court has a further discretion, once it has appointed an intermediary, to allow the witness to give evidence from a separate room. In effect this means that two applications have to be made: an application to appoint the intermediary, and an application to use the informally arranged room. The two applications will normally be brought together.[12] Thus if the second application is not brought, one is faced with the ludicrous situation that the child witness is still forced to give evidence in court in the presence of the accused, although all questions will be conducted via the intermediary! In the light of the aim of this section as envisaged by the Law Commission, such a situation could not have been the intention of the legislature. This highlights the need for the section to be redrafted.

A further anomaly is created by the provision in subsection (1) that "the court may . . . appoint . . . an intermediary" followed by the provision in subsection (3) that the court may allow the witness to give evidence in a room other than the courtroom. The implication arises that an intermediary must be appointed in order for the witness to give evidence from another room. The informal room therefore cannot be used without an intermediary being appointed. This gives rise to the possibility that a witness who does not necessarily require the services of an intermediary (for instance because the witness is sixteen or seventeen years old), but who is afraid to give evidence in court, will not be allowed to use the room.

The court in *Klink v Regional Court Magistrate*[13] referred to the confusion engendered by this section as follows:

> "The effect is that a witness who reasonably needs to give evidence in a separate room will also have to be examined and cross-examined through an intermediary although he may not be exposed to undue mental stress and suffering if he testifies without the intermediary's assistance."

---

11 *Ibid.*
12 *Ibid.*
13 1996 3 BCLR 402 (SE) 407J–408B.

The regional magistrate in this case had come to the conclusion on the facts that the complainant would experience undue stress if she testified in open court. It was not contended that the complainant would endure undue stress if she gave evidence without the aid of an intermediary. Melunsky J accordingly remarked that "the section may well require revision having regard to possible anomalies that may arise in its application".[14]

3 2 Undue mental stress or suffering

In exercising its discretion, the court has to decide whether the child will be exposed to undue mental stress or suffering. The term "undue" is used in order to qualify the phrase "mental stress or suffering". According to *The concise Oxford dictionary of current English*,[15] "undue" means "excessive" or "disproportionate". The question to be asked, is how acute the mental stress or suffering must be before it can be classified as "undue". It would appear from the wording that the mental stress or suffering experienced by the child will have to be more than that ordinarily experienced.

An illustration of what the courts understand by the expression "undue mental stress or suffering" may be found in *S v Klink*,[16] where the state brought an application to use the intermediary and the live link. This was opposed by the defence. A clinical psychologist was called to give evidence as to whether a sixteen-year-old girl would be exposed to undue mental stress or suffering if she testified in the presence of the accused. The girl was the complainant in an alleged charge of rape. The evidence of the clinical psychologist proceeded in part as follows:

> "State: I see you testified to the fact that she should give evidence in the little room. Could you tell us what W's reaction could be or the effects could be of her receiving cross-examination without an intermediary or the court questioning her without an intermediary?
>
> "Witness: I think this is going to place an enormous amount of undue stress on her that she will not be able to tolerate at this stage given her very fragile state. I fear it might precipitate a breakdown and that she won't be able to give evidence satisfactorily. That is going to be too emotionally taxing for her, and basically what is going to happen if she appears in open court, it is going to be a retraumatisation. I think it will also hamper the prognosis in this case and it is going to set her back a great deal. She is a suicidal person and I am frightened for her.
>
> "State: Is it then your opinion that she shall suffer mental stress if she was due to testify?
>
> "Witness: Yes, it is."

The application to use the intermediary and the live link was granted in this case. In the course of researching this article, we conducted interviews with two magistrates in Port Elizabeth who had previously been involved in cases in which intermediaries had been appointed. Although the small number of magistrates interviewed seriously affects the statistical validity of the research and the information can therefore not be used in any conclusive way, the replies themselves are of particular interest on a qualitative basis because they seem to support a number of the arguments we have advanced.

---

14 408B–C.

15 (1995) by Della Thompson (ed).

16 ECD case no RC 6/68/95, unreported.

The magistrates were asked what they understood by the term "undue stress". One believed that it equated to "excessive emotional stress, intimidation" and depended on the type of evidence that had to be given by the child. The second magistrate's defintion was as follows: "stressful circumstances in which a minor has to testify amongst strangers in an intimidatory environment like a court of law and reveal intimate or violent conduct against her".

The replies are particularly revealing and emphasise the different approaches adopted by these magistrates. The first requires that there must be "excessive" emotional stress, even intimidation. This interpretation seems to be even stricter than that required by section 170A itself, which mentions only "undue mental stress or suffering". "Excessive" implies something more than "undue". In terms of the second magistrate's interpretation, any court appearance would amount to "undue stress", since it would involve a minor victim testifying among strangers in an intimidatory environment. It is interesting to note that he limits the protection of the section to victims only, although the section itself does not do so.

In practice, it would appear that an intermediary will be appointed without any undue stress having to be shown where the defence does not object. Thus, in *S v Els*[17] the prosecutor at the commencement of the trial announced to the court that "die klaagster in hierdie aangeleentheid is 'n minderjarige dogter en die staat is van plan om gebruik te maak van 'n tussenganger – fasiliteite wat beskikbaar is. Ek verstaan dat die verdediging het geen beswaar daarteen nie". The court asked the defence whether they objected, and when no objection was made the intermediary was appointed. From the above it would appear that the intermediary was appointed simply because the complainant was a minor (aged thirteen). There was no attempt to show undue mental stress and suffering. Of interest is the fact that the state did not apply for the appointment of an intermediary in the case of the second witness, who was only ten. Was this based on the fact that the first witness, although older, was the complainant in the case? Kriegler[18] argued that youth alone is not sufficient to necessitate the use of an intermediary. The court has to take into account factors such as intelligence, age, sex, personality of the witness, nature of the evidence and other factors.

In *S v Mathebula*[19] the court came to a different conclusion, based perhaps on the fact that the accused in that case was unrepresented. The application to appoint an intermediary went as follows:

> "*AANKLAER*: Edelagbare, op hierdie stadium wil die [staat] aansoek doen vir die aanstelling van 'n tussenganger. Die rede daarvoor is hierin [is] twee dogters betrokke, die een is 10 jaar oud die een teen wie die beweerde onsedelike aanranding plaasgevind het. Die beskuldigde is aan beide die dogters bekend. Hy is 'n sogenaamde buurman van hulle, hulle ken sy gesig. Die klaer se vader sal ook getuig dat hy bekend is met die beskuldigde.
>
> "HOF: Die hof sal dit toestaan."[20]

The court held that in appointing an intermediary the trial court had not heeded the requirement of "undue mental stress or suffering" as required by section 170A.[21] There was evidence that the complainant was allowed to sit in court

17 ECD case no SH 6/29/95, unreported.
18 *Suid-Afrikaanse strafproses* (1993) 433.
19 [1996] 4 All SA 168 (T).
20 170*h–j*.
21 171*c–d*.

after the state had closed its case, and Stafford J remarked that it was difficult to allege in these circumstances that the accused's mere presence would have upset her to such an extent as to cause undue mental stress.[22] In addition, the court found that the accused was unrepresented and had not been given an opportunity to express a view on this important aspect of the case.

What will amount to "undue mental stress or suffering" in each case has, in view of the lack of any definition of this expression, been left to the discretion of the court. This gives rise to the danger of inconsistency. Unless there are well-defined guidelines, one court may find that certain factors amount to undue mental stress or suffering while another may not come to the same conclusion on the same facts. A similar dilemma caused the Scottish Law Commission to suggest that the Scottish version of undue mental stress be determined in some way.[23] The Scottish Draft Bill on Children and Other Witnesses contained a section which set out guidelines as to which factors the court should take into account (eg the age and maturity of the child; the nature of the alleged offence; the nature of the evidence which the child may have to give; and the relationship between the accused and the child).

Schwikkard[24] argues that the discretionary nature of section 170A as a whole will give rise to problems, and appears to be to the detriment of children. The discretionary nature of section 170A means that those children who give evidence via an intermediary must be viewed as the exception rather than the norm. Since research indicates that in the majority of cases child witnesses suffer significant trauma in testifying in an "adult" adversarial environment, Schwikkard argues that this section would be more effective if subsection (1) were amended to require a court to use an intermediary in all cases in which a child complainant has to testify. Schwikkard limits this to children who are complainants. We believe, however, that there does not appear to be any justification for limiting section 170A to complainants, since the section in its present form is not limited in its application to complainants; rather, the dispensation created by the section is available to "any witness". A child who has witnessed the murder of a family member, although not a complainant in a case, will experience the same traumatic effect of giving evidence in an adversarial environment. Nevertheless, the general principle that all child witnesses automatically be allowed to give evidence from outside the courtroom is recommended. The court would, according to Schwikkard,[25] be excused from allowing a child witness to make use of this section only "where it was clear that the child would not be traumatised or where it was impossible to do so".

3 3 Language

Section 170A requires for its application that the child be exposed to undue mental stress or suffering, and does not extend to the language difficulties a child may experience. This would mean that if a child experienced no trauma or stress from testifying in court, but was unable to understand the language employed in

---

22 171*e–f*.

23 Scottish Law Commission *Report on the evidence of children and other potentially vulnerable witnesses* (1990) 46.

24 "The abused child: a few rules of evidence considered" 1996 *Acta Juridica* 148 ("Schwikkard *Abused child*").

25 *Idem* 160.

court because of his or her age, the section would not be applicable and the child would not be able to make use of an intermediary. Language is the medium of the interactions that take place in court, and the specialised language used in court falls outside the normal repertoire of a child.[26] Since section 170A(2)(b) gives the intermediary the right to convey "the general purport" of questions to the child, it seems safe to deduce that the legislature was aware of the difficulties that a child witness might experience in understanding questions addressed to him or her.[27] According to the proposal recommended by the Law Commission, the intermediary was seen as offering a method of removing any hostility and aggression from the questions posed to the child. The Commission must also have foreseen the language problems experienced by children, for it gave the intermediary the role of interpreting the questions to the child. It seems illogical, however, that a court cannot make use of such an intermediary where the child is too young to understand the questions that are being addressed to him or her.

3 4 Expert witness

In order to grant an application in terms of section 170A, the court must be satisfied that the child witness will be exposed to undue mental stress or suffering. Does this necessitate the calling of an expert witness to give evidence about the possible effect of a court appearance on the child, or would the evidence, for example, of a parent be sufficient? A parent might not be well-equipped in the eyes of the court to offer an independent opinion as to what mental stress or suffering would be "undue", since he or she is not an expert in the relevant field of child psychology. Experts such as psychologists, psychiatrists and social workers would be better able to testify about whether the child will experience undue mental stress.[28] In the United States, for example, only expert witnesses can be called to give evidence on whether a child will suffer emotional trauma. Evidence given by lay people or parents is not sufficient to establish unavailability.[29] In *State of Wisconsin v Gollon*[30] a mother gave evidence that her six-year-old child was too frightened to testify. The court held that this evidence, unsupported by expert evidence, would not be sufficient to establish unavailability.

In the interviews we conducted with the Port Elizabeth magistrates (referred to above), a further question put to the magistrates was whether expert evidence had to be led to prove "undue mental stress or suffering". One magistrate replied that expert evidence would have to be led if the application to use the intermediary was opposed, although he felt that evidence of a family member would in certain instances suffice to convince the court that there was undue stress. The other magistrate felt that expert evidence was not necessary and that the evidence of a family member would be sufficient. In the absence of any guidelines about what "undue mental stress or suffering" entails, it is understandable that there will be confusion in the application of that requirement to individual children.

---

26 Brennan and Brennan *Strange language – child victims under cross-examination* (1988) 3.

27 Müller *Child witness* 54.

28 *Ibid*

29 Gembala and Serritella "Three recent Supreme Court decisions for professionals who testify in child sexual abuse cases" 1992 (1) *Journal of Child Sexual Abuse* 15 19.

30 115 Wis 2d 592, 340 NW 2d 912 (Ct App 1983).

3 5 When must the application be made?

In *S v Klink*[31] the state brought an application in terms of section 170A for the appointment of an intermediary. The defence, in opposing the application, argued that the application could not be brought until the charge had been put to the accused. The defence argued that the application would affect the manner in which the trial would be heard, since evidence was being led before a plea had been entered. The application, it was argued, was an integral part of the trial and could not be heard separately.

The magistrate called upon to decide the matter explained that section 170A(1) used the expression "[w]henever criminal proceedings are pending before any court". He compared this to section 241(8) of the Constitution of the Republic of South Africa, 1993[32] which used similar wording, namely "were pending before any court of law". The court therefore had to decide what was meant by the expression "criminal proceedings . . . pending before any court". The court referred to the decision in *S v Saib*,[33] where it was held that criminal proceedings in the Supreme Court commenced with the service of an indictment on the accused and the lodging of the indictment with the registrar. Proceedings are therefore pending before an accused has pleaded. The magistrate went on to explain that the proceedings in a summary trial commence with the lodging of a charge sheet with the clerk of the court and that for the purposes of section 170A(1) criminal proceedings are pending even before an accused has pleaded, that is once the charge sheet has been lodged with the clerk of the court. An intermediary can therefore be appointed before the accused has pleaded. In our opinion, this argument cannot be faulted.

3 6 Identification

The use of section 170A creates problems in so far as identification is concerned. Since the child will be giving evidence from another room and will not see the accused, identification of the perpetrator may give rise to difficulties. Does this imply that the child must be brought into court to identify the alleged perpetrator? In *S v Olcker*[34] the witness was an eight-year-old girl who gave evidence via an intermediary. The complainant alleged that she had been assaulted by a person called Attie. Roux J made the following statement:

> "Of cardinal importance is that the complainant never identified the appellant, the person in the accused dock, as her assailant."

In *S v Mathebula*[35] identification became a key issue after the accused asked the witness if she knew him:

> "Dit is duidelik dat sy nie 'n instinkmatige vertroue in haar eie uitkenning het nie. Toe sy onder kruisondervraging deur die beskuldigde gevra is 'wil u sê u ken my?' was haar antwoord 'nee'."[36]

It is very difficult to determine without a context what the witness meant by her reply. Did she say she did not recognise the accused or that she did not know

---

31 ECD case no RC 6/68/95, unreported.
32 Act 200 of 1993.
33 1994 4 SA 554 (D), 1994 2 SACR 517.
34 TPD 1996-02-29, case no A1507/95, unreported.
35 [1996] 4 All SA 168 (T).
36 172*j*–173*a*.

him? This, together with the fact that the witness was not afforded an opportunity to identify the accused, resulted in the conviction being set aside:

> "Die gevare wat normaalweg ter sprake is by die identifikasie van 'n verdagte word in hierdie geval verhoog deur die feit dat die klaagster nie die geleentheid gebied is om die beskuldigde wat in die hof verskyn het aldaar te identifiseer nie."[37]

3 7 The intermediary

Although the Law Commission originally referred to this person as the child investigator, section 170A uses the term "intermediary". The expression "child investigator" is perhaps misleading and would account for the change to "intermediary". A child investigator suggests somebody who will be involved in the investigation, similar to the position of the youth interrogator in Israel. In fact, the role envisaged by the Commission was closer to that of an interpreter, and perhaps explains the choice of the term "intermediary" in the section. In its report the Commission[38] originally suggested that an intermediary should be an educational psychologist, a psychologist, a clinical psychologist or a welfare officer. Educational psychologists were regarded as the ideal intermediaries, since they were trained in the techniques of interviewing children.

Section 170A(4)(a) provides that the Minister of Justice may by notice in the *Gazette* determine the people or the category or class of people who are competent to be appointed as intermediaries. The list of people who may be so appointed was set out in GN R1374 *GG* 15024 of 30 July 1993 (*Reg Gaz* 5127). The following is a summary of the people who qualify:

(*a*) medical practitioners who specialise in paediatrics;

(*b*) medical practitioners who specialise in psychiatry;

(*c*) family counsellors appointed in terms of section 3 of the Mediation in Certain Divorce Matters Act[39] and registered as social workers, or classified as teachers in qualification categories C to G, or registered as clinical, educational or counselling psychologists;

(*d*) child-care workers who have successfully completed a two-year course in child and youth care;

(*e*) registered social workers who have two years' experience in social work;

(*f*) teachers qualified in qualification categories C to G, who have four years' experience in teaching and have not been dismissed or suspended from teaching;

(*g*) psychologists who are registered as clinical, educational or counselling psychologists.

In the interviews we conducted with two Port Elizabeth magistrates, one believed that in order to be appointed as an intermediary, a person had to fall within these categories set out in the *Gazette*. The second magistrate, on the other hand, believed that a suitably qualified person could be appointed even though he or she might not fall within the listed categories. The wording used in the *Gazette* does not appear to suggest any discretion. It merely states:

---

37 173*i–j*.
38 SALC *Protection* 36.
39 Act 24 of 1987.

> "I . . ., Minister of Justice, hereby determine the following categories or classes of persons to be competent to be appointed as intermediaries . . . "

From the list of people who have been appointed as possible intermediaries, it appears that the emphasis is on people who are presumed to be skilled at communicating with children. This is also in line with the comments of the Law Commission.

3 8 Functions of the intermediary

Section 170A(2)(b) provides that the intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness. It would accordingly seem that the function of the intermediary is simply to convey the question of the prosecution or the defence to the child in a manner which is understandable to the child. The intermediary is mandated to convey the general meaning of the question and does not, therefore, have to repeat the exact words in which the question was originally framed. It is sufficient if the intermediary conveys the meaning of the question. In the interviews we conducted with magistrates, we asked what they understood by the expression "to convey the general purport of a question". One was of the opinion that the intermediary must ask what the questioner actually seeks to know, whereas the other said that the intermediary must relate the question to the witness in a manner that the witness will understand.

It would therefore appear that the duty of the intermediary is to convey the content and meaning of the question to the child in a manner which the child understands. In carrying out this duty, the intermediary has two distinct functions. First, she is able to remove all hostility and aggression inherent in the questions, as was recognised by the Law Commission in its report.[40] This is especially important when conveying the questions of defence counsel, which are often phrased in a manner that aims to intimidate and confuse the witness.[41] This "ulterior" purpose of cross-examination was accepted by the court in *S v Gidi*,[42] where Rose-Innes J said:

> "In the case of many a witness it calls for no skill to intimidate or confuse or distress a witness who does not have the resources of intellect, language or personality to defend himself against a bullying prosecutor."

The intermediary, therefore, can and does act as a form of protection for the child against the hostility implicit in certain questions. This was accepted in *Klink v Regional Court Magistrate*:[43]

> "It is true that it is not only the content of the questions that forms part of the armoury of the cross-examiner. The successful cross-examiner may employ intonations of voice and nuances of expression to drive his point home and, perhaps, to cause discomfort to the witness. It is therefore possible that the forcefulness and effect of cross-examination may, to some extent, be blunted when an intermediary is interposed between the questioner and the witness."

Secondly, the intermediary has in terms of section 170A(2)(*b*) the power to change the question in such a way that the child understands what is being required. She may not change the meaning of the question, as the parties will

---

40 SALC *Protection* 21–22.

41 Müller and Tait "The child witness and the accused's right to cross-examination" 1997 *TSAR* 519 526.

42 1984 4 SA 537 (C) 540B–C. Van Heerden J concurred.

43 1996 3 BCLR 402 (SE) 411I–412A.

have the right to object that their question was not asked, and may put it to the witness again. This interpretation was accepted in *Klink*'s case, where it was argued that it was in the interests of justice for a child witness to comprehend the questions put to her, so that she could answer them properly:[44]

> "There are sound reasons why the conveyance of the general purport of the question might enable a child witness to participate properly in the system. Questions should always be put in a form understandable to the witness so that he or she may answer them properly . . . Where the witness is a child, there is the possibility that he may not fully comprehend or appreciate the content of a question formulated by counsel. The danger of this happening is more real in the case of a very young child. By conveying 'the general purport' of the question, the intermediary is not permitted to alter the question. He must convey the content and meaning of what was asked in a language and form understandable to the witness."

The intermediary is, in fact, nothing more than an interpreter. This was accepted in *Klink*,[45] where the court remarked: "The intermediary acts, in a sense, as an interpreter . . ."

The function of the intermediary is therefore twofold: to protect the child against hostile cross-examination and to assist the child in understanding the questions posed. In so far as the intermediary's function in regard to rephrasing questions is concerned, the powers are limited. The court can, for instance, insist that the intermediary repeat the question exactly as it was phrased, since the section makes provision for this. In *S v Klink*[46] the defence addressed the following question to the court after the intermediary was appointed: whether the court was prepared to make a ruling that the intermediary could convey the general purport of the questions or that she had to convey the questions exactly as they were put to her. The magistrate replied that each and every question had to be decided on its own. He explained:

> "I do not know what the kind of questions will be, it might be a pertinent question that you do not want to be altered at all and then you can ask the court for an order on that point that the question not be altered through the intermediary."

The intermediary also does not have the authority to comment on a question or to give an opinion as to whether a child understands a question or not. For example, where the prosecution or defence asks a question that on the face of it appears to be simple, the intermediary will have to repeat the question. If a prosecutor were to ask a five-year-old child: "Why did you do that?", the intermediary will not be able to point out that a five-year-old child cannot be expected to answer a "why" question. In this way, the powers of an intermediary are limited by the questions asked, and if prosecution and defence lawyers are not trained to interview children, then the intermediary will not be effective in assisting the child. In this regard, it is important in what order questions are asked. To give evidence effectively, young children need to tell their story in sequence from beginning to end. They become confused when questions dart from one occasion to another and then back again. This, however, happens to be one of the techniques employed in cross-examination, and the intermediary will be powerless to intervene and argue that questions should not be asked in a particular sequence, especially if the questions are phrased simply. The intermediary is an

44 412H–J.
45 411I.
46 ECD case no RC 6/68/95, unreported.

interpreter, not an expert witness, and is not seen as representing the child in the capacity of a guardian *ad litem*. Therefore, the intermediary will not be allowed to insist that the child be given a break.

The intermediary can, however, play a very important role in filtering difficult questions. In order to rephrase the question to the child, the intermediary must be able to understand the question. When the question is too long or involved, the intermediary can ask that the question be put again as she herself does not understand what is required. An example of this occurred in *S v Els*:[47]

> "Prokureur: Nou maar ek gaan die polisieman roep indien nodig om te kom getuig hierso of jy het vir hom dit gegee en hy dit neergeskryf het en of hy vir jou geleentheid gegee het om dit self te lees en of hy dit neergeskryf het en jy kon self gelees het voordat jy geteken het.
>
> "Tussenganger: Kan u net die vraag 'n bietjie duideliker vra. Dit was nie 'n vraag nie."

And again later in the same case:

> "Prokureur: Ek gaan dit aan jou stel, ek gaan dit bewys dat jy moes met jou maatjies gepraat het oor hierdie saak. Want in die eerste instansie, Jenny, ek wil hê jy moet dit verklaar, vir Sy Edelagbare sê hoekom jy belangrike goed uitgelaat het om aan die polisie te vertel onder andere.
>
> "Tussenganger: Kan u net stukkie-vir-stukkie vra asseblief.
>
> "Prokureur: Goed, ek wil hê u moet die volgende verklaar aan Sy Edelagbare.
>
> "Tussenganger: Kan u net daar stop asseblief."

From these exchanges it can be seen that the intermediary can effectively protect a child witness from a barrage of questions, especially those that are long and involved.

3 9 Qualifications of the intermediary

Neither in section 170A nor in the provisions in the *Gazette* which set out who may act as an intermediary is any additional qualification required in order for a person to act as an intermediary. An intermediary is not required to undergo any training before being appointed as such.

In order for intermediaries to carry out their functions as described above, they need to have a knowledge of several disciplines. First, they need an understanding of the developmental stages through which children pass so that they will be able to deal appropriately with children of particular ages. Secondly, an intermediary requires knowledge of the critical framework of a child's ability to understand language so that she will be able to communicate with a child of a particular age in a manner which the child will understand. Thirdly, an intermediary requires training with respect to the psychological effects of testifying and the incidental stress, in addition to the effects of abuse where the child witness is a victim of abuse. Fourthly, it is essential that an intermediary has some insight into the law. She would have to understand the features of a legal (investigative) interview as opposed to a therapeutic interview. For example, she would have to know what leading questions are, how to guard against them, their effect in law, what suggestion is, and the devastating effect suggestion can have on a trial.[48]

---

47 ECD case no SH 6/29/95, unreported.

48 Müller *Child witness* 55.

The people who have been designated by the Minister as capable of acting as intermediaries seem to have been chosen on the basis that they are people who come into contact with children. Paediatricians, family counsellors, teachers and even some psychiatrists and psychologists are not trained to communicate with children unless they specialise in this field. A paediatrician is a medical doctor and is not qualified to interview children. Some social workers have no experience of working with children. Ordway,[49] who also proposed the creation of an official position like that of the intermediary, was of the opinion that this person should have dual qualifications: she should be qualified to deal with victims of child sexual abuse and also be familiar with legal practices:

> "In order to be truly helpful in this role, the expert should understand the importance of objectivity and be familiar with pretrial and trial procedures. Such training could be provided by court personnel or through experience. The expert must realize the dual purpose of the job: to aid the child and to help the trier of fact rationally decide whether to believe the child."

Generally, there is confusion about what the role of an intermediary encompasses. Is the intermediary allowed to meet the child before the court appearance in order to give the child an opportunity to become familiar with her? This may give rise to allegations by the defence that the child has been prepared and that there is the danger of suggestion. On the other hand, it may be asked why the child should be prepared to speak to the intermediary if she is also a stranger: what difference it makes whether the child is talking to the intermediary or to the prosecutor. The idea was surely to enable the child to speak to someone with whom the child felt at ease. In order for this to occur, the child will have to meet the intermediary before the trial. Spencer[50] argues that the insistence on courtroom questioning by strange adults is one of the many factors which combine to make it impossible for a young child's account of an incident to be placed before the court. As a recommendation, he said that "the prosecution must be given the option of putting questions through a person who has already gained the child's confidence".

In evaluating the appointment of a person such as an intermediary, Davies[51] argues that the so-called Pigot Committee[52] foresaw that an intermediary "would be a person known to and trusted by the child", since this would protect the child from questioning by a variety of strangers. In order to rule out any confusion, it is suggested that rules of practice be formulated and implemented as to the procedure to be followed by intermediaries. These would have to address issues such as whether the intermediary may meet the child before the court appearance; where such a meeting can take place (could this occur, for instance, at the home of the child?); whether the intermediary may take the child to court in preparation for the trial so that the child is not confronted with an alien environment on the day of the trial; and whether the intermediary is responsible for taking care of the child during breaks and ensuring that the child is given something to drink, and so on.

---

49 "Parent-child incest: proof of trial without testimony in court by the victim" 1981 *Univ of Michigan LJ* 133 139–140.

50 "Child witnesses and video-technology: thoughts for the home office" 1987 *Journal of Criminal Law* 444 447.

51 "Children on trial? Psychology, videotechnology and the law" 1991 *Howard Journal of Criminal Justice* 177 189.

52 In 1989 the Home Office in London appointed a committee, known as the Pigot Committee, to investigate the implications of allowing children to testify via video equipment.

3 10 Amendment of section 158 of the Criminal Procedure Act

It seemed logical to extend the use of closed-circuit television to witnesses other than children, and in 1996 the Criminal Procedure Amendment Act[53] amended section 158 of the Criminal Procedure Act. The amended section came into effect on 1 September 1997, and provides that all criminal proceedings in court must take place in the presence of the accused, except where otherwise expressly provided by any other law. This authorises statutory exceptions to the accused's right to confront his accuser.

The court, on its own initiative or on application by the prosecutor, may in terms of subsection (2) order a witness or an accused to give evidence via closed-circuit television or similar electronic medium. The subsection also provides that an application may be brought by the witness or the accused for an order permitting him or her to testify in that way. Such an order may be made only with the consent of the person testifying.

The court may make an order for a person to give evidence via closed-circuit television only if suitable facilities are readily available or obtainable, and if to do so would:

- prevent unreasonable delay;
- save costs;
- be in the interests of the security of the state or of public safety, or in the interests of justice or the public; or
- prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present in court.

In addition, in terms of subsection (4), the court has been given a wide discretion to impose conditions on the giving of evidence in these circumstances, provided that the prosecutor and the defence are not deprived of their right to question a witness or to observe a witness's demeanour. This discretion must be exercised in order to ensure a fair and just trial.

Section 158 does not refer to section 170A at all, and it does not mention child witnesses. It provides only for a witness or an accused to give evidence via closed-circuit television. Although section 158 does not provide for the appointment of an intermediary, subsection (4) gives the court wide powers to impose conditions. In our view, however, where the appointment of an intermediary is required, the courts will proceed in terms of section 170A.

Does this mean that it is possible for a child to give evidence via either section 158 or section 170A, or is section 170A limited to witnesses under eighteen, whereas section 158 caters for those falling outside the ambit of section 170A (*viz* for those over 18)? Although section 170A expressly limits its application to children under the age of 18, there is no similar limiting provision in section 158. It is, therefore, assumed that a child may be allowed to give evidence in terms of section 158 as well. This will be particularly useful for older children, perhaps aged 15 or 16, who do not require the use of an intermediary. This resolves one of the anomalies created by section 170A, as discussed above. An added advantage of section 158 is that an application can be brought by the witness himself if he wishes to make use of this provision.

---

53 Act 86 of 1996, s 7.

A disconcerting fact, however, is that the test which has to be complied with in order for section 158 to be invoked is not nearly as stringent as the test laid down in section 170A. In terms of the latter section, the child must experience "undue mental stress or suffering", whereas in section 158 closed-circuit television can be used where it would be convenient to do so, or where it would save costs. This distinction seems indefensible, since once again it is more difficult for a child to make use of these provisions than for an adult, or even the accused, to do so.

In the case of young children it will not be practical to proceed in terms of section 158, since they will not be able to give evidence without an intermediary and section 158 makes no provision for the appointment of an intermediary. It will not be feasible for a young child to give evidence alone from a room outside the courtroom: the child will be isolated and alone, and it will be very difficult (if not impossible) to capture a young child's attention in this way. The witness, it is assumed, will be linked by earphones as in the present system. This will not assist a young child, and may necessitate the use of two-way monitors. For these reasons, it is assumed that the legislature did not intend section 158 to be used for young children.

4 RECOMMENDATIONS

In the above analysis we have identified certain problems with the wording and practical application of section 170A, and we suggest that the section should therefore be amended. The original objective of section 170A was to alleviate the plight of the child witness, and in order to realise this (at least to some extent), we recommend that the section be redrafted to read as follows:

"Evidence through intermediaries

(1) This section applies to any witness under the age of eighteen years appearing in criminal proceedings before any court.

(2) Any witness referred to in subsection (1) shall give his or her evidence at any place –

(a) which is informally arranged to set the witness at ease;

(b) which is so situated that any person whose presence may upset that witness is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that witness during his or her testimony and any person appointed to act as intermediary terms of subsection (3).

(3) In the case where a witness referred to in subsection (1) is younger than thirteen years, the court must, subject to subsection (6), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through such intermediary.

(4) In the case where a witness referred to in subsection (1) is aged thirteen or older, the court may, if it appears to be in the interests of justice, appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through such intermediary.

(5) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.

(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(6) (a) The Minister may by notice in the *Gazette* determine the persons or the category or class of persons who are competent to be appointed as intermediaries.

(b) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him as the Minister of Finance may determine."

Some explanatory comments are called for in respect of this draft provision. We have retained the provision limiting the use of the section to witnesses under the age of 18. It should be noted that the section can also be used in respect of juvenile accused giving evidence, where appropriate.

As pointed out earlier, section 170A requires that an intermediary be appointed before a child witness may be allowed to use the separate room. The purpose of section 170A is to protect the child by removing him or her from the court environment. The first logical step, in our view, would be to place the child in a separate room. It is for this reason that the redrafted section provides for the use of a separate room before the necessity of appointing an intermediary is considered. It is our suggestion that the discretion to make use of the separate room be removed completely. In so doing, the problems emanating from the exercise of this discretion will be eliminated. As research has shown that court appearances are inherently traumatic for children, it seems sensible indeed to make this facility available to all children.

Subsection (3) provides for the appointment of an intermediary in all cases in which the witness is younger than 13 years. This provision is mandatory and removes the discretion to decide whether or not an intermediary should be appointed. Furthermore, the interpretational problems inherent in concepts such as "undue mental stress or suffering" are also eliminated by this.

The redrafted subsection (4) provides for a discretion, in that the court may appoint an intermediary where the child witness is 13 or older. In the exercise of this discretion, the court must determine whether it would be in the interests of justice to do so. In our opinion, this is a more general test and removes the focus from whether an individual child will undergo "undue mental stress or suffering". The latter thus becomes merely one of the factors to be considered in determining what will be in the interests of justice. The test also allows for other factors, previously excluded, to be considered, for example the cognitive and language ability of a particular child. The removal of contentious expressions such as "undue mental stress or suffering" also eliminates the confusion as to whether or not expert witnesses need to testify.

The problem relating to identification cannot be addressed in the section, nor is it possible to deal with it satisfactorily within the ambit of this article. Suffice it to say that if identification indeed becomes an issue in a case, it should take place only after the child has given evidence, to eliminate any effect it may have on the child's ability to testify.

Finally, a few words need to be added about the person of the intermediary. An intermediary should, perhaps, be seen as more an expert than a mere interpreter. She should be given the power to offer an opinion whether a question can be understood by the child and also be allowed to represent the child's interests to ensure that the child is given a break and taken care of. This will, however, still not address the fundamental problem that, unless the prosecutor and defence know how to conduct the leading of evidence and examination of a child, the intermediary will be unable to structure the interrogation in a way that most benefits the child and the judicial process.

5 CONCLUSION

Section 170A has achieved one of its aims, namely to remove any direct confrontation between the child and the accused, and thereby reduce the trauma experienced by the child. It is nevertheless open to criticism because it does not address the traumatic effect of the adversarial nature of the trial.[54] Section 170A has not succeeded in dealing effectively with those aspects of the adversarial system which cause the greatest difficulty for children.

Cross-examination, despite being conducted through an intermediary, is still a major obstacle for children giving evidence, especially the very young. In fact, the Law Commission accepted that "[o]ne of the great and repeated complaints against the present system is directed against the adversary system and everything it implies: aggressive cross-examination of the child witness and the neutral role of the presiding officer".[55] Neither of these issues has been addressed by section 170A.

In conclusion, we believe that the recommendations contained in the proposed redraft of section 170A improve significantly upon the present section 170A and would enable it to fulfil its true potential. According to Schwikkard,[56] however, it is the adversarial nature of the proceedings that is at the core of the problem. Enabling a child to give evidence via closed-circuit television "will not prevent the child from being traumatized for as long as the trial is viewed as a contest and not as an inquiry into the truth".

> *A parallel conception in the legal universe would hold that, just as space cannot extricate itself from the unfolding story of physical reality, so also the law cannot extract itself from social structures: it cannot "step back", establish an "Archimedean" reference point of detached neutrality, and selectively, as though from the outside, make fine-tuned adjustments to highly particularized conflicts. Each legal decision restructures the law itself, as well as the social setting in which law operates, because, like all human activity, the law is inevitably embroiled in the dialectical process whereby society is constantly recreating itself.*
>
> *Laurence Tribe "The curvature of constitutional space: what lawyers can learn from modern physicists" 1989* Harvard LR *1 7–8.*

54 Schwikkard *Abused child* 162.
55 SALC *Protection* 11.
56 Schwikkard *Abused child* 155ff.

The enforcement of the obligations of sectional owners in a sectional title scheme

CG van der Merwe
BA BCL LLD
Erstwhile Professor of Law, University of Stellenbosch

HJ Erasmus
MA LLB Dlitt et Phil
Professor Emeritus and Senior Research Fellow, University of Stellenbosch

OPSOMMING

Die afdwing van die verpligtiginge van deeleienaars in 'n deeltitelskema

Hierdie bydrae handel oor die mate waarin die sankies en regsmiddels vervat in die Wet op Deeltitels, die modelreëls en die gemene reg daarin slaag om die finansiële en nie-finansiële verpligtinge van 'n deeleienaar in 'n deeltitelkompleks af te dwing. Ingevolge die bepalings van die Wet en die modelreëls, kan die finansiële verpligting van 'n deeleienaar om sy heffings te betaal in die landdroshof afgedwing word en is die eienaar verplig om alle regskoste, invorderingskommissie, uitgawes en koste verbonde aan die invordering van heffings te betaal. Daarnaas kan die trustees rente op agterstallige bedrae eis en is die deeleienaar nie bevoeg om vir 'n gewone meerderheidsbesluit op 'n algemene vergadering van deeleienaars te stem indien alle heffings nie betaal is nie. Die Wet plaas verder 'n embargo op die oordrag van 'n deeltiteleenheid indien alle agterstallige bedrae verskuldig aan die regspersoon nie vereffen is nie. Verdere stappe wat die regspersoon kan doen, is beslaglegging op 'n deeltiteleenheid gevolg deur 'n verkoop in eksekusie, of die insolvent-verklaring van die agterstallige deeleienaar. Daar word voorgestel dat die Wet of reëls gewysig word om die regspersoon 'n voorkeurreg op huurgeld betaalbaar aan die deeleienaar te gee indien laasgenoemde versuim om sy heffings te betaal.

Indien 'n deeleienaar sy nie-finansiële verpligtinge versuim deur die gedragsreëls te verbreek of oorlasstigtende aktiwiteite te bedryf, kan die deeleienaar se stemreg ontneem word indien hy nie reageer op waarskuwings in dier voege nie. Indien die deeleienaar versuim om sy deel te herstel of sy uitsluitlike gebruiksgebied behoorlik te versorg, kan die regspersoon die nodige op koste van die deeleienaar doen. Alle regskoste, uitgawes en koste verbonde aan die afdwing van reëls kan ook van die oortreder verhaal word. Indien die eienaar op 'n blatante manier die rus en vrede van die deeleienaars-gemeenskap versteur, kan by die plaaslike landdros aansoek gedoen word om 'n bevel teen die sondebok om hom te dwing om die vrede te bewaar. Daarbenewens kan aansoek by die hoogsgeregshof gedoen word om 'n interdik wat 'n oorlasstigtende aktiwiteit verbied. Die hoë regskoste en die uitgerekte regsproses maak hierdie remedie egter minder aantreklik. Daarom word ook verwys na oorsese oplossings ingevolge waarvan kroniese oortreders gedwing kan word om hul deeltiteleenhede op 'n openbare veiling te verkoop (Duitsland) of om saam met sy familie die eenheid vir 'n tydperk van hoogstens twee jaar te ontruim en aan ander persone te verhuur (Spanje). Omdat hierdie oplossings die eiendomsstatus van 'n deeleienaar kan aantas, word ten slotte voorgestel dat boetes as 'n spesiale reël opgelê kan word vir die oortreding van 'n nie-finansiële verpligting.

1 INTRODUCTION

The Sectional Titles Act imposes several obligations on a sectional owner. He must *inter alia* keep his section in a state of good repair,[1] not use his section or permit it to be used in a manner that will cause a nuisance to any occupant of any other section;[2] not use his section or allow it to be used for a purpose injurious to the reputation of the building;[3] not make alterations which are likely to impair the stability of the building;[4] not do anything to his section which is likely to prejudice the harmonious appearance of the building[5] and not, without the written consent of the trustees, keep any animal, reptile or bird in his section.[6] He must in addition *inter alia* use and enjoy the common property with due consideration for the rights of other occupants, not park or leave any vehicle standing on the common property without the written consent of the trustees,[7] not place or do anything on any part of the common property which in the discretion of the trustees is aesthetically displeasing or undesirable when viewed from the outside[8] and not deposit or throw any rubbish, including dirt, cigarette butts or food scraps on the common property.[9] Apart from these non-financial obligations which are mostly contained in the model rules of every sectional title scheme, a sectional owner has the financial obligation to pay his share of the maintenance and administrative expenses by contributing to a fund from which the expenses of managing the scheme as well as maintaining the common property are met.[10]

The success of a sectional title scheme will depend upon the necessary co-operation and support of its members in complying with these obligations. Minor or unintentional breaches of obligations are susceptible to gentle reprimand and friendly admonition. More serious offences and chronic offenders might, however, cause grave disharmony. The annoyance and disorder that the proverbial bad egg may cause if there is no possibility of getting rid of them, is a matter of serious concern to other owners in the scheme. One or two recalcitrant or pig-headed owners can make life unbearable for the other owners and occupants of the scheme. Similarly, repeated failure to contribute to common expenses may hamstring timely maintenance and the efficient administration of the scheme and ultimately wreck the scheme.

Since one or two troublemakers can destroy the social harmony and financial stability of a sectional title development, effective procedures for the enforcement of rules and obligations are essential. Accordingly, effective sanctions are a *sine qua non* for a viable and successful sectional title scheme.[11] In what follows, the sanctions for non-compliance with financial obligations, primarily the non-payment of levies, will first be considered. Thereafter the sanctions for non-compliance with

---

1 S 44(1)(c) of the Sectional Titles Act 95 of 1986.
2 S 44(1)(e).
3 Annexure 8 r 68(1)(i).
4 Annexure 8 r 68(1)(iii).
5 Annexure 8 r 68(1)(iv).
6 Annexure 9 r 1(i).
7 Annexure 9 r 3.
8 Annexure 9 r 5.
9 Annexure 9 r 7.
10 S 32(3)(c) read with s 37(1)(a).
11 See in general Leyser "The ownership of flats – a comparative study" 1958 *ICLQ* 31 40 49; Berger "Condominium – shelter on a statutory foundation" 1963 *Columbia LR* 987 1011–1012.

non-financial or neighbourly obligations will be dealt with. Since sanctions are conspicuously few and far between in the South African sectional title legislation, certain proposals for more effective sanctions will be advanced.

2 ENFORCEMENT OF FINANCIAL OBLIGATIONS

2 1 Levies and special levies are recoverable in court

The Sectional Titles Act provides that all contributions levied for administrative expenses shall be due and payable once the trustees of the body corporate has passed a resolution to that effect. This resolution must be passed soon after each general meeting on which the estimate of income and expenditure has been approved and the amount to be levied on owners during the ensuing financial year determined.[12] The amount payable by each sectional owner must then be determined in accordance with the participation quotas (or an amendment with regard to expenses)[13] of their respective sections. Within 14 days after each general meeting each owner must be advised in writing of the amount payable by him or her.[14] The amount will then become payable in instalments as determined by the trustees. Once the resolution has been passed by the trustees, arrear contributions may be recovered by the body corporate by action in court, including any magistrate's court, from the persons who were owners of units at the time when such contributions became due.[15] The fact that the levies can be recovered in the magistrate's court and not necessarily in the High Court having jurisdiction, keeps the cost of recovery of levies low. Since the body corporate is a juristic person, it is unfortunately not able to recover levies in the Small Claims Court, which would have reduced the cost of recovery even further.[16]

2 2 Owner responsible for all costs of recovery and interest on arrears

If an owner fails to pay arrear levies or other arrear amounts due by him, he is liable for all legal costs, including costs between attorney and client, collection commission, expenses and damages incurred by the body corporate in obtaining the recovery of arrear levies.[17] In addition, the trustees are entitled to charge interest on arrear amounts at such rates as they may from time to time determine.[18] These interest rates may, however, not exceed the rates set under the Prescribed Rate of Interest Act.[19]

2 3 Deprivation of vote

If an owner has not duly paid his contributions in respect of his unit, he will not be entitled to vote at any general meeting. This deprivation applies only in the case of ordinary resolutions and not if he has to vote for matters requiring a

12 Annexure 8 r 31(2).
13 S 32(4).
14 Annexure 8 r 31(3).
15 S 37(2) read with Annexure 8 r 31(1)–(4)).
16 S 7(1) of the Small Claims Courts Act 61 of 1984. S 42(14) of the Land Titles (Strata) Act of 1986-05-15 of Singapore (cap 277 Stat Rep of Singapore VII (1988)) allows for the recovery of unpaid levies in the Small Claims Court. The Act considers contributions levied by the management corporation as money payable under a contract of services.
17 Annexure 8 r 31(s).
18 Annexure 8 r 31(6).
19 Act 55 of 1975 s 1(2). The current rate is set at 18½%.

special or unanimous resolution. Furthermore, an owner who has not paid his levies may still attend and speak at any general meeting and any sectional mortgagee of such owner's unit is entitled to vote as such owner's proxy at any general meeting.[20] It stands to reason that this sanction does not carry much weight.

2 4 Embargo on alienation unless arrears paid

In terms of the Sectional Titles Act, the registrar may not register a transfer of a unit unless a conveyancer's certificate is produced to him confirming that, as at date of registration, the body corporate has certified that all moneys due to it have been paid or that provision has been made to the satisfaction of the body corporate for the payment thereof.[21] This provision places an embargo on the transfer of a unit unless arrear levies have been paid. However, this remedy is effective only if the unit is not heavily mortgaged and the transferor has sufficient funds left over after the sale to pay off the arrears.[22]

2 5 Attachment of movables

In terms of section 66 of the Magistrates' Courts Act,[23] the body corporate may attach and sell in execution the movable property of a sectional owner against whom a judgment has been obtained. This route is not an altogether satisfactory one in all cases:

(i) Section 65E(4) of the Magistrates' Courts Act[24] provides that a judgment creditor who issues a warrant of execution against movable property belonging to a judgment debtor before the hearing of proceedings in terms of a notice under section 65A(1) of the Act and a *nulla bona* return is made, shall not be entitled to the costs in connection with the issue and execution of the warrant unless the court on good cause shown orders otherwise. This means that a prudent judgment creditor who has doubts as to whether a judgment debtor is possessed of attachable movable assets, will first ascertain in proceedings under a notice in terms of section 65A(1) whether or not the judgment debtor has attachable assets.[25] Section 65A makes provision for an inquiry into the financial position of a judgment debtor.

(ii) More often than not, movable property (such as items of furniture and motor vehicles) in the possession of a sectional owner will be property sold under a hire-purchase, credit or sale agreement with a term suspending the transfer of ownership to the purchaser. In such cases the interest of the puchaser in the movable property may be attached, but the goods themselves cannot be attached and sold while the ownership remains in the seller.[26]

---

20 Annexure 8 r 64(a) and (b).
21 S 15B(3)(i)(aa).
22 See *infra* under 2 7.
23 Act 32 of 1944.
24 *Ibid.*
25 See *Jones and Buckle The civil practice of the magistrates' courts in South Africa I The Act* 9 ed (1996) by Erasmus and Van Loggerenberg 273.
26 S 68(3) of the Magistrates' Courts Act 32 of 1944 and r 42(2).

(iii) There is the risk of interpleader proceedings when third parties (members of the family of hire-purchase sellers), lay claim to goods that have been attached.

(iv) The costs and expenses of issuing a warrant and levying execution rank as a first charge upon the proceeds of the property sold in execution.[27] The costs of execution may be increased by an obstructive judgment debtor, or the goods may be of so little value that it is not worthwhile holding a sale in execution. Rule 39(1) provides that if the proceeds of the sale in execution are insufficient to cover the costs of execution, such costs may be recovered from the judgment debtor as costs awarded by the court – a worthless provision from a practical point of view!

(v) In terms of rule 39(2), all warrants of execution lodged with the sheriff on or before the day immediately preceding the date of the sale in execution rank *pro rata* in the distribution of the proceeds of the goods sold in execution.

2 6 Attachment of rent

If a sectional owner against whom a judgment has been obtained has leased his unit to a third party, is the judgment creditor entitled to attach the claim for rent which the sectional owner has against the lessee? A judgment debtor's interest in a contract of lease is an incorporeal movable which may indeed be attached in execution.[28] It has, however, been held that the only incorporeal movables capable of attachment in terms of the Magistrates' Courts Act[29] are those expressly enumerated in section 68 of the Act as being subject to attachment.[30] A judgment creditor seeking to execute upon incorporeal movable property not enumerated in the Act under the authority of a magistrate's court judgment must invoke the aid of the High Court.[31] It is not necessary to obtain a judgment in the High Court:[32] it is sufficient if the authority of the High Court is applied for and obtained.[33] The body corporate is accordingly entitled to bring an application in the High Court for the necessary permission to attach and sell in execution the defaulting sectional owner's right, title and interest in the lease. The value of the lease will depend on factors such as the duration of the term of the lease, the period of notice required to terminate the lease and the rent payable by the lessee.

2 7 Attachment of immovable property

If the movable property of the debtor turns out to be insufficient to settle the debt, the body corporate may proceed to attach the sectional unit (apartment) and to sell it in execution. Since such units are usually subject to a mortgage bond, the question arises whether the bondholder's right ranks higher than that of the body corporate. This very question came up for decision in the Transvaal High

---

27 R 39(1).

28 See *Herbstein and Van Winsen. The civil practice of the supreme court in South Africa* (now the High Courts and the Supreme Court of Appeal) 4 ed by Van Winsen, Cilliers and Loots (1997) 780; and see *Soja (Pty) Ltd v Tuckers Land Development Corporation (Pty) Ltd* 1981 2 SA 407 (W) 409F–410A.

29 Act 32 of 1944.

30 See *Jones v Trust Bank of Africa Ltd* 1993 4 SA 415 (C) 422B–C.

31 *Jones v Trust Bank of Africa Ltd* 1993 4 SA 415 (C) 422C.

32 As was held in *Hogan v Messenger, Johannesburg* 1915 WLD 101 104.

33 See *Patel v Marika* 1969 3 SA 509 (D).

Court in *South African Permanent Building Society v Messenger of the Court.*[34] Counsel for the body corporate argued that the embargo or restraint provision in the Sectional Titles Act which provides that the Registrar should only register transfer of a unit on certification by the body corporate that all arrears in respect of the unit have been paid,[35] was analogous to an embargo provision which restricts the transfer of rateable property unless all outstanding rates have been paid to the municipality. He argued that such an embargo created a very real and extensive preference for the body corporate. Curlewis J, however, concluded that the clause did not create a preferential claim in favour of the body corporate and that the claim of the mortgagee was indeed preferent to that of the body corporate within the meaning of section 66(2) of the Magistrates' Courts Act. The court therefore found that the mortgagee's claim ranked higher than that of the body corporate and that, since the mortgagee had not consented to it, the sale in execution had to be set aside. This decision is not in conflict with a slightly older decision on the same topic in the High Court of the Cape. In *Nel NO v Body Corporate of the Seaways Building*[36] the applicant (the liquidator of the company owning a number of sectional units), sought an urgent declaratory order that the embargo provision in the Sectional Titles Act[37]did not confer an effective preference on the body corporate in respect of moneys owed to it by the units' owners in the event of its liquidation. Brand J, however, found that the embargo provision creates an effective embargo which prevents the sectional title unit from being transferred until outstanding levies have been paid in full. He then decided that this preference in favour of the body corporate in respect of outstanding levies can be accommodated in the scheme of the Insolvency Act[38] as being part of the "cost of realisation" envisaged in section 89(1). Although the effect of this was a preference in favour of the body corporate on insolvency of the sectional owner, Brand J was at pains to point out that this did not mean that the body corporate was technically a "preferent creditor" in terms of either the Insolvency Act or the Magistrates' Courts Act.[39] The moral of the story is that the body corporate will enjoy a preference only on a sale in insolvency and not on a sale in execution after attachment. The body corporate would thus be wise to institute insolvency proceedings or to wait for another creditor to do so instead of procuring an attachment.

2 8 Emoluments attachment orders, garnishee orders and administration orders

Apart from the attachment and sale in execution of the judgment debtor's property, the Magistrates' Courts Act[40] makes provision for other processes in execution. These are:

---

34 1996 1 SA 401 (T).
35 S 15B(3)(i)(aa).
36 1995 1 SA 130 (C).
37 *Ibid.*
38 Act 24 of 1936.
39 133F–G. For a discussion of these decisions, see Van der Merwe 1995 *Annual Survey of SA Law* 299–203; Van der Merwe "Does the restraint on transfer provision in the Sectional Titles Act accord sufficient presference to the body corporate for outstanding levies?" 1996 *THRHR* 367.
40 Act 32 of 1944.

(i) *Emoluments attachment orders.* Section 65J provides for an emoluments attachment order in terms of which specific amounts out of the emoluments of the judgment debtor are regularly paid to the judgment creditor by the judgment debtor's employer. This process does not seem to provide a suitable remedy in the sectional title context.

(ii) *Garnishee orders.* In terms of section 72 of the Act, a magistrate's court may order the attachment of any debt at present or in future owing or accruing to the judgment debtor to an amount sufficient to satisfy the judgment and the costs of the proceedings for attachment. This remedy, too, does not seem to be suitable in the sectional title context.

(iii) *Administration orders.* Sections 74 to 74W of the Act provides for the granting of administration orders in the case of debtors who are unable to meet their financial obligations and whose estates are so small that sequestration proceedings would swallow the assets. In terms of the order, the debtor must regularly (weekly or monthly) pay the administrator a prescribed amount which the latter distributes *pro rata* among the creditors. In determining this amount, the court may leave an unencumbered residue sufficient to enable a debtor to discharge monthly instalments which he or she may be obliged to make in terms of an instalment sale transaction or a mortgage bond. The amount for distribution is usually very small and the dividend accruing to individual creditors, especially if they are numerous, negligible.

2 9 Sequestration

After an unsuccessful sale in execution, the body corporate may institute sequestration proceedings on the basis that the unit owner is *de facto* insolvent. However, the winding-up of an estate may be time-consuming, with the consequent escalation of arrear levies. In addition, the body corporate may run the risk of incurring liability for the costs of the sequestration.[41]

Nevertheless, we have already pointed out that if the unit of a sectional owner is heavily mortgaged, it would be more advantageous for the body corporate to have the indebted sectional owner sequestrated. If the debtor has not himself voluntarily surrendered his estate,[42] the body corporate may, if it has an unsatisfied and liquidated claim of at least R100, apply to the court for the compulsory sequestration of the sectional owner's estate.[43] A prerequisite for the application is that the debtor should either have committed an act of insolvency or that he should in fact be insolvent. Since the body corporate would in the majority of cases not be in a position to prove that the sectional owner is in fact insolvent, it would have to rely on any of the eight different grounds of insolvency mentioned in the Act as a ground for his application for the compulsory sequestration of the sectional owner's estate.[44] The most probable act of insolvency relied upon in practice by the body corporate is contained in section 8(b) of the Act, namely

41 See in general Smith "The recurrent motif of the Insolvency Act – advantage of creditors" 1985 *MBL* 27–32.

42 Insolvency Act 24 of 1936 s 3. See Smith *The law of insolvency* (1988) ("Smith *Insolvency*") 10–31.

43 S 9.

44 Insolvency Act 24 of 1936 s 8. See in general Smith *Insolvency* 32–80.

> "if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment."

This means that attachment proceedings may be interrupted to apply for a sequestration order. In this manner the body corporate can take advantage of its more advantageous position in a sale on insolvency rather than a sale in execution after attachment.

2 10 Proposed amendment of the Act or rules

Since the embargo comes into operation only on transfer of a unit, and since it is effective only if the debtor has been declared insolvent, the body corporate still needs an immediate and potent remedy against the defaulting owner. SAPOA Memoranda have suggested that an owner's financial obligations could effectively be enforced in one or more of the following ways:

First, if the apartment is occupied by a tenant, the body corporate should be given the first claim to the rental owed by the tenant in order to satisfy the owner's levies. This is analogous to the right of a local authority to claim rental from the tenant of premises to pay an owner's local authority's charges. The position of the body corporate would be significantly improved if the Act could be amended to include such a provision. In the meantime the rules can be amended to make provision for such an eventuality. This provision would be particularly helpful in view of the practical difficulties and high costs involved in attaching a sectional owner's title and interest in claiming rent from a tenant discussed above.

Secondly, if a sectional owner is in arrears in paying for certain specified services like water and electricity, the body corporate should be able to suspend these services until they are paid for. For this purpose the body corporate must have acquired the right to such action by virtue of either the Act or a special rule inserted in the model rules. If this is not done, cutting off the supply of water or electricity to an apartment would amount to spoliation and the body corporate could be compelled to restore the *status quo*.[45]

3 ENFORCEMENT OF NON-FINANCIAL OBLIGATIONS

3 1 Remedies in model rules

In the event of non-compliance with non-financial obligations, the model rules contain a number of special sanctions.

First, an owner who persists in the breach of any of the conduct rules contained in Annexure 9 notwithstanding written warning by the trustees or the managing agent to refrain from breaching such rule, is not entitled to vote for ordinary resolutions at a general meeting.[46] In terms of this rule, a mortgagee is, however, entitled to vote as his proxy at any general meeting. Note that the rule refers only to the breach of conduct rules and not to the breach of management

45 See in general *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 3 SA 609 (W); *Plaatje v Olivier NO* 1993 2 SA 156 (O).

46 Annexure 8 r 64(b).

rules contained in Annexure 8.[47] This means that it does not apply in the case of non-financial obligations imposed by virtue of rule 68 of Annexure 8. It is therefore not applicable *inter alia* if the owner uses his section or the common property in a manner or for a purpose that is injurious to the reputation of the building, makes alterations which are likely to impair the stability of the building, or does anything to his section or exclusive use area which is likely to prejudice the harmonious appearance of the building.[48]

Secondly, an owner who fails to repair or maintain his section in a state of good repair or adequately to maintain an area of the common property allocated for his exclusive use, may be given written notice to repair or maintain it by the trustees or the managing agent on their behalf. If he thereafter persists in such failure for a period of 30 days, the body corporate is entitled to execute the necessary maintenance or repairs and to recover the reasonable cost of such intervention from the owner.[49]

As in the case of the enforcement of financial obligations, the owner is thirdly liable for and must pay all legal costs, including costs as between attorney and client, incurred by the body corporate in enforcing compliance with the model rules or the Act.[50]

Finally, in terms of the rules of Annexure 9, the trustees may cause any vehicle parked standing or abandoned on the common property without their written consent, to be removed or towed away at the risk and expense of the owner of the vehicle.[51] From the context of this rule it is clear that it applies not only to the vehicles of owners but also to the vehicles of occupiers. It is uncertain whether the vehicles of visitors are also included, since the model rules only bind the body corporate and the owners of sections, as well as any person occupying a section.[52]

3 2 Common-law remedies

The above-mentioned sanctions aimed at the enforcement of non-financial obligations, are special sanctions dealing with special cases. If an offender's misconduct is not covered by any of these special rules, the aggrieved owner (or the body corporate), will have to resort to common-law remedies.

In the case of bodily threats or flagrant instances of nuisance, for instance where an owner wanders around the sectional title complex shouting abuse at any person he encounters, the body corporate, or an owner, may invoke section 384 of the old Criminal Procedure Act of 1955,[53] which was not repealed by the new Criminal Procedure Act of 1977.[54] In terms of this section, a complaint on oath may be made to the magistrate of the district that a person is conducting himself violently towards, or is threatening injury to the person or the property of another or that he has used language or behaved in a manner towards another in a manner likely to provoke a breach of the peace or assault. It does not matter whether such threat, language or conduct occurred in a public or a private place

47 The rule refers to the conduct rules referred to in s 35(2)(b) of the Act.
48 See Annexure 8 r 68(1)(i), (iii) and (iv).
49 Annexure 8 r 70.
50 Annexure 8 r 5.
51 Annexure 9 r 3(2).
52 S 35(4).
53 Act 56 of 1955.
54 Act 51 of 1977.

such as a sectional title scheme. On receiving the complaint, the magistrate may order such person to appear before him and, if necessary, may cause him to be arrested and brought before him. Thereupon the magistrate must inquire into and determine upon such complaint and may, in his discretion, order the offender to guarantee an amount not exceeding R2000 with or without sureties, for a period of six months to keep the peace towards the complainant.[55] If the offender refuses to give the guarantee, or fails to do so, the magistrate may order him to be committed to gaol for a period not exceeding six months unless such security is found sooner.[56] If the conditions of the guarantee are not observed, the magistrate may declare the guarantee forfeit and this will have the effect of a judgment in a civil action in the magistrate's court of the district.[57]

A recalcitrant unit owner may be ordered by way of interdict to refrain from a certain course of action, or be ordered to perform some or other positive act in order to rectify an unlawful state of affairs brought about by him. An aggrieved owner, or the body corporate on behalf of one or more aggrieved owners, may bring the application for an interdict.[58] A magistrate's court can grant both prohibitory and mandatory interdicts, but its jurisdiction to do so is subject to the limits prescribed by the Magistrates' Courts Act.[59] Section 29 of the Act lays down the monetary limits of the jurisdiction of the magistrates' courts. One of the difficulties with interdicts in the magistrates' courts is that of assessing the value to be placed on the claim in order to ascertain whether it falls within the jurisdiction. A magistrate's court, moreover, does not have jurisdiction to grant a mandatory interdict which amounts to an order for specific performance of a unit holder's contractual obligations under a sectional scheme.[60] A final difficulty is enforcement – a person wilfully disobeying, or refusing or failing to comply with an order of court, may, in terms of section 106 of the Magistrates' Courts Act,[61] be sentenced to payment of a fine or imprisonment for a period not exceeding six months by way of *criminal prosecution*.[62] If the High Court remains the only realistic forum which can be resorted to, an interdict would be of limited value in view of the high legal costs involved and the protracted nature of the judicial process. Furthermore, the interdependence of the owners and occupants of units and the unavoidable requisite of harmonious co-existence, renders an interdict inadequate and indeed inappropriate in the sectional title context. A successful application for an interdict could permanently shatter the harmony of a sectional scheme.

3 3 Foreign law sanctions

It is generally accepted that the Sectional Titles Act does not have the teeth to deal effectively with nuisance and non-compliance with the rules of a scheme. A glance at sanctions employed by the German and Spanish statutes on apartment ownership may therefore be instructive.

---

55 S 384(2).
56 S 384(3).
57 S 384(4).
58 The capacity of the body corporate to act on behalf of an aggrieved owner is provided for by s 36(4) read with s 36(6)(d) of the Act.
59 Act 32 of 1944 s 30(1). See *Jones and Buckle* Act 79–Act 82.
60 *Badenhorst v Theophanous* 1988 1 SA 793 (C) 798.
61 *Supra*.
62 See *Jones and Buckle* I Act 386–Act 390.

Under the German *Wohnungseigentumsgesetz* recalcitrant owners may, in certain prescribed circumstances, be excluded from the sectional community.[63] German apartment owners may by a majority vote of more than half the owners entitled to vote, resolve that a troublemaker should be compelled to alienate his apartment if he violates his obligations towards other participants in the scheme to such a serious degree that they cannot be expected to continue living with him in the same community. Such a situation arises when the offender, in spite of repeated warnings, persists in committing serious breaches of his or her statutory obligations or when he or she is more than three months in arrears with his contributions to an amount which exceeds three per cent of the value of his or her apartment.[64] If he or she fails to comply with the demand to sell the apartment, legal proceedings may be instituted to obtain a court order to compel him or her to sell and transfer his unit.[65] Such a sale must be in the form of a public auction by the local authority. The decision to introduce such a drastic sanction has undoubtedly been influenced by the unfortunate experience Germany had with a primitive form of sectional ownership (*Stockwerkseigentum*) in which each owner was allowed to do as he pleased and the community lacked any kind of management organ.[66] Past experience taught them that effective sanctions are needed to avoid disintegration of a sectional title community. Even so, this drastic sanction is rarely used in practice. German commentators, however, seem convinced of its deterrent value.[67] The provision for exclusion from the community is justified by the argument that an effective mechanism had to be created against arrogation of rights by individual sectional owners with resulting grave breaches of obligations within a sectional title community.

Although South African lawyers recognise that the intensified community of owners within the same building requires a restriction of ownership in the public interest, they would probably reject the German solution on both financial and dogmatic grounds. Prospective purchasers of units in a sectional scheme may be suspicious of buying a unit the ownership of which is subject to forfeiture, whereas institutional mortgagees may not regard a title with such an inherent potential risk as adequate security. Dogmatically, the fact that the ownership of a sectional title unit is defeasible in certain circumstances, raises doubts as to whether sectional ownership can in the final analysis be regarded as genuine ownership. In the South African context the perception that sectional ownership approximates home ownership should accordingly be maintained not only for dogmatic reasons, but also for socio-political reasons.

A less drastic solsution is offered by the Spanish statute on apartment ownership. In terms of this statute, an owner or occupier of an apartment is prohibited from conducting activities in his or her apartment or on the common property

---

63 See par 18 and 19 of the *Wohnungseigentumsgesetz*. Similar provisions are contained in art 649(b) and (c) of the Swiss Civil Code, par 22 of the Austrian Law of 1975 and par 25 of the Turkish Law of 1965. See in general Van der Merwe "Apartment ownership in Drobnig *et al International Encyclopedia of Comparative Law* Volume VI Chapter 5 s 259.

64 Par 18(3).

65 Par 19.

66 See Van der Merwe and Butler *Sectional titles, share blocks and time-sharing* 1 *Sectional titles* (1995) 1-3 1-4

67 See Barmann, Pick and Merle *Kommentar zum Wohnungseigentumsgesetz* (1987) par 18 fn 2.

which contravene the rules of the scheme, cause damage to the scheme or which are immoral, dangerous, embarrassing or dangerous to the health of persons. An owner or occupier who breaches any of these prohibitions must first be warned. If the *owner* does not heed the warning, the general meeting can, by way of a majority resolution, institute an action in court with the object of depriving the owner and the persons who occupy the apartment with him of the possession of the apartment. The judge has the discretion, depending on the seriousness of the offence, to fix the period of exclusion to a maximum period of two years. Such an order does not affect the remaining ownership rights and obligations of the offender. If the offender remains recalcitrant, this mechanism may be repeated as often as is necessary. If the offender is an *occupier*, the general meeting may resolve to institute court proceedings against him or her for either an eviction order or the termination of the contract. This action can, however, only be embarked upon once the owner has been given a reasonable period to evict the occupier himself or herself or to terminate the lease. This period must be fixed and clearly notified to the owner. In these cases, a simplified procedure is followed by the court.

The Spanish solution, which is to deprive a troublesome owner and his family of the possession of his or her apartment for a limited period of time, seems highly appropriate in the context of sectional ownership. Although ownership is no longer regarded as an absolutely exclusive right, but rather as a privilege which must be exercised in the public interest, it is still a protected constitutional right which can be radically affected only in exceptional circumstances. As long as the ultimate substance of ownership is not infringed, temporary deprivation of one of the entitlements of ownership that flow from ownership, namely occupation and use of the object, is not considered an unconstitutional infringement of ownership. By contrast, the permanent deprivation of the contractual right of a non-owning occupier who persists with his or her offensive behaviour after having been repeatedly warned, appears to be fully justified.[68]

3 4 Suggested additional sanctions

At first blush, the provision of severe sanctions, including the right of expulsion or at least temporary deprivation of possession of a recalcitrant sectional owner by means of an amendment of the Sectional Titles Act, seems highly desirable. On second thoughts, it is probably wiser for a sectional scheme to provide for financial and preventative sanctions in the rules which are tailored for the needs of a particular development. This should preferably be done at the outset by the developer. Subsequent amendment of the rules by the general meeting, particularly rules in Annexure 8, can be effected only by a unanimous resolution. For this very reason, sanctions desired to be entrenched against subsequent amendment, should be included in Annexure 8.

If there is a need for sanctions in a particular scheme, it is suggested that, in line with local practice, the rules of that particular scheme should be amended to include the following special rule:

> "1 Failure to refrain from conduct which constitutes a nuisance or from obeying the management and conduct rules
>
> 1(1) If the conduct of an owner or an occupier of a section or his or her visitors constitutes a nuisance in the opinion of the trustees, or if an owner, occupier or

68 See in general Reay-Smith *Spanish real property and inheritance laws* (1985) 80; Ventura-Travaset y Gonzales *Derecho de Propiedad Horizontal* (1992) 445–466.

visitor contravenes a management or conduct rule, the trustees may furnish the owner or occupier with a written notice which may in the discretion of the trustees be delivered by hand or by registered post. In the notice the particular conduct which constitutes a nuisance must be adequately described or the rule that has alledgedly been contravened must be clearly indicated, and the recipient must be warned that if he or she persists in such conduct or contravention, a fine will be imposed on the owner of the section.

1(2) If the owner or occupier nevertheless persists in that particular conduct or in the contravention of that particular rule, the trustees may convene a meeting of trustees to discuss the matter.

1(3) A written notice by which the alleged offender (whether owner or occupier), is informed of the purpose of the meeting and invited to attend, must be sent to the owner or occupier at least 7 days before the meeting is held. At the meeting the owner or occupier must be given the opportunity to present his case, but may not participate in the affairs of or vote at the meeting except in so far as this is permitted by the chairperson.

1(4) After the owner or occupier has been given the opportunity to present his or her case, the trustees may by way of a special resolution (75% of the trustees present at the meeting with a minimum of three trustees), impose a fine of R200 for the first offence and R300 for every identical offence thereafter.

1(5) If any fine imposed in terms of sub-rule (4) is not paid within 14 days after the offender has been notified of the imposition of the fine, the amount of the fine may be added to the contribution which an owner is obliged to pay in terms of s 37(1) of the Act and claimed by the trustees as part of the monthly instalments payable by the owner."

The following comments should clarify the purpose and scope of the above provision. First, the fact that the fine can be repeated for subsequent identical offences, should be an effective deterrent against the repetition of similar offences in future. Secondly, the fact that the question whether the nuisance conducted by the offender is actionable is left to the discretion of the trustees, avoids endless disputes on this question. Thirdly, the fact that the offender is fully informed about the nature of the offence and is given the opportunity to present his case, is in accordance with the principles embodied in the Constitution of the Republic of South Africa. Fourthly, the decision by the trustees to impose a fine, is ultimately an administrative decision, which may in appropriate circumstances be taken on review to the High Court. Such a review would succeed only if it can be proved that the trustees acted from manifestly ulterior motives or if the decision to impose the fine was so grossly unreasonable that they could not have applied their minds to it.[69] Fifthly, the fact that the fine may be added to the monthly instalments owed by the owner and be recovered as part thereof, provides an effective means of recovering the fine. Sixthly, note that the fine is imposed on the owner only, even where the offender is the occupier. The reason for this is that only the owner is obliged to contribute to administrative expenses. The owner is therefore under an obligation to ensure that the occupier toes the line or to terminate his or her contract with the occupier. Finally, this sanction will naturally be effective only in cases where an owner is financially able to pay his or her contributions regularly. If the responsible owner is unable to pay his or her levies, more drastic steps will have to be taken.

69 See in general *The Administrator Transvaal and the Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 1 SA 56 (A) 86.

Domicile of choice and *animus*: How definite is indefinite?*

Elsabe Schoeman
BLC LLB LLD
Senior Lecturer, Department of Jurisprudence, University of South Africa

OPSOMMING

Domisilie van keuse en *animus*: hoe bepaald is onbepaald?

Domisilie word in die Suid-Afrikaanse reg as 'n verbindingsfaktor op die gebiede van jurisdiksie en konfliktereg (internasionale privaatreg) gebruik. Derhalwe is die interpretasie van die *animus*-vereiste vir 'n domisilie van keuse, veral met betrekking tot privaatregtelike status, van deurslaggewende belang. Hierdie bydrae ondersoek die interpretasie van die *animus*-vereiste in die Suid-Afrikaanse regspraak en evalueer die hervorming teweeggebring deur die Wet op Domisilie 3 van 1992. Die nuwe statutêre *animus*-vereiste vir 'n domisilie van keuse (die bedoeling om vir 'n onbepaalde tydperk op 'n plek te woon) word beoordeel teen die agtergrond van die Engelse en Skotse regskommissies se verslae wat 'n wesenlike invloed op die Suid-Afrikaanse wetgewing gehad het. Ten slotte word riglyne betreffende die interpretasie van die term "onbepaalde tydperk" gegee met spesifieke verwysing na faktore soos tyd en die relevansie al dan nie van toekomstige gebeurlikhede.

1 INTRODUCTION

Domicile is used as a connecting factor in jurisdiction and conflict of laws[1] in South African law. Even though domicile has, in many areas of jurisdiction, been superseded or supplemented by other jurisdictional criteria, such as ordinary residence,[2] it has retained its position as the dominant choice-of-law connecting factor in conflicts matters regarding private-law status.[3] In these areas of choice of law the ascertainment of the domicile of the *propositus* is crucial to the determination of the appropriate *lex causae*. Should this involve an inquiry into the probable acquisition of a domicile of choice, the issue will no doubt focus on the intention (*animus*) required to acquire a domicile of choice. In this regard section 1(2) of the Domicile Act[4] provides:

---

* Based on a section of my LLD thesis, entitled *Domicile and jurisdiction as criteria in external conflict of laws with particular reference to aspects of the South African law of persons*.

1 For a general overview of the origin and development of the concept *domicilium* as a connecting factor in the conflict of laws, see De Jager *Domicilium as koppelfaktor in die internasionale privaatreg* (LLM-verhandeling (Unisa), 1973); Schoeman "Die herkoms en ontwikkeling van *domicilium* as verbindingsfaktor in internasionale privaatreg" 1994 *THRHR* 204.

2 See eg s 2(1) of the Divorce Act 70 of 1979.

3 Spiro *Conflict of laws* (1973) 136 ff.

4 3 of 1992.

> "A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period."

But what does this intention to settle indefinitely, or for an indefinite period, mean? How should it be interpreted by the courts? Are there any guidelines? In this contribution (which will appear in two parts) an attempt will be made to analyse this requirement and provide a basis for the interpretation of the *animus* requirement in current South African law. In the first part the development of the *animus* element in South African law will be placed in historical perspective, while the second part will focus on the recent statutory intervention in this area of the law.

2 OUR ROMAN-DUTCH HERITAGE

In their definitions of a domicile of choice the Roman-Dutch writers[5] focused on the definition given in the *Corpus Iuris Civilis*:

> "There is no doubt that individuals have their domicile where they have placed their household goods and the greater part of their property and fortunes, and no one shall depart from thence unless something requires him to do so, and whenever he does leave the place, he is considered to be on a journey, and when he returns, to have completed it."[6]

This definition stresses the negative side of the requisite intention, namely that "no one shall depart", whereas a positive formulation would emphasise the intention to remain with a certain degree of permanence.[7] In their expositions on domicile, and more specifically on this text of the *Codex*, some of the Roman-Dutch writers have adopted the negative formulation of the required *animus*. See, for example, Johannes Voet's definition of domicile:

> "Everyone can also be sued by virtue of domicile, in the place, that is to say, in which he has set up his home and the main body of his property and fortunes, from which he is not likely to depart if nothing calls him away, and which when he has left he appears to be travelling abroad."[8]

Elsewhere he adopted a positive formulation:

---

5 See Kahn *The South African law of domicile of natural persons* (1972) (hereinafter Kahn *Domicile*) 41 ff for an excellent exposition of the Roman-Dutch writers' formulations and definitions of domicile. However, he comes to the conclusion (43) that the "Roman-Dutch authorities can hardly be said to have distinguished themselves as jurists in their analysis of *animus manendi*".

6 C 10 40(39) 7 *lex* 1 (Scott's translation). The Latin text reads as follows:
"Et in eodem loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, unde cum profectus est, peregrinari videtur, quod si rediit peregrinari iam destitit." For an exposition and critical discussion of the pre-codification Continental interpretation of the Roman law definition of domicile, see Uys *The intention required in South Africa for the acquisition of a domicile of choice* (LLM Dissertation (US), 1983) 25 ff.

7 Kahn *Domicile* 42 ff. See also Pollak "Domicile" 1933 *SALJ* 449 462 ff.

8 *Commentarius ad Pandectas* 5 1 92 (Gane's translation). The Latin text reads as follows:
"Domicilii quoque intuitu convcniri quisque potest, in eo scilicet loco, in quo larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, undcque cum profcctus est, peregrinari videtur." See also Voet J *Commentarius ad Pandectas* 5 1 94, as well as Brissonius *Lexicon Juridicum* sv *Domicilium*; Schrassert *Consultatiën, Advysen ende Advertissementen* cons 94 fn ; Van Leeuwen *Censura Forensis* 2 1 12 5.

> "It is certain that domicile is not established by the mere intention and design of the head of a household, nor by mere formal declaration without fact or deed; nor by getting ready of a house in some country; nor by residence without the purpose to stay there permanently."[9]

Other writers have combined the negative and the positive approaches within the same definition. See, for example, Van Leeuwen's definition:

> "Ik seg een vaste woonplaats, Om dat niet het enkel verblijven van yemand, het welk dikmaals maar voor een tijd geschied, gelijk als yemand in hete siekte sig buyten de Stadt begeeft, of om andre saken buyten de Stadt sijn vier en ligt houd, maar het vaste voornemen om daar te zijn en blyven, sonder mening van wederkeren, yemands woonplaats maakt."[10]

It would seem as if the negative formulation of the required *animus* makes for a more realistic yardstick than the positive approach, since the intention not to leave, unless something happens, is less rigid than the intention to remain forever, which leaves little or no room for doubt as regards the future.[11] However, whether one adopts a positive or negative formulation of the requisite *animus*, it is clear that a certain degree of permanence is required to satisfy the *animus* requirement for a domicile of choice. Exactly how permanent, has been the debate in many a courtroom.

3 SOUTH AFRICAN CASE LAW

3 1 The influence of English and Scottish case law

While the jurisprudential basis of the South African law of domicile is rooted in Roman-Dutch law, our case law bears testimony to the influence of nineteenth and early twentieth-century English and Scottish cases on the interpretation of the *animus* requirement. An interesting feature of these English and Scottish cases is the extent to which they relied on Roman-Dutch and other civilian authorities in their expositions of domicile.[12] References to the famous C 10 40(39) 7,[13] as well as to writers like Johannes Voet, Bynkershoek and Pothier appear frequently.[14] Although the references to civilian authority declined during the latter half of the nineteenth century, reference was often made to the American judge and author Joseph Story, who, in turn, relied heavily on civilian authority in his exposition of domicile.[15]

---

9 *Commentarius ad Pandectas* 5 1 98 (Gane's translation). The Latin text reads as follows: "Illud certum est, neque solo animo atque destinatione patrisfamilias, aut contestatione solâ, sine re & facto, domicilium constitui . . . neque solâ domus comparatione in aliquâ regione . . . neque solâ habitatione, sine proposito illic perpetuo morandi . . ." See also Schomaker *Selecta Consilia en Responsa Juris* I cons 7; Schrassert *Consultatiën, Advysen ende Advertissementen* cons 94 fn 11.

10 Van Leeuwen *Het Roomsch Hollandsch Recht* 3 12 10. (See, however, the negative formulation of domicile adopted by Van Leeuwen in his *Censura Forensis* 2 1 12 15.) Although Voet J and Schrassert described the requisite *animus* in both negative and positive terms, they did not combine the two approaches within the same definition.

11 Pollak 1933 *SALJ* 449 463.

12 See in general Schoeman 1994 *THRHR* 204.

13 See *supra* fn 6.

14 *Somerville v Somerville* (1801) 5 Ves 750, 31 ER 839; *Pottinger v Wightman* (1817) 3 Mer 67, 36 ER 26; *Munro v Munro* (1840) 7 Cl & Fin 842, HL, 7 ER 1288; *Forbes v Forbes* (1854) Kay 341, 69 ER 145; *Hodgson v Beauchesne* (1858) 12 Moo PCC 285, 14 ER 920; *Whicker v Hume* (1858) 7 HLC 124, 11 ER 50; *Lord v Colvin* (1859) 4 Drew 366, 62 ER 141.

15 Story *Commentaries on the conflict of laws* (1883) par 39 ff.

With regard to the interpretation of the *animus* element (whether *manendi* or *non revertendi*) the English and Scottish courts must receive credit for their tireless investigation into the Roman texts (notably C 40(39) 7) and the civilian authorities. To extract a definition of domicile from the diverse analyses of C 10 40(39) 7 by our Roman-Dutch writers must have been a daunting task.[16] But these endeavours must be viewed in proper historical context. With the expansion of the British Empire during the nineteenth and early twentieth centuries the conception took root that the British, although travelling abroad and settling in British colonies or even foreign countries, never really relinquished their English or Scottish domiciles of origin, since they might want to return "home" one day. In the case law of this era this historical sentiment is reflected in the heavy burden of proof required for a change of domicile, in other words, to prove the necessary *animus non revertendi* or *animus manendi*, especially where a domicile of origin was concerned.[17] This tenacity of the domicile of origin, as well as the reluctance of the courts to find in favour of a change of domicile where the "new" domicile was a foreign one,[18] made it extremely difficult for a British subject to acquire a new domicile of choice. Added to this was the conception that an individual could have only one domicile at any given time,[19] which led the courts to scrutinise every minute detail, lest they should too easily find in favour of a change of domicile.

Two cases from this era that have greatly influenced and shaped the development of the *animus* requirement in South African law, were the Scottish case of *Udny v Udny*[20] and the English case of *Winans v Attorney-General*.[21]

Initially South African courts adopted the formulation of the required *animus* as set out in *Udny v Udny*:

> "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time . . . it must be a residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation."[22]

In *Weatherley v Weatherley*[23] this interpretation of *animus* was regarded as consistent with the *animus manendi* required by Roman-Dutch authorities such

---

16 See Kahn *Domicile* 3 41 ff.

17 Cf *Winans v Attorney-General* [1904] AC 287 290:
"Domicil of origin . . . differs from domicil of choice mainly in this – that its character is more enduring, its hold stronger, and less easily shaken off . . ." See also *Udny v Udny* (1869) LR 1 Sc & Div 441 457–458.

18 See eg *Lord v Colvin* (1859) 4 Drew 366 422–423, 62 ER 141 163:
". . . it requires stronger and more conclusive evidence to justify the Court in deciding that a man has acquired a new domicile in a foreign country, than would suffice to warrant the conclusion that he has acquired a new domicile in a country where he is not a foreigner." See also *Hodgson v Beauchesne* (1858) 12 Moo PCC 285 314–315 317, 14 ER 920 931 932; *Whicker v Hume* (1858) 7 HLC 124 159, 11 ER 50 64.

19 Cf *Udny v Udny* (1869) LR 1 Sc & Div 441 448:
"It is clear by our law a man must have some domicil, and must have a single domicil." See also *Webber v Webber* 1915 AD 239 242: "It is a fundamental English principle, however, (though it was not so in Roman law) that no man can have more than one domicile at one time."

20 (1869) LR 1 Sc & Div 441.

21 [1904] AC 287.

22 (1869) LR 1 Sc & Div 441 458.

23 (1879) Kotzé 66.

as Van Leeuwen, J Voet and Groenewegen.[24] A reference to an opinion that, should there be an intention to return to one's native country – even after the lapse of a thousand years – no new domicile will have been acquired,[25] seems to indicate that Kotzé J required a rather high degree of permanence for the acquisition of a new domicile.[26]

In *Moreland v Moreland*[27] this test from *Udny v Udny*[28] was again applied, but Mason J added that the test would be satisfied even though the *propositus* may have contemplated "the possibility of circumstances compelling him to change his abode".[29] This tag was probably attached in order to reflect the reality of the situation: the acquisition of the husband's domicile for the purposes of divorce jurisdiction in *Moreland* was bound up with the Anglo-Boer War and the judge probably wished to indicate that the affairs of many people were in a state of uncertainty. The war might actually have *compelled* some people to change their domiciles. Therefore this *dictum* cannot really be regarded as a relaxation of the requisite *animus* as described in *Udny*.[30] However, any possible further interpretations of the test in *Udny* were countered by the appearance of the English writer John Westlake's fourth edition of his *Treatise on private international law* in 1905, the year after *Winans v Attorney-General*[31] was decided. In *Winans v Attorney-General* the requisite intention was formulated as follows:

> "Has it been proved 'with perfect clearness and satisfaction to yourselves' that Mr. Winans had at the time of his death formed a 'fixed and settled purpose' – 'a determination' – 'a final and deliberate intention' – to abandon his American domicil and settle in England?"[32]

Subsequent to this decision Westlake pronounced that, as a result of the English cases, and especially after the decision in *Winans*:[33]

> "The intention necessary for acquiring a domicil of choice excludes all contemplation of any event on the occurrence of which the residence would cease."[34]

The description of the requisite *animus* for the acquisition of a domicile of choice in terms of a "fixed and settled purpose", "a determination" and "a final and deliberate intention" in *Winans v Attorney-General*[35] has had a decisive

---

24 74.

25 74–75:

> "Accordingly Simon van Groenewegen, an eminent Dutch lawyer, has observed that if a man leaves his native country for several years, merely to make his fortune in the East Indies, he does not thereby change his domicile of origin (*Consult et Adwijs*, *vol* 6, *cons* 153), and the Dutch *Juris-Consult* elsewhere emphatically says, that if there be an intention of returning to the native country, even after the lapse of a thousand years, no new domicile will have been created by the removal or change of residence . . . (*Consult et Adwijs*, *vol* 3, *cons* 138, fn 27)."

26 See also *Clear v Clear* 1913 CPD 835 839.

27 (1901) 22 NLR 385.

28 (1869) LR 1 Sc & Div 441 458.

29 *Moreland v Moreland* (1901) 22 NLR 385 388.

30 (1869) LR 1 Sc & Div 441 458.

31 [1904] AC 287.

32 292.

33 *Ibid*.

34 Westlake *op cit* par 264.

35 [1904] AC 287 292: see full quotation *supra*.

influence on South African law. In *Webber v Webber*[36] Innes CJ interpreted the "array of emphatic adjectives"[37] used in *Winans* as meaning that the *propositus* must deliberately have decided to give up his old home and make his permanent home in a new place.[38] No reference was made in *Webber* to Westlake's interpretation of the requisite *animus* in the wake of the decision in *Winans*. Thus *Webber* stressed the positive approach of intending to establish one's permanent home in a certain place, but did not add the interpretation of Westlake to the effect that the contemplation of any event on the occurrence of which the residence would cease, would defeat such an intention.[39] It would seem that, had the description of the requisite *animus* remained at "permanent", without Westlake's interpretation added to it, the criterion would have been more susceptible of innovation. As was pointed out in *Deane v Deane*,[40] the word "permanent" should not be given a too drastic, too absolute connotation, since "man is not a prescient being and cannot predicate an inflexible course of life".[41] McGregor J[42] regarded the rule expounded in *Webber v Webber*,[43] which was based on *Winans v Attorney-General*,[44] as being essentially the same as the criterion laid down in *Udny v Udny*.[45] Therefore, leaving aside the interpretation of Westlake, a compromise could probably have been reached between *Udny* and *Winans* to the effect that the intention should be to remain permanently or indefinitely. However, once Westlake's interpretation was authoritatively accepted in *Johnson v Johnson*,[46] the strict positive approach adopted in *Winans* was burdened with the insurmountable requirement that there should not be present in the mind of the *propositus* contemplation of any event on the occurrence of which the intended residence would cease.

3 1 1 Johnson v Johnson[47]

This case tells the story of a twelve-year-old Swedish boy who ran away from home, sailed all over the world and settled wherever opportunity presented itself. He acquired his wealth through hard work, never allowing an opportunity to make money slip by. One could say that his movements throughout his life were steered by his ambition to better himself. In an action concerning the property rights of the Johnson spouses, the domicile of the husband at the time of the conclusion of the marriage had to be determined.[48] It appeared that Mr Johnson was residing in the state of New Jersey at the time when he married, but the

---

36 1915 AD 239.
37 243.
38 *Ibid*. See also 249 and 258 of the report, as well as *Hutchison's Executor v The Master* 1919 AD 71 74.
39 Westlake *op cit* par 264.
40 1922 OPD 41.
41 43–44.
42 44.
43 1915 AD 239 243.
44 [1904] AC 287 292.
45 (1869) LR 1 Sc & Div 441 458.
46 1931 AD 391 398.
47 1931 AD 391.
48 In terms of the conflict rule that the proprietary consequences of a marriage must be determined by the law of the husband's domicile at the time of the marriage: Edwards *LAWSA: Conflict of laws* (1st reissue, 1993) par 441.

court had to decide whether his residence in New Jersey at that stage constituted a domicile. The majority of the court decided that he had not acquired a domicile in New Jersey at the time of his marriage and based their finding on the requirement for the acquisition of a domicile of choice set out in *Winans v Attorney-General*.[49] De Villiers CJ, who delivered the majority judgment, also adopted Westlake's view to the effect that the contemplation of any event on the occurrence of which the residence would cease, would exclude the necessary intention, emphasising that Westlake's view satisfied the test of Johannes Voet's *propositum illic perpetuo morandi*.[50] Looking at the facts, there was really no way that a man like Mr Johnson, who would have gone anywhere to make a fortune (and had in fact just done that), could ever have satisfied the test put forward by Westlake. As a matter of fact, Mr Johnson must always have contemplated the possibility of a new business venture, regardless of where in the world he found himself, since he moved between continents with the greatest ease.

Stratford JA, the lone dissenting voice, stated that he did not differ from the other judges in regard to the law, but rather in regard to the inference drawn from the facts of the case.[51] It is interesting to note, though, that, whereas the majority adopted Westlake's approach to the required *animus*, Stratford JA preferred the test of *Udny v Udny*,[52] reaching the conclusion that Mr Johnson had, in fact, established his residence in New Jersey for an unlimited or indefinite period at the time of his marriage. Stratford JA emphasised that Mr Johnson's subsequent conduct (after his marriage) could not be used retrospectively to prove that he could not have intended to remain in New Jersey.[53] He also stressed that the ambition to better oneself should not be allowed to frustrate the acquisition of a domicile of choice:

> "If much importance is attached to aspirations of this kind, it will be difficult to assign a domicile of choice to any emigrant of the working-man type, for in the case of each of them we must assume a ready willingness to leave one locality for another which offers better and more remunerative employment. A state of mind of that kind . . . should not . . . avoid the acquisition of a domicile."[54]

The significance of the minority judgment is that the test in *Udny v Udny*[55] presented a more workable criterion in Mr Johnson's case, in the sense that he intended remaining in New Jersey *indefinitely*, than Westlake's test which was adopted in the majority judgment.

Thus, whereas there would still have been room for creative judicial interpretation in regard to "permanent" or "indefinite", Westlake's statement removed any possibility that may have existed to interpret "permanent" or "indefinite" in accordance with changing circumstances. Westlake's interpretation of the required intention has been consistently applied in South African courts for more than half a century.[56] The acceptance of the conception that Westlake's

---

49 [1904] AC 286 292.
50 *Johnson v Johnson* 1931 AD 391 398.
51 408.
52 (1869) LR 1 Sc & Div 441 458: see *supra*.
53 *Johnson v Johnson* 1931 AD 391 410–411.
54 *Ibid* 410.
55 (1869) LR 1 Sc & Div 441 458.
56 Since its adoption in *Johnson v Johnson* 1931 AD 391 it was applied in, amongst other cases, *Moncrieff v Moncrieff* 1934 CPD 208; *Carvalho v Carvalho* 1936 SR 219; *Ex Parte*

continued on next page

view of the *animus* requirement was in keeping with the kind of intention required by the Roman-Dutch authorities[57] resulted in a reluctance by the courts to deviate from it.

Three subsequent cases that stand out with regard to the interpretation of the *animus* requirement in South African law are *Ley v Ley's Executors*,[58] *Smith v Smith*[59] and *Eilon v Eilon*[60] (especially the minority judgment).

3 1 2 Ley v Ley's Executors[61]

This case concerned the life story of a stone mason who was born in England, but came to South Africa and worked wherever he was able to find employment. When he arrived in South Africa at first (he was unmarried at the time), he was mostly seen in Cape Town, where he had a postal address, and had told witnesses that he intended to remain in the country. A few years after his marriage, he settled in Pretoria. When he died, a dispute arose between the executors of his estate and his wife with regard to the question whether the marriage had been in or out of community of property. The question turned on the issue of domicile: had he been domiciled in England at the time of the marriage, the marriage would have been out of community of property; had he been domiciled in the Cape Colony at the time of the marriage, the marriage would have been in community of property.[62] Whereas the trial court decided that Mr Ley was not domiciled in the Cape at the time of his marriage, the Appellate Division decided that he had acquired a domicile of choice in the Cape at that time. Since this case concerned a pre-Union domicile,[63] it had to be established that Mr Ley was indeed domiciled in the Cape Colony at that time.

The trial court judge said that, although Mr Ley had decided to make his future home somewhere in South Africa, it had not been shown that he had chosen the Cape Colony to the *reasonable exclusion of the other colonies south of the*

Ralston's Estate 1937 TPD 46; *Lewis v Lewis* 1939 WLD 140; *O'Mant v O'Mant* 1947 1 SA 26 (W); *Nicol v Nicol* 1948 2 SA 613 (C); *Ley v Ley's Executors* 1951 3 SA 186 (D); *Smith v Smith* 1952 4 SA 750 (O); *Senior v Commissioner of Inland Revenue* 1960 1 SA 709 (A); *Eilon v Eilon* 1965 1 SA 703 (AD); *Howard v Howard* 1966 2 SA 718 (R).

57 See eg *Webber v Webber* 1915 AD 239 242:
"The principles regulating domicile, founded as they are upon the civil law, have been developed in England and in Holland upon very similar lines . . ." and further (with regard to the *animus* requirement specifically) 243: ". . . the Roman-Dutch law, as administered by our Courts, is in substantial agreement with the law of England." See also *Johnson v Johnson* 1931 AD 391 398 where De Villiers CJ said that the statement in *Winans v Attorney-General* [1904] AC 287 292, as well as the statement by Westlake (*op cit* par 264) was "in accord with our law as laid down by *Voet* (5 1 98) and others, who require a *propositum illic perpetuo morandi*". Cf also *Eilon v Eilon* 1965 1 SA 703 (AD) 720 ff.

58 1951 3 SA 186 (A).

59 1952 4 SA 750 (O).

60 1965 1 SA 703 (A).

61 1951 3 SA 186 (A).

62 An application of the choice-of-law rule that the patrimonial consequences of a marriage, concluded without an antenuptial agreement, must be determined by the law of the husband's domicile when the marriage was entered into (the *lex domicilii matrimonii*): see Edwards *op cit* par 441.

63 The couple were married in 1905.

Limpopo. Thus his intention fell short of the requirement set by Westlake.[64] However, Centlivres CJ, who delivered the unanimous judgment of the Appellate Division, thought that the trial court judge had experienced difficulty in applying Westlake's criterion, "excludes all contemplation", as adopted in *Johnson v Johnson*.[65] Centlivres CJ then proceeded to explain what this phrase was intended to mean:

> "[I]t means that if the state of mind of the *de cujus* is something like this, 'I may settle here permanently, and anyhow I'll stay for a time; but perhaps I'll move to another country' the intention required to establish a domicile is not present. But if his state of mind is like this, 'I shall settle here', that is enough, even though it is not proved that if he had been asked, 'will you never move elsewhere?' he might not have said something like, 'Well, never is a long day. Who knows? I might move if I change my mind or if circumstances were to change.' Any doubt actually present in his mind as to whether he will move or not will according to *Westlake's* statement exclude the intention to settle permanently, but the possibility that, if the idea of a move in the future had been suggested to him, he might not at once have scouted it does not amount to contemplation of an event on which the residence would cease. It is only the former that has to be disproved by the person alleging a change of domicile."[66]

From this *dictum* it is clear that Centlivres CJ had in mind an intention to settle in a place for the foreseeable future, without any doubt about whether the *propositus* would remain. Therefore the required *animus* will be defeated only by *genuine doubt* about the permanence of the *propositus*'s stay.[67] This interpretation qualifies that of Westlake in regard to the phrase *any event*: this phrase refers to the contemplation of an event that will not necessarily occur, but which is definitely contemplated by the *propositus*.

3 1 3 Smith v Smith[68]

In this case the parties had recently moved to Welkom in the Orange Free State from the Transvaal, where they had originally established their matrimonial home. The move to Welkom was prompted by better terms of employment, the husband accepting work as an electrician on a mine. Shortly after their move, the wife instituted an action for divorce and the question of jurisdiction arose. It had to be decided whether the husband had acquired a new domicile of choice in

---

64 *Ley v Ley's Executors* 1951 3 SA 186 (A) 190.

65 1931 AD 391 398.

66 *Ley v Ley's Executors* 1951 3 SA 186 (A) 195A–C, quoted with approval in *Senior v Commissioner of Inland Revenue* 1960 1 SA 709 (A) 714B–D and *Howard v Howard* 1966 2 SA 719 (R) 721E–H. In support Centlivres CJ referred to the following *dictum* from the English case *Attorney-General v Pottinger* (1861) 30 LJ Ex 284 292: "But is it to be said that a contingent intention of that kind defeats the intention which is necessary to accompany the *factum* in order to establish a domicile? Most assuredly not. There is not a man who has not contingent intentions to do something that would be very much to his benefit if the occasion arises. But if every such intention or expression of opinion prevented a man having a fixed domicile, no man would ever have a domicile except his domicile of origin."

67 At the time Pollak expressed the hope that the *dicta* on the nature of the *animus* requirement in *Ley* would lead to a more realistic approach: see "Conflict of laws" 1951 *ASSAL* 282 283; Kahn "Domicile: an important decision" 1951 *SALJ* 360 361. However, this was not to be: see the discussion of the majority judgment in *Eilon v Eilon* 1965 1 SA 703 (A) *infra*.

68 1952 4 SA 750 (O).

Welkom or not. In deciding that there was insufficient proof that a domicile of choice had been acquired in Welkom, Horwitz AJP referred to the interpretation of the *animus* requirement in *Ley v Ley's Executors*,[69] and concluded that it boiled down to

> "the necessity of proving a final and deliberate intention to abandon a domicile of origin and to settle in another country".[70]

This is in line with the *animus* requirement, as formulated in *Winans v Attorney-General*,[71] and may be seen as a vote in favour of a realistic positive formulation of the requisite *animus*. The judge also referred to the English case of *Gulbenkian v Gulbenkian*[72] in which it was stated that the intention should be *unlimited in period*, but not *irrevocable in character*.[73]

3 1 4 Eilon v Eilon[74]

This case concerned, amongst other issues, the question of divorce jurisdiction. The wife had instituted the action and since at that stage a married woman still followed the domicile of her husband in terms of the domicile of dependence,[75] the jurisdiction of the Cape Provincial Division depended on whether the husband was domiciled in the court's area of jurisdiction at the commencement of the proceedings.[76] Mr Eilon and his wife were Israeli citizens who came to South Africa as teachers of Hebrew under the aegis of the Jewish Agency in Israel. The aim of this agency was to send these teachers all over the world as missionaries for limited periods. Thus the Eilons were sent to South Africa for an initial period of two-and-a-half years in terms of their contract of employment. At their request, their contracts were extended for a further two years, but problems arose when they requested that their contracts be extended for another two years. It seems that their contracts were renewed for another two years, yet Mr Eilon, probably sensing that yet a further extension would not be granted (and was, in fact, not granted) by the Jewish Agency, tried to secure other employment in South Africa after the last extension expired. He accepted a position in Johannesburg, but his appointment was summarily cancelled even before he commenced duties and he returned to Israel. The question, therefore, was whether Mr Eilon had formed the intention to remain permanently in South Africa, despite the fact that the Jewish Agency could have terminated his contract and recalled him to Israel. Relevant facts that were placed before the court included the following: that the Eilons held fixed property in Israel, but none in South Africa; that Mr Eilon had retained his Israeli citizenship (although he had applied for permanent residence in South Africa); that Mr Eilon had family relations in Israel; that abandonment of his Israeli domicile would have postulated a disloyalty to the ideals of Zionism and that he did, in fact, return to Israel when his contract was terminated. Although a person's moral standards can hardly

69 1951 3 SA 186 (AD), see *supra*.
70 *Smith v Smith* 1952 4 SA 750 (O) 754.
71 [1904] AC 287 292.
72 [1937] 4 All ER 618.
73 627.
74 1965 1 SA 703 (A).
75 The wife's domicile of dependence was abolished in 1992: s 1(1) of the Domicile Act 3 of 1992.
76 S 6 of the Matrimonial Affairs Act 37 of 1953.

affect the acquisition of a domicile, the fact that the divorce proceedings came about as a result of Mr Eilon's adulterous relationship with another woman, certainly reflected badly on his Zionist convictions. Rumpff JA indicated that, as a result of Mr Eilon's alleged immoral conduct, his co-religionists had made it impossible for him to acquire a teaching position in South Africa.[77]

On the facts before them the majority of the judges (Potgieter AJA, Steyn CJ and Wessels JA) decided that Mr Eilon had not acquired a domicile of choice in South Africa, whereas the minority (Rumpff JA and Williamson JA) were of the opinion that the respondent had in fact acquired a domicile in South Africa. However, the division between the majority and minority did not relate purely to a difference as regards the inference drawn from the facts: it went to the principles applied in South African law at that stage to determine whether a person had formed the requisite *animus* for the acquisition of a domicile of choice. Broadly speaking, the majority followed the approach adopted in South Africa since *Johnson v Johnson*,[78] which was firmly based on English law as enunciated by Westlake,[79] while the minority rejected Westlake's approach. The judgments of Rumpff JA and Williamson JA (the minority) and of Potgieter AJA (who delivered the majority judgment) make interesting reading.

In a short judgment which ran only to one page, Rumpff JA expressed his sentiments clearly:

> "In my view *Westlake* and the English cases referred to are best left alone. It is sufficient to refer to our own – albeit somewhat ancient – author Vromans . . . Like our other old writers he may be ancient in regard to time but not necessarily in regard to outlook."[80]

In his interpretation of the requisite *animus* he stated that the intention to settle indefinitely need not be accompanied by a desire to turn one's back on the old country or to sever all connections with that country or a desire never to return there. Thus a Zionist could have his domicile in another country, yet retain his spiritual bonds with Israel.

Williamson JA delivered a more detailed judgment. He took the trial judge (Corbett J) to task for relying on De Villiers CJ's exposition of the principles relating to the acquisition of a domicile in *Johnson v Johnson*.[81] It will be remembered that De Villiers CJ was of the opinion that Westlake's view with regard to the requisite *animus* was in agreement with the Roman-Dutch authorities.[82] According to Williamson JA, reference to Johannes Voet[83] indicated that the requisite *animus manendi* or *morandi* was not excluded on the basis of "any contemplation of a possible move".[84] To his mind Roman-Dutch law had never adopted such a rigid approach to the *animus* requirement as was the case in English law, since

77 *Eilon v Eilon* 1965 (1) SA 703 (A) 704H.
78 1931 AD 391.
79 Discussed *supra*.
80 *Eilon v Eilon* 1965 (1) SA 703 (A) 704E–F.
81 1931 AD 391.
82 See discussion of *Johnson v Johnson* 1931 AD 391 *supra*.
83 *Commentarius ad Pandectas* 5 1 92 and 94: see *Eilon v Eilon* 1965 1 SA 703 (A) 706E.
84 *Eilon v Eilon* 1965 1 SA 703 (A) 706E.

> "it is not quite correct to call the intention required by English law an *animus manendi*; it is an *animus semper manendi* . . . it needs the will to 'live and die' in that country".[85]

The judge noted that the very strict *animus* requirement enunciated by Westlake in the wake of *Winans v Attorney-General*,[86] was not received into American law, a legal system which, at that stage, followed the English principles of the conflict of laws very closely.[87] He also mentioned the fact that there had been some degree of deviation from Westlake's strict approach by English judges. In the English case of *Gulbenkian v Gulbenkian*,[88] quoted in *Smith v Smith*,[89] it was stressed that the intention need not be irrevocable in character.[90] This was in accordance with the more lenient way in which the required intention was approached in the seventh edition of Dicey's work on the *Conflict of Laws* where the author said that, as long as the *propositus* did not *actually contemplate* moving, it was immaterial that he might have contemplated it.[91] Williamson JA came to the conclusion that Mr Eilon had actually formed the intention to reside permanently in South Africa at the stage when divorce proceedings were commenced by his wife; Mr Eilon returned to Israel only because he could not find a position in South Africa. In his view the enquiry did not involve a "scrupulous and solicitous investigation as to whether perhaps in the future he might not in certain circumstances decide to remove his permanent home to Israel".[92]

Potgieter AJA, in handing down the majority judgment, did not pursue the question whether English law, and more specifically Westlake's exposition of the requisite *animus*, was reconcilable with the principles of Roman-Dutch law in regard to a domicile of choice. However, the fact that he adopted the views of De Villiers CJ in *Johnson v Johnson*,[93] seems to indicate that he did not seriously question the stance taken by De Villiers CJ that the English law was in harmony with the views of our Roman-Dutch authorities. His judgment was nevertheless not devoid of innovative reasoning in this respect. According to Potgieter AJA, "excludes all contemplation" could never have meant that the *propositus* must have excluded from his mind "all possibility that in future he might leave the country".[94] With reference to the views of Centlivres CJ in *Ley v Ley's Executors*,[95] Westlake's formulation of the *animus* requirement was clarified to a certain extent:

> "A contemplation of any certain or foreseeable future event on the occurrence of which residence in that country would cease, excludes such an intention. If he entertains any doubt as to whether he will remain or not, intention to settle permanently is likewise excluded. That appears to be in accordance with our common law."[96].

---

85 707.
86 [1904] AC 287 292: see *supra*.
87 *Eilon v Eilon* 1965 1 SA 703 (A) 708F:
"It is interesting to note that the legal system which most closely follows the English principles of Private International Law, *viz*. the American Law, does not seem to have followed that law in its apparent deviation about the time of the *Winans* case."
88 [1937] 4 All ER 618.
89 1952 4 SA 750 (O) 754G.
90 [1937] 4 All ER 618 627.
91 96, quoted 707 of the report (*Eilon v Eilon* 1965 1 SA 703 (A)).
92 709C.
93 1931 AD 391: discussed *supra*.
94 *Eilon v Eilon* 1965 1 SA 703 (A) 720C–D.
95 1951 3 SA 186 (A): discussed *supra*.
96 *Eilon v Eilon* 1965 1 SA 703 (A) 721A–B.

This "gloss" on Westlake's "excludes all contemplation of any event" certainly makes for a more realistic interpretation of the *animus* element. In terms of Potgieter AJA's interpretation only a real doubt about the permanency of the *propositus*'s residence would exclude the intention to remain permanently. Thus *contemplation* relates to a *certain or foreseeable future event* and *contemplation* must be interpreted as *actual contemplation*. The judge decided that Mr Eilon must have entertained some doubt about the permanence of his stay in South Africa; he might actually have "contemplated that he would at some foreseeable future date return to Israel".[97]

Eilon's case marks the end of an era, for this case represents the culmination of the common-law development of the *animus* requirement in South African law which preceded the statutory reform of domicile. Sadly though, the cases discussed above bear testimony to the reluctance to reform the *animus* required for a domicile of choice. The interpretation of the requisite *animus* by the English and Scottish courts was accepted and applied, often without question, by South African courts. And even though potent reasons may be advanced for our courts' reliance on English law in this regard, such as the fact that South Africa was part of the British Empire, the fact that – especially after Union in 1910 – judicial criticism of the very strict *animus* requirement went unheeded for so many years, can hardly be justified. It was only in 1992 that the legislator intervened: the Domicile Act[98] now clearly states that the intention to acquire a domicile of choice must be to settle in a place for an indefinite period.[99] It is against this background of case law discussed above that the interpretation of "indefinite" will be investigated in the second part of this contribution.

to be continued

The ideas . . . of freedom, rationality and equality possess their meaning in connection with other meanings in our culture, with meanings to which they have come to be related such as those of human rights, fairness and entitlement, and meanings from which they have become importantly distinct such as exploitation, domination and hierarchy. The ideas with which we construct our ideal theories are thus already ideas which receive their definition within a particular context. They have developed over time, through the experience of the culture and in association with the rest of its moral vocabulary.

Georgia Warnke Justice and interpretation *4*.

97 723E.
98 3 of 1992.
99 S 1(2).

AANTEKENINGE

DIE STRAFHOF AS PUBLIEKE RUIMTE: PSIGOLOGIESE SKULD EN POLITIEKE DIALOOG

1 Op pad na 'n konstitusionele strafreg

Die demokratiese transformasie van die Suid-Afrikaanse samelewing het reeds 'n ingrypende en soms kontroversiële invloed op die strafregpleging gehad. Verskeie hervormings is in 'n baie kort tydjie aan die prosesreg aangebring in 'n poging om die strafprosesreg met 'n kultuur van menseregte te versoen. Hierdie hervormings dek 'n wye veld en strek vanaf die polisie se ondersoekmetodes tot by die vonnis wat 'n veroordeelde beskuldigde uiteindelik moet uitdien (sien byvoorbeeld *S v Mphala* 1998 1 SASV 470 (HHA); *S v Zuma* 1995 1 SASV 568 (KH); *S v Smile* 1998 1 SASV 658 (HHA); *S v Hayes* 1998 1 SASV 625 (OPA); *S v Hassen* 1997 1 SASV 247 (T); *S v Makwanyane* 1994 2 SASV 158 (KH); *Van Biljon v Minister of Correctional Services* 1997 2 SASV 50 (K)).

In merkbare teenstelling met die ingrypende hervorming van die strafprosesreg het die demokratisering van die Suid-Afrikaanse samelewing tot op hede weinig invloed op die substantiewe strafreg gehad. So byvoorbeeld is die konstitusionaliteit van spesifieke misdade slegs in enkele gevalle reeds bevraagteken (sien oa *S v Kampher* 1997 2 SASV 418 (K); *S v Lawrence; S v Negal; S v Solberg* 1997 2 SASV 540 (KH); *Osman v Attorney-General of the Transvaal* 1998 1 SASV 28 (T)).

Die gebrek aan transformasie van die substantiewe strafreg is selfs meer akuut in die geval van die algemene beginsels van strafregtelike aanspreeklikheid. Ten spyte van verskeie oproepe daartoe (Labuschagne "Strafregtelike menseregte" 1987 *TRW* 115; Labuschagne "Strafregtelike aanspreeklikheid en vrywillige dronkenskap: is die voorrasionele steeds in beheer?" 1996 *SAS* 322; Le Roux "Obedience to illegal orders: a closer look at South Africa's post-apartheid response" 1996 *Obiter* 247; Le Roux "'n Les uit Eden: onbillike lokvalle en strafregtelike skuld" 1997 *SAS* 3) is hierdie beginsels hoegenaamd nog nie by die demokratiseringsproses betrek nie. Die gebrek aan transformasie van die substantiewe strafreg kom vreemd voor, veral in die lig van die feit dat die Konstitusionele Hof reeds by meer as een geleentheid verklaar het dat die reg op 'n billike verhoor – wat tot dusver die katalisator vir die transformasie van die strafprosesreg gevorm het – ook 'n reg op *substantiewe* geregtigheid insluit (*S v Zuma* 1995 1 SASV 568 (KH) 579D–H; *S v Ntuli* 1996 1 SASV 94 (KH) 96C–F). Selfs al aanvaar 'n mens die enger interpretasie van hierdie uitlatings wat in *S v Coetzee* 1997 1 SASV 379 (KH) voorgehou is, bly die gedagte van 'n konstitusionele basis vir die substantiewe strafreg behoue, in die mate waarin daar in *Coetzee supra* beslis is dat skuld as voorwaarde vir strafregtelike aanspreeklikheid in artikel 11 van die tussentydse Grondwet verskans is (414D–415D; 438D–445B).

Hierdie kort aantekening is 'n poging om die Konstitusionele Hof se suggestie van 'n menseregtelike strafreg op te neem en uit te bou. As eerste stap in die rigting kritiseer ek die houvas wat die sogenaamde psigologiese skuldbegrip steeds op die strafregtelike verbeelding in Suid-Afrika uitoefen. My kritiek begin met die argument dat die psigologiese skuldbegrip, ten spyte van strafregwetenskaplike retoriek en vele verklarings tot die teendeel (soos dié in *S v Ngubane* 1985 3 SA 677 (A) 687E), nie in die positiewe reg toegepas word nie. In die lig hiervan argumenteer ek verder, met verwysing na Hannah Arendt se siening van die publieke sfeer, dat die voortgesette lippediens aan die psigologiese dimensie van skuld in die weg staan van die noodsaaklike demokratisering van die Suid-Afrikaanse strafreg. My argument stuur uiteindelik af op die stelling dat die psigologiese skuldbegrip die strafhof in 'n onmenslike ruimte omskep en daarom onkonstitusioneel is.

2 Die psigologiese skuldbegrip en die positiewe reg

Die Suid-Afrikaanse strafreg is die afgelope paar dekades oorheers deur 'n debat tussen ondersteuners van 'n normatiewe skuldbegrip aan die een kant en die ondersteuners van 'n psigologiese skuldbegrip aan die ander (Van Oosten "The psychological fault concept versus the normative fault concept; quo vadis the South African criminal law?" 1995 *THRHR* 361–378; 568–584). Vandag word algemeen aanvaar dat die voorstanders van die psigologiese skuldbegrip die oorhand in die debat verkry het. Volgens hierdie siening is die psigologiese skuldbegrip gedurende die 1970's en 1980's in 'n reeks uitsprake in die positiewe reg aanvaar en sedertdien konsekwent toegepas (*S v Ntuli* 1975 1 SA 429 (A); *S v De Blom* 1977 3 SA 513 (A); *S v Chretien* 1981 1 SA 1097 (A); *S v Bailey* 1982 3 SA 772 (A); *S v Ngubane* 1985 3 SA 677 (A) en *S v Campher* 1987 1 SA 940 (A)). Vir baie beteken die onlangse stabiliteit van die Suid-Afrikaanse strafreg dat die akademiese gekibbel oor die normatiewe aard van skuld weinig kan bydra tot die verdere ontwikkeling van ons strafreg.

Hierdie siening oor die stand van sake in die debat rondom die Suid-Afrikaanse skuldbegrip is gevaarlik simplisties. In die eerste plek het die onlangse demokratiese transformasie van die Suid-Afrikaanse samelewing nuwe lewe in die ou debat oor strafregtelike skuld geblaas (sien Snyman "Die normatiewe skuldbegrip in die strafreg – 'n antwoord" 1996 *THRHR* 638 643; *S v Coetzee* 1997 1 SASV 379 (KH) 438D–445B). In die tweede plek is die psigologiese skuldbegrip nog nooit in die positiewe reg aanvaar as logiese vertrekpunt vir die vasstelling van skuld nie. Die psigologiese inhoud wat gewoonlik aan opset gegee word, kan nie in isolasie van die voortgesette normatiewe benadering tot nalatigheid beskou word nie. Sodra die positiewe reg in historiese perspektief beskou word, blyk dit gou dat 'n bose gesindheid of *mens rea*, selfs in die geval van sogenaamde opsetsmisdade, nie in die positiewe reg beskou word as *voldoende* grond vir strafregtelike verwyt nie. Ten einde oorhaastige veralgemenings te voorkom, is dit nodig om nog eens kortliks bestek op te neem van die debat oor die aard van skuld in die Suid-Afrikaanse strafreg.

2 1 Die pragmatiese benadering tot skuld in die positiewe reg

Die debat oor die aard van skuld in die Suid-Afrikaanse strafreg omvat 'n verskeidenheid posisies. Gerieflikheidshalwe kan hierdie posisies losweg in drie groepe verdeel word. In die eerste plek word skuld soms beskou as die bose gesindheid waarmee 'n beskuldigde persoon 'n onreg sou gepleeg het. Die bose

gesindheid kan bestaan uit die bewustelike (opsetlike) of onagsame (nalatige) pleeg van 'n onreg. Om dié rede kan opset en nalatigheid nie oorvleuel nie. Dit is van groot belang dat skuld hier *in beginsel* vasgestel word deur die oënskynlik objektiewe beskrywing van die gesindheid waarmee die beskuldigde persoon gehandel het. Om dié rede word daar om die beurt na hierdie benadering tot skuld verwys as die psigologiese of beskrywende skuldbegrip. Die psigologiese skuldbegrip is konsekwent nie-normatief van aard. Die klassieke en neo-klassieke Duitse strafreg is die inspirasie vir die psigologiese skuldbegrip (De Wet en Swanepoel *Strafreg* (1985) 103–104; 137; 156–159; Labuschagne "Vonnisbespreking: S v De Blom 1977 (3) SA 513 (A)" 1977 *De Jure* 386 387).

In die tweede plek is daar diegene wat skuld beskou as 'n verwyt wat ooreenkomstig 'n objektiewe verwagbaarheidskriterium oor die wederregtelike gedrag van die beskuldigde uitgespreek word. Verskillende verwagbaarheidskriteria is al voorgestel maar die gesindheid van die beskuldigde is nêrens 'n bepalende faktor nie. Dit is kenmerkend dat skuld hier *in beginsel* vasgestel word met 'n suiwer verwagbaarheidstoets. Daarom die naam "normatiewe skuldbegrip". Die normatiewe skuldbegrip is konsekwent normatief van aard. Die moderne Duitse strafregwetenskap dien as inspirasie vir hierdie benadering tot skuld (Snyman *Strafreg* (1999) 148–155).

Die derde posisie verskil van die eerste twee omdat nóg gesindheid nóg verwagbaarheid *in beginsel* as basis van skuld aanvaar word. Pragmatisme, daarenteen, is aan die orde van die dag. Die gesindheid van die beskuldigde word as vertrekpunt geneem maar dikwels om pragmatiese oorwegings aan 'n verwagbaarheidskriterium ondergeskik gestel. Die normatiewe beoordeling van die beskuldigde se gesindheid geskied deur die toepassing van 'n verskoningsleerstuk waarvolgens die *mens rea* van die beskuldigde, waar nodig, gedeeltelik of selfs heeltemal verskoon word. Daarom die naam "pragmatiese skuldbegrip". Die pragmatiese skuldbegrip is inkonsekwent normatief van aard. Die Anglo-Amerikaanse strafreg dien as inspirasie vir die pragmatiese skuldbegrip (Burchell en Milton *Priniciples of criminal law* (1997) 290–295).

Sover, in kort, die akademiese debat rondom die Suid-Afrikaanse skuldbegrip. Die benadering tot skuld wat tans in die positiewe reg gevolg word, kan nie as suiwer psigologies of normatief beskryf word nie. Ten spyte van lippediens tot die teendeel (*S v Chretien* 1981 1 SA 1097 (A) 1105F–G) het die strafreg nog nie wesentlik van die pragmatiese karakter wat dit gedurende die eerste helfte van die eeu onder invloed van die Engelse strafreg gehad het, wegbeweeg nie. Soos in die pragmatiese era word die gesindheid van die beskuldigde of *mens rea* as vertrekpunt geneem in die ondersoek na skuld. Ten spyte daarvan word skuld, nes in die pragmatiese era, steeds om pragmatiese redes nie sonder meer op *mens rea* gevestig nie.

Die pragmatiese benadering wat in die positiewe reg gevolg word, tree duidelik na vore in daardie gevalle waar *mens rea* ontbreek en die skuldvraagstuk heeltemal van karakter verander en soms om pragmatiese redes aan die hand van 'n verwagbaarheidskriterium (wat nou niks meer met die beskuldigde se gesindheid te make het nie) verklaar word dat die beskuldigde steeds skuldig is. Die pragmatiese aard van hierdie gedifferensieerde benadering tot skuld word in ons reg deur die konseptuele onderskeid tussen nalatigheid en opset as skuldvorme verdoesel. 'n Mens sou hoogstens kon praat van 'n geordende pragmatisme waarin die normatiewe dimensie van skuld, op die oog af, volledig tot nalatigheid en die beskrywende dimensie daarvan, tot opset beperk is. Soos hieronder duideliker

sal blyk, is die probleem van die wisselwerking tussen en oorvleueling van opset en nalatigheid nie daarmee uitgeskakel nie. My argument is dat dieselfde pragmatiese sprong vanaf die beskrywing van 'n gesindheid na die beoordeling van gedrag plaasvind selfs wanneer daar van 'n opsetsmisdryf sprake is. Die pragmatiese sprong word dus nie alleen *tussen* opset en nalatigheid gemaak nie maar is tipies aan die proses waardeur opset in die positiewe reg vasgestel word.

Een manier om die hof se huidige benadering tot skuld te verstaan is om, net soos in die geval van straftoemeting, te onderskei tussen die *grond* van strafregtelike verwyt en die bepaling van die *omvang* van daardie verwyt (Hart *Punishment and responsibility* (1968) 8–13; Van der Merwe "Retribution in criminal law" 1980 *Obiter* 43). Selfs in die moderne Suid-Afrikaanse strafreg is die afwyking van die redelike mens-standaard (die verwagbaarheidskriterium wat tans in die positiewe reg aanvaar word) die enigste *grond* vir die toeskryf van strafregtelike skuld. Dit is so selfs in die geval van opsetsmisdade. Die bekende en prominente onderskeid tussen nalatigheid en opset is hiervolgens slegs relevant by die bepaling van die *omvang* van die skuldverwyt wat teenoor 'n beskuldigde persoon uitgespreek word. Dit sou beteken dat opset in die Suid-Afrikaanse strafreg dieselfde funksie vervul as vergelding in Hart se teorie van straf (Hart *Punishment and responsibility* (1968) 8–13). Anders gestel: opset ('n bose gesindheid) is vir baie misdrywe in die Suid-Afrikaanse strafreg 'n *noodsaaklike* voorwaarde vir verwyt. Dit is ten spyte daarvan nooit *voldoende* voorwaarde vir verwyt nie.

Hierdie teoretiese formulering van die hantering van die skuldvraagstuk kan vanselfsprekend nie daar gelaat word nie. Dit is tyd om die argument aan te vul met 'n ontleding van 'n aantal uitsprake uit die positiewe reg.

2 2 Nalatigheid as grond van opset

Die howe se standpunt dat nalatigheid nie 'n gesindheid is nie (*S v Ngubane* 1985 3 SA 677 (A)), maak vier permutasies van die verwantskap tussen opset en nalatigheid moontlik: (1) beide opset en nalatigheid is teenwoordig; (2) nalatigheid is teenwoordig maar opset ontbreek; (3) opset is teenwoordig maar nalatigheid ontbreek, en (4) beide opset en nalatigheid is afwesig. Dit is slegs in die geval van die eerste twee moontlikhede dat die skuldverwyt in die moderne Suid-Afrikaanse strafreg uitgespreek word.

Voordat ek tot 'n bespreking van die vier permutasies oorgaan, moet 'n belangrike kwalifikasie eers afgehandel word. Die redelike mens-standaard is bloot een verwagbaarheidskriterium. Dit moet nie as die enigste of die som-totaal van kriteria vir verwytbaarheid beskou word nie. Soos Whiting, De Wet en Swanepoel, en Snyman almal argumenteer, het die redelike mens-standaard in elk geval nie noodwendig iets met die persoonlike verwytbaarheid van die beskuldigde persoon te doen nie. (Whiting "Negligence, fault and criminal liability" 1991 *SALJ* 431; De Wet en Swanepoel *Strafreg* (1985) 156–163; Snyman *Strafreg* (1992) 222) Om die argument so eenvoudig moontlik te hou, aanvaar ek egter gewoon die howe se gebruik om die redelike mens-standaard (nalatigheid) as kriterium van verwytbaarheid te gebruik. My doel is hier bloot om die normatiewe aard van opset te belig en nie om 'n vaste inhoud aan die normatiewe dimensie van skuld te gee nie.

Die uitspraak in *S v Ngubane* 1985 3 SA 677 (A) is 'n gerieflike aanknopingspunt vir die bespreking van die verwantskap tussen opset en nalatigheid. In dié uitspraak is 'n beskuldigde as gevolg van 'n prosedurele aangeleentheid skuldig

bevind aan strafbare manslag ten spyte daarvan dat opset, en dus moord, deur die staat bewys is. Deur Ngubane skuldig te bevind, het die hof bevestig dat opset in die gewone loop van sake ook nalatigheid aan die kant van die beskuldigde veronderstel. Die uitspraak in *Ngubane* is 'n voorbeeld van die gelyktydige teenwoordigheid van opset en nalatigheid waarna in die eerste permutasie verwys is. Soos in die meeste ander gevalle waar opset en nalatigheid gesamentlik aanwesig is, sal 'n skuldigbevinding aan die opsetsmisdaad volg. Ngubane self sou in ander omstandighede aan moord skuldig bevind gewees het.

Die aanwesigheid van nalatigheid by gebrek aan opset (die tweede permutasie hierbo) lei ook tot die uitspreek van die skuldverwyt soos die uitsprake in *S v De Bruyn* 1968 4 SA 498 (A), *S v Ntuli* 1975 1 SA 429 (A) en *S v De Blom* 1977 SA 513 (A) aantoon.

Die uitspraak in *S v Van As* 1976 2 SA 921 (A) is 'n bekende voorbeeld van 'n feitestel waar beide opset en nalatigheid met betrekking tot die doodslag van 'n medemens ontbreek het (permutasie vier). Die beskuldigde het, soos verwag kan word, verwyt oor die doodslag vrygespring. In al drie bogenoemde situasies het aanspreeklikheid slegs gevolg waar die dader nalatig was, ongeag daarvan of hy opsetlik gehandel het of nie.

Hierbo is beweer dat nalatigheid altyd 'n *noodsaaklike* voorwaarde vir strafregtelike verwyt is. Die sake wat tot dusver bespreek is, dui almal in hierdie rigting. Daar bly egter nog die derde permutasie waarna hierbo verwys is (opset is aanwesig maar nalatigheid ontbreek). Slegs indien hierdie permutasie korrek aangetoon is, sou verklaar kan word dat 'n bose gesindheid of *mens rea* nooit in die positiewe reg voldoende grond vir strafregtelike verwyt is nie.

Doodslag onder dwang kan beskou word as die handboekvoorbeeld van 'n situasie waar opset teenwoordig is maar nalatigheid mag ontbreek. Die toeskryf van die skuldverwyt aan 'n beskuldigde in hierdie omstandighede hou daarom die sleutel tot die skuldvraagstuk in die Suid-Afrikaanse reg. Deur die probleem op hierdie wyse te formuleer, word ook aanvaar dat noodtoestand nooit die doodslag van 'n ander mens kan regverdig nie.

Tot en met die uitspraak in *S v Bailey* 1982 3 SA 772 (A) was die regsposisie in die geval van doodslag onder dwang gereguleer deur die verskoningsleerstuk. Dit beteken dat die pragmatiese skuldbegrip algemeen toegepas is. Volgens die verskoningsleerstuk kon die opsetlike doodslag – aanvanklik slegs beskou as die doelbewuste doodslag – van 'n ander mens in sommige gevalle verskoon word. In welke mate die opsetlike doodslag verskoonbaar was, is bepaal deur die aard en omvang van die dwang waaronder die beskuldigde gehandel het. In gevalle waar die *mens rea* van die dader wat die doodslag vergesel het slegs gedeeltelik verskoonbaar was, is die aanklag van moord gereduseer tot strafbare manslag (*R v Hercules* 1954 3 SA 826 (A) 832G). Waar die *mens rea* van die dader wat die doodslag vergesel heeltemal verskoonbaar was, is die aanklag van moord as 't ware gereduseer tot 'n vryspraak (*S v Goliath* 1972 3 SA 1 (A) 36G).

Die vasstelling van skuld ingevolge die verskoningsleerstuk was eksplisiet maar onkonsekwent normatief van aard. Die opset of gesindheid van die beskuldigde is nooit beskou as die bepalende faktor van haar skuld nie. Skuld het berus op die objektiewe verwytbaarheid van die beskuldigde se gedrag in die lig van die omstandighede waarin haar bose gesindheid gevorm is. Die norm van verwagbaarheid was die gedrag van die redelike man in soortgelyke omstandighede (*S v Goliath supra* 11D).

Voor *Bailey* is op sterkte van die verskoningsleerstuk dus onderskei tussen drie tipes skuld. In die geval van opset met nalatigheid (die sogenaamde hibriede geval) is die aanklag van moord na strafbare manslag gereduseer. In die geval van nalatigheid sonder opset is die beskuldigde aan strafbare manslag skuldig bevind. In die geval van opset sonder nalatigheid is die beskuldigde vrygespreek. 'n Skuldigbevinding het dus nie gevolg in alle gevalle waar opset of 'n bose gesindheid aanwesig was nie. Daarenteen het 'n vryspraak gevolg in alle gevalle waar nalatigheid nie aanwesig was nie. Dit was duidelik die beskuldigde se gedragsafwyking (nalatigheid) – en nie haar gesindheid (opset) nie – wat in die toepassing van die verskoningsleerstuk beskou is as die grond vir die beskuldigde se skuld.

Die verskoningsleerstuk is gedurende die 1980's by drie geleenthede uitdruklik deur die howe verwerp – in *S v Chretien* in geval van vrywillige dronkenskap, in *S v Campher* in geval van provokasie en in *S v Bailey* in geval van doodslag onder dwang. Die opmerkings in *Bailey* oor die verskoningsleerstuk is van besondere belang. Verskeie skrywers interpreteer *Bailey* as 'n verwerping van die normatiewe benadering wat in die verskoningsleerstuk opgesluit is en die vestiging van 'n suiwer psigologiese of beskrywende benadering tot skuld. (Mare "Noodtoestand as verweer teen 'n aanklag van moord" 1993 *SAS* 165 178). Op sterkte van hierdie interpretasie is pogings reeds aangewend om 'n vryspraak in vergelykbare omstandighede langs 'n ander weg – byvoorbeeld deur die skep van 'n regverdigingsgrond – te bewerkstelling (Mare 178–184).

Daar kan geen twyfel bestaan dat *Bailey* wel die gedeeltelike verskoningsleer, soos dit in *Hercules* toegepas is, verwerp het nie. Appélregter Jansen verklaar onomwonde:

> "Die betreklik onlangse erkenning in ons regspraak van die onderskeiding tussen kleurlose opset en opset met wederregtelikheidsbewussyn in die *Ntuli-* en *De Blom*-sake *supra* maak dit dus nodig om die sg hibriede geval in die lig van daardie onderskeiding te hersien" (799A).

Dit wil dus voorkom asof die hof by implikasie ook die leerstuk van algehele verskoning, wat in *Goliath supra* op sterkte van die uitspraak in *Hercules* ontwikkel is, verwerp het. Regter Jansen gaan voort:

> "Daar skyn weinig rede te bestaan om, strydig met ons nou-erkende beginsels, op hierdie stadium doodslag met opset met wederregtelikheidsbewussyn anders as moord te beskou en om vir doeleindes van skuldigbevinding grade van verwytbaarheid by sodanige opset te onderskei" (799B).

Daar moet egter onthou word dat regter Jansen se opmerkings gemaak is in die veronderstelling dat die dwang waaronder die beskuldigde gehandel het nie so sterk was dat 'n redelike mens ook daaronder sou geswig het nie (795H). Wat sou die posisie gewees het indien die dwang wel so sterk was dat die opsetlike doodslag – nou verstaan as doelbewuste gedrag met wederregtelikheidsbewussyn – nie nalatig plaasgevind het nie? Volgens 'n *obiter* opmerking deur regter Jansen vroeër in sy uitspraak sou die beskuldigde dan vrygespreek moes word ten spyte van sy opsetlike doodslag van die oorledene. Dit is insiggewend dat regter Jansen ter ondersteuning van hierdie opmerking met goedkeuring na die uitspraak in *Goliath* verwys:

> "[D]ie voorbehoue vraag gaan klaarblyklik van die veronderstelling uit . . . dat as 'n redelike persoon in die posisie van die respondent wel ook sou geswig het, die respondent onskuldig bevind moes gewees het. Steun vir hierdie veronderstelling kan gevind word in *S v Goliath* (*supra* te 11D–G, 25B–H) en dit moet as korrek aanvaar word" (795H).

Met hierdie sydelingse opmerking en bevestiging van *Goliath* wil dit voorkom asof regter Jansen, ten spyte van die verwerping van die gedeeltelike verskoningsleerstuk, die wese van die verskoningsleer behou. Deur te beslis dat die beskuldigde vrygespreek behoort te word, ten spyte daarvan dat hy die oorledene met 'n bose gesindheid (opset met wederregtelikheidsbewussyn) gedood het, word toegegee dat die beskuldigde se verwytbaarheid uiteindelik op 'n normatiewe gedragsbeoordeling berus. Net soos in *Goliath* bevestig die hof dus *obiter* in *Bailey* dat die beskuldigde se bose gesindheid (opset) nie altyd voldoende rede is om haar te verwyt nie.

Bailey verwerp bloot die hibriede of middelposisie wat deur die idee van gedeeltelike verskoning tot stand gebring is – dit is die verskillende grade van verwytbaarheid waarna regter Jansen afkeurend verwys. Die normatiewe idee van verwagbare gedrag en algehele verskoning bly egter behoue. Dit is insiggewend dat die regter doelbewus die beginsel van 'n normatiewe beoordeling van skuld ooplaat (799F–G). Waarmee hy skynbaar ongemaklik voel, is die logiese implikasies wat die normatiewe skuldbegrip inhou. Een hiervan sou wees dat 'n beskuldigde steeds aan 'n opsetsmisdryf skuldig bevind sou kon word ten spyte van 'n gebrek aan wederregtelikheidsbewussyn waar daardie gebrek verwytbaar is (797F–G). Regter Jansen is duidelik nie geneë om die groter klem wat op die *mens rea* van die beskuldigde geplaas word in die "nuwe benadering wat 'intention' betref" (799B) of die sogenaamde psigologiese skuldbegrip prys te gee nie.

Regter Jansen se uitspraak is daarom nie 'n afwyking van die pragmatiese benadering tot skuld nie maar bloot 'n verfyning daarvan. Die *mens rea* (nou gereserveer vir opset met wederregtelikheidsbewussyn) van die beskuldigde word as vertrekpunt geneem maar steeds, om pragmatiese redes, verskoon in gevalle soos die hipotetiese een waarna die regter verwys. Net soos die Appèlhof 'n paar jaar later in *S v Ngubane,* is die hof duidelik nie gekant teen die gedagte van die normatiewe beoordeling van skuld nie. Net soos die Appèlhof in *S v Ngubane* is regter Jansen ook nie bereid om verwagbaarheid logies as vertrekpunt in die ondersoek na skuld te neem en die voordele van die psigologiese benadering tot skuld prys te gee nie. Wat hy wel doen, is om die normatiewe en psigologiese benaderings op pragmatiese wyse ten gunste van die beskuldigde te kombineer.

Een van die besware teen die konsekwente toepassing van die psigologiese skuldbegrip is juis dat dit die omstandighede waaronder strafregtelike aanspreeklikheid opgedoen word oormatig verklein. Wat regter Jansen in effek doen, is om daardie omstandighede nog verder te verklein deur hom selektief na die normatiewe skuldbegrip te wend en te verklaar dat 'n beskuldigde soms, selfs ten spyte van haar *mens rea,* vrygespreek moet word. Die regter is bereid om die normatiewe skuldbegrip aan te wend om die omvang van strafregtelike aanspreeklikheid (soos dit deur die psigologiese skuldbegrip getrek word) verder te verklein. Hy is egter nie bereid om die gedagte van normatiewe skuld konsekwent toe te pas en so die horison van psigologies gegronde aanspreeklikheid te vergroot nie. Regter Jansen en die positiewe reg se pragmatiese skuldbegrip vorm in effek die pragmatiese deelversameling van normatiewe en psigologiese aanspreeklikheid.

Om die bespreking van opset in die positiewe reg af te sluit, gee ek kortliks die huidige stand van die pragmatiese skuldbegrip van die Suid-Afrikaanse strafreg weer. In die lig van regter Jansen se verwerping van die hibriede geval van die ouer pragmatiese benadering bevat die verskoningsleerstuk nou net twee

posisies: waar die beskuldigde opsetlik gedood het (kleurlose opset met wederregtelikheidsbewussyn) en die dwang nie so sterk was dat 'n redelike persoon sou geswig het nie, soos in *Bailey* se geval, is die beskuldigde se gedrag verwytbaar en sal sy op sterkte van haar opset aan moord skuldig bevind word. Waar die beskuldigde opsetlik gedood het maar die redelike mens ook voor die druk sou geswig het, die hipotetiese voorbeeld waarna regter Jansen in *Bailey* verwys, ontbreek verwytbare gedrag en moet die beskuldigde, ten spyte van haar bose gesindheid, vrygespreek word. Hier is opset aanwesig maar nalatigheid ontbreek. In die enigste oorblywende moontlikheid dood die beskuldigde die oorledene nalatig maar sonder opset (hetsy kleurlose opset of opset met wederregtelikheidsbewussyn) aan haar kant. In laasgenoemde geval is die beskuldigde skuldig aan strafbare manslag.

Daar is niks in die uitsprake van *Chretien* en *Campher* wat impliseer dat dieselfde nie ook in die geval van dronkenskap, provokasie of soortgelyke omstandighede geld nie. Die feit dat 'n ontoerekeningsvatbare dader nie aan strafbare manslag skuldig bevind kan word nie, beïnvloed slegs die moontlikheid van 'n skuldigbevinding ten spyte van die afwesigheid van opset (permutasies twee en vier hierbo). Dit bied daarom nie ondersteuning vir die stelling dat 'n bose gesindheid genoegsame regverdiging vir strafregtelike verwyt is nie. Omdat dit slegs in grenssituasies gebeur dat normatiewe aanspreeklikheid enger is as psigologiese aanspreeklikheid, word maklik in die illusie verval dat skuld in die Suid-Afrikaanse strafreg slegs berus op psigologiese aanspreeklikheid. Regter Jansen se uitspraak in *Bailey* het die meriete dat dit die normatiewe drumpelposisie van opset (nalatigheid vir die doeleindes van hierdie deel van die bespreking) voortdurend voor oë hou. Skuld is in die laaste instansie nie op die gesindheid van die dader gegrond nie. Dit geld sowel nalatigheid (*S v Ngubane* 686E–687G) as opset (*S v Bailey*). Binne die pragmatiese benadering tot skuld wat tans in die positiewe reg toegepas word, is nalatigheid die enigste *grond* van opset.

3 Psigologiese skuld, politieke dialoog en demokrasie: die strafverhoor as publieke ruimte

Indien aanvaar word dat nalatigheid (binne die howe se pragmatiese benadering tot skuld) in alle gevalle die grond van strafregtelike verwyt daarstel, kan die normatiewe aard van die Suid-Afrikaanse skuldbegrip nie langer ontken word nie. In die positiewe reg word nalatigheid naamlik beskou as die versuim om te voldoen aan 'n objektiewe standaard van redelik verwagbare gedrag (*S v Ngubane supra* 686E–F). Die oordrewe fokus op die gesindhede wat by skuld ter sprake is en die volgehoue lippediens aan psigologiese skuld het die negatiewe uitwerking dat die normatiewe onderbou van die Suid-Afrikaanse skuldbegrip baie swak ontwikkel is.

Selfs in die geval van nalatigheid, waar die normatiewe aard van skuld algemeen erken en aanvaar word, is bedenkinge by vele geleenthede uitgespreek oor die positiewe reg se konstruksie van die verwagbaarheidskriterium en die toepassing van 'n monolitiese redelikheidstandaard binne 'n plurale gemeenskap (Heyns "Reasonableness in a divided society" 1990 *SALJ* 279). Daar word algemeen aanvaar dat die hof se toepassing van die redelike mens-standaard weinig met die persoonlike verwytbaarheid van beskuldigdes te make het (Snyman *Strafreg* (1992) 222; Whiting "Negligence, fault and criminal liability" 1991 *SALJ* 431; De Wet en Swanepoel *Strafreg* (1985) 156–163). Die normatiewe onderbou van opset, wat gewoonlik verkeerdelik deur die klem op die beskuldigde se gesindheid oorskadu word, is selfs nog swakker ontwikkel.

In die lig van die Konstitusionele Hof se tentatiewe erkenning van 'n reg op 'n substantiewe strafreg wat met die beginsels van 'n oop en demokratiese samelewing versoenbaar is (*S v Zuma* 1995 1 SASV 568 (KH) 579D–H; *S v Ntuli* 1996 1 SASV 94 (KH) 96C–F; *S v Coetzee* 1997 1 SASV 379 (KH) 414D–415D 438D–445B) verg die aard van nalatigheid, in die besonder, en die normatiewe dimensie van skuld, in die algemeen, dringend aandag. As eerste stap in hierdie rigting moet die normatiewe of pragmatiese aard van die sogenaamde psigologiese skuldbegrip erken en die houvas van positivisme en die empiriese epistemologie op die Suid-Afrikaanse strafreg verbreek word.

Onder die invloed van die empirisme en positivisme reduseer die psigologiese skuldbegrip naamlik die normatiewe stryd om die beskuldigde persoon se skuld tot 'n feitebevinding. Op dié wyse word die beskuldigde persoon reeds *voor* haar skuldigbevinding geplaas aan die onderpunt van 'n hierargie waarin psigiaters en kliniese sielkundiges uiteindelik saam met regters die bo-punt vorm (*S v De Bruyn* 1968 4 SA 498 (A); *S v P* 1972 3 SA 412 (A); *S v Laubscher* 1988 1 SA 163 (A) 171J–172G; *S v Kalogoropoulos* 1993 1 SASV 12 (A) 21I–22A; *S v Cunningham* 1996 1 SASV 631 (A) 636A–C; *S v Pederson* 1998 2 SASV 383 (NPA) 390I–J). Van hier is dit vir die beskuldigde persoon onmoontlik om die vasstelling van haar skuld op 'n dialogiese en demokratiese wyse te betwis. Die beskuldigde word nie meer beskou as 'n deelnemer aan 'n inter-subjektiewe debat oor die aard van die normatiewe landskap waarbinne sy lewe nie. Die beskuldigde word die stom objek van feitelike beskrywing en ontleding. Anders gestel: die beskuldigde is in die psigologies gedomineerde strafhof nie meer 'n deelnemende subjek nie maar word gereduseer tot gedomineerde objek.

Hierdie reduksie is onversoenbaar met die reg op 'n billike en menswaardige verhoor. Soos Labuschagne argumenteer, moet skuld beskou word as 'n konstitusionele voorvereiste vir strafregtelike aanspreeklikheid sodat skuldlose aanspreeklikheid *per se* sou neerkom op 'n skending van die reg op 'n billike verhoor (Labuschagne "Strafregtelike menseregte" 1987 *TRW* 115; Labuschagne "Strafregtelike aanspreeklikheid en vrywillige dronkenskap: is die voorrasionele steeds in beheer?" 1996 *SAS* 322; sien ook *S v Coetzee supra* 438D–445B). Die konstitusionalisering van skuld behoort egter verder gevoer te word. Die psigologiese benadering tot skuld kan nie in 'n oop en demokratiese samelewing regverdig word nie. Waar die psigologiese skuldbegrip toepassing vind, ontaard die hofsaal in 'n soort kliniese laboratorium en verloor dit so die potensiaal om 'n publieke ruimte te vorm waarbinne demokratiese dialoog en politiek kan ontvou.

Die inherent betwisbare vraag na die waardes waarvolgens ons lewe, kan in 'n oop en demokratiese samelewing slegs op dialogiese wyse besleg word. In die strafhof word egter steeds voorgegee dat die normatiewe dialoog oor hierdie waardes heeltemal omseil kan word óf deur die objektiewe beskrywing van geestestoestande en ander feite (in die geval van opsetsmisdade), óf deur die objektiewe toepassing van 'n bestaande redelikheidsmaatstaf (in die geval van nalatigheidsmisdade). Die gevolg is dat reflektiewe oordeel, empatie, verbeelding en narratief geen rol speel in die strafverhoor nie maar die toneel van skuld oorheers word deur kliniese, quasi-empiriese en wetenskaplike beskrywings. In die Suid-Afrikaanse strafhof word voorgehou dat die vraag na skuld, soos enige feitevraag, altyd bepaalbaar is: "The state of a man's mind is as much a fact as the state of his digestion" (R Nestadt in *S v Van Niekerk* 1981 3 SA 787 (T) 791D).

Die gebrek aan publieke ruimtes waarbinne ware politiek kan vergestalt, is die sentrale tema in Hannah Arendt se kritiek teen beide liberale en totalitêre samelewings. (Arendt *The human condition* (1958) en *Lectures on Kant's political philosophy* (1982) 7–77). Ek staan simpatiek teenoor Arendt se pogings om die rol van reflekterende oordeel binne die publieke sfeer te bedink. Dit is in 'n groot mate haar siening van 'n pluralistiese en menslike politiek wat as inspirasie vir my kritiek teen die psigologiese skuldbegrip dien. In meer Arendtiaanse terme sou gesê kon word dat die psigologiese skuldbegrip die plurale en agonistiese aard van die menslike wêreld, insluitende die normatiewe dimensie daarvan, ontken. Sover dit deur die tegniese vasstelling van feite oorheers word, is die psigologiese benadering tot skuld 'n voorbeeld van die werkerslogika wat Arendt as die bedreiging van ware politiek en menslike aksie beskou. Die praktiese probleme van die alledaagse menslike wêreld word omskep in die tegniese probleme van 'n handjievol wetenskaplike kenners. Die sekerheid van logika en empiriese waarheid verdring die kwesbaarheid en tydelikheid van intersubjektiewe en waarlik politieke dialoog. Die psigologiese skuldbegrip kan daarom beskryf word as 'n voorbeeld van wat Arendt noem totalitaristiese denke (Arendt *Essays in understanding* (1994) 307–327).

Die pogings om die strafreg deur die toepassing van die psigologiese skuldbegrip in 'n waardevrye wetenskap te omskep, berus boonop op 'n twyfelagtige dualisme tussen feite en waardes wat vandag algemeen as onhoudbaar verwerp word. Die aanname wat die psigologiese benadering tot skuld onderlê (dat universeel geldige (waarde)-oordele onmoontlik is), is reeds tweehonderd jaar gelede deur Kant bevraagteken. Onderliggend tot sy siening van estetiese oordele formuleer Kant wat hy noem objektiewe subjektiwiteit. Die kloof tussen die objektiwiteit van feite en subjektiwiteit van waardes word hier deur hom oorkom deur die inter-subjektiewe aard van reflekterende oordeel. Die skoonheid van 'n voorwerp kan nie gedemonstreer of logies uit 'n definisie van skoonheid afgelei word nie. Terselfdertyd is dit ook nie bloot 'n arbitrêre opinie of voorkeur nie. Skoonheid is 'n refleksie oor die belangelose genot wat 'n voorwerp verskaf met inagneming van die moontlike opinies van ander mense. Die detail van die oordeelproses hoef nie hier verder ondersoek te word nie. Dit is voldoende om te meld dat Kant se kunsfilosofie 'n model bied van 'n beoordeling van praktiese probleme wat op 'n dialogiese, en nie 'n logiese wyse nie, geskied (Kant *Critique of aesthetic judgement* (1952) 3–228. Vir 'n algemene oorsig oor die debat rondom die feit-waarde-dualisme sien Bernstein *Beyond objectivism and relativism* (1983) 1–50). Dit is nie meer die wetenskap wat dien as model van die reg nie maar die kuns. Hierdie verskuiwing is kenmerkend van denkwyses wat in die algemeen bekend staan as postmodern.

Arendt se betoog vir die daarstel en behoud van publieke ruimtes waarbinne norme op agonistiese wyse betwis kan word en Kant se opmerkings oor die dialogiese aard van normatiewe oordele klink wêreld-vreemd binne die konteks van die Suid-Afrikaanse strafreg. Ons strafreg word gekenmerk deur 'n poging om die noodsaak van reflekterende oordeel te besweer deur die tegniese toepassing van klinkklaar formules (soos die formules wat Heyns 298–299 op rasionalistiese wyse uit Rawls se beginsel van verskil (*difference principle*) aflei; of die redelike mens-standaard van die positiewe reg) of te steun op die veiligheid van feite (die beskrywing van die beskuldigde se geestestoestand in die geval van opset).

Ten spyte hiervan plaas die stryd teen misdaad en geweld die strafverhoorsigbaar in die brandpunt van pogings om 'n demokrasie gegrond op menswaardigheid,

gelykheid en vryheid in Suid-Afrika te vestig en uit te bou. Dit is ironies dat die voortgesette beklemtoning van die psigologiese skuldbegrip meebring dat die strafverhoor self nie kwalifiseer as een van die publieke ruimtes van 'n demokratiese Suid-Afrika nie. Die probleem is tweeledig. Die normatiewe dimensie van skuld word grootliks onderspeel, en waar dit wel erken word (by nalatigheidsmisdade) laat die huidige redelike mens-toets weinig ruimte vir 'n verskeidenheid van stemme en 'n dialogiese bevraagtekening van die bestaande normatiewe landskap.

Dit is dringend noodsaaklik vir die demokratiese transformasie van die Suid-Afrikaanse samelewing dat die kliniese laboratorium as model van die strafverhoor vervang word deur 'n meer dialogiese model waarbinne die strafverhoor herwin kan word as 'n publieke ruimte en plek van stryd, oordeel en politiek. Hierdie publieke ruimte sal onder meer gekenmerk word deur 'n normatiewe benadering tot skuld en 'n radikale individualisering van skulduitsluitings- of verskoningsgronde. Hierdie suggestie strook met die individualisering of subjektivering van opset wat reeds met die verwerping van die *aberratio ictus*-leerstuk, die erkenning van wederregtelikheidsbewussyn en die skep van die verweer van nie-patologiese ontoerekeningsvatbaarheid in die positiewe reg uitdrukking gevind het. Die demokratiese potensiaal van die pogings om skuld te subjektiveer wat reeds in ons reg onderweg is, kan egter nie tot volle uiting kom so lank as wat dit tot die grense van die psigologiese skuldbegrip beperk word nie.

In dié verband druk Fletcher die droom van 'n meer normatiewe, dialogiese en demokratiese strafreg soos volg uit:

> "Once we identify with the criminal defendant and grasp that he is one of us, we cannot but affirm his right to a hearing. We respond to the imperative, not because it will inure to society's benefit, but because we know that not responding will betray what is human within us ... Excuses do not express policy goals. They respond to an imperative generated by the defendant's situation. Excuses are not levers for channelling behaviour in the future, but the expression of compassion for one of our kind caught in the maelstrom of circumstance." ("The individualisation of excusing conditions" 1974 *Southern California LR* 1269 1305).

By versuim om in hierdie rigting te beweeg deur die beskuldigde te verwyder uit die posisie van objek (wat sy in die psigologiese benadering tot skuld inneem) en te erken as deelnemer aan 'n inter-subjektiewe dialoog (wat deur die normatiewe beoordeling van skuld moontlik gemaak word) is die Suid-Afrikaanse stafreg bestem tot anakronisme in 'n andersins postmoderne normatiewe landskap.

WESSEL LE ROUX
Universiteit van Suid-Afrika

NOTES ON SOME LEGAL ASPECTS CONCERNING THE ADMISSION OF LEARNERS TO PUBLIC SCHOOLS

1 In a previous publication (see Visser "The admission of learners to public schools: who makes the decisions?" 1998 *THRHR* 487–491) certain problematic aspects relating to the law on the admission of learners to public schools were considered. It was recommended there that more "detailed legislation on a

national or provincial level seems to be required to clear up some of the ambiguities". In the meantime, the national Minister of Education has published his "Admission policy for ordinary public schools" (see *Government Gazette* 19377 of 1998-10-19). The present contribution briefly examines the legal status of that policy document and evaluates its effect on and contribution to the law in regard to admission.

2 As has been pointed out before (see Visser 489), the governing body of a public school (acting in terms of s 5 of the South African Schools Act 84 of 1996) is the only body which has the power to adopt an admission policy in respect of a particular school (see generally on the legal position of the governing body Beckmann and Visser "Enkele gedagtes oor die regsposisie van beheerliggame van openbare skole in die nuwe onderwysomgewing" 1999 *THRHR* 108). The exercise of this power is subject to at least the following:

(i) the provisions of the Bill of Rights, which recognises a fundamental right to basic education, the right to receive education in the official language or languages of one's choice as well as the right not to be discriminated against unfairly (especially ss 9 and 29 of the Bill; see generally Devenish "Aspects of the right to education in the Constitution" 1998 *De Jure* 22–240; Malherbe "Reflections on the background and contents of the education clause in the South African bill of rights" 1997 *TSAR* 85–99);

(ii) certain specific provisions in the Schools Act (s 5(1)) which place a duty on the school to admit learners and provide that certain considerations may not be used in deciding on the admission of learners (eg an admission test, or the inability or refusal of a parent to pay school fees – s 5(3)(a) (b)(c));

(iii) the policy of the national Minister of Education regarding admission to public schools made in terms of section 3(4)(i) of the National Education Policy Act 27 of 1996 (this issue is dealt with in greater detail below);

(iv) the age requirements for admission to an ordinary public school as published by the national Minister of Education (see Notice 2433 in *Government Gazette* 19377 of 1998-10-19);

(v) the language policy of the national Minister of Education which contains certain provisions in regard to admission (for a discussion and references, see Visser "Some problems regarding the validity of the official language documents in public education" 1998 *De Jure* 367–372);

(vi) the provisions of any provincial education law or provincial regulations dealing with the admission of learners. (Provincial law will not be considered for the purposes of this contribution.)

Subject to the above, the admission policy of a governing body may lay down reasonable and relevant requirements regarding admission.

3 The national admission policy document referred to above (of which only an English version seems to be available) has been published in terms of section 3(4)(i) of the National Education Policy Act. This provision authorises the Minister to make policy on "the admission of students to education institutions, which shall include the determination of the age of admission to schools". The term "education institution" includes an institution providing "primary" and "secondary" education (see s 1 (viii)) and this apparently also refers to "school" in the Schools Act (s 1 (xix)). The concept "student" is not used in the Schools Act (the term "learner" is preferred) but in terms of the National Education

Policy Act (s 1 (xiv)) a student is "any person enrolled in an education institution". As admission is normally relevant only in regard to persons who have not already been admitted to an education institution, it must be assumed that the reference in section 3(4)(i) above to a student includes a person who aspires to be a student at an education institution. In section 1(ix) of the Schools Act this matter is dealt with more elegantly by defining a "learner" so as to include a person "obliged to receive education in terms of this Act". For the purposes of the present discussion, it is assumed that the Minister may validly promulgate national policy on the admission of learners to public schools.

4 Whilst the national Minister may frame general policy for "the admission of students", the governing body of a public school is empowered to make policy in respect of admission to a particular school (see s 5(5) of the Schools Act). In this regard, the following question arises: What is the effect of the ministerial policy on the powers and functions of the governing body to frame an admission policy for its school? In section 5(4) of the Schools Act it is provided that the Minister may by notice in the *Gazette,* after consultation with the Council of Education Ministers, determine age requirements for the admission of learners to a public school. As far as this issue is concerned, the position is that the governing body acting on behalf of a public school is clearly bound by a valid notice in terms of section 5(4) (see Visser 1998 *THRHR* 489). However, the position is less clear as far as the general policy of the Minister is concerned. Section 5(5) of the Schools Act provides only that "subject to this Act [which includes the regulations in terms of it] and any provincial law, the admission policy of a public school is determined by the governing body of such school". There is therefore no direct provision subjecting the school's admission policy to any national policy made under the National Education Policy Act. It may perhaps be argued (with reference to some remarks in the judgment of the Constitutional Court in *Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill, 1995, in re: Ep Speaker of the National Assembly* 1996 4 BCLR 518 (CC)) that, since a provincial education authority is not necessarily obliged to act in conformity with national education policy, the same principle should apply to a public school which falls under a provincial education department. Another approach may be to have regard to section 146 of the Constitution (see also ss 147–150) which determines that national legislation (which includes subordinate legislation made in terms of an Act of Parliament) may under certain circumstances prevail over provincial legislation (which also includes subordinate legislation). However, it should be noted that the power of a governing body to make an admission policy applicable to a public school is derived from *national* legislation and not from provincial legislation. We are therefore faced with the situation that the national Minister, as well as the governing body of a public school, is empowered by national legislation to create subordinate legislation governing the same issue, namely admission.

5 For the purposes of this discussion, it is assumed without further consideration that the ministerial policy on admission may in principle bind governing bodies of public schools in the exercise of their functions *qua* admission in so far as the ministerial policy does not unreasonably interfere with the statutory authority given to a governing body in terms of a proper construction of section 5 of the Schools Act, provided that the policy is not contrary to other applicable law.

6 The ministerial policy published on 15 October 1998 attempts to clarify the legal status of the policy. It is stated in section 2 that it applies uniformly in all provincial departments of education and ordinary public schools. Section 3 of

the policy directly requires the admission policy of a public school to be consistent with the ministerial policy. As stated above, the validity of these sections will depend on whether the Minister is empowered to determine the scope of applicability and to override a school's admission policy made in terms of section 5 of the Schools Act.

7 The purpose of the ministerial policy is said to be the provision of a "framework" to all governing bodies for developing the admission policy of the school (s 4 of the policy document). This seems to be indicative of an intention not to regulate admission in absolute detail (which would render s 5 of the Schools Act meaningless) but to provide a general set of principles within which governing bodies may perform their functions ("developing the admission policy of the school"). The same principle is said to apply in regard to provincial education departments (s 4). It is not clear exactly what the last-mentioned provision is supposed to mean, since provincial legislatures are empowered to make provincial law on admission which does not conflict with section 5 of the Schools Act. However, provincial education authorities are not legally involved in formulating an admission policy for each and every school. The unclear reference to provincial departments is an example of the unfortunate formulation which characterises parts of the ministerial admission policy-document.

8 Sections 5–13 of the ministerial policy, which purport to deal with "administration of admissions", do not cover such issues only. However, they do fill a gap in the vague procedural provisions of section 5 of the Schools Act (see Visser 1998 *THRHR* 490–491). Sections 5–13 go much further than "administration" and deal with some substantive matters such as, for example, the school's obligation to admit a learner to the "total school programme". According to the policy, this means, *inter alia,* that a learner may not be suspended from or denied access to cultural, sporting or social activities on the grounds that his or her parent has not paid the required school fees. A matter which is not dealt with by this provision is whether a learner may rightfully insist on being allowed to participate in expensive sporting or cultural activities for which extra payment (not included in normal school fees) must be made by parents. Presumably a learner has no such right and a policy providing for extra payments in respect of such activities (as well as extra payments for supplementary education) – with the corollary that a learner may validly be excluded from these in the case of non-payment – does not fall foul of the ministerial policy. In this regard it is important that each school should develop a proper definition of its "total school programme" so that additional activities not financed by general school fees are clearly distinguishable from the regular "total school programme".

9 Section 10 of the Minister's policy prohibits a learner from being denied access to a school on the ground that his/her parent does not subscribe to the mission statement *and the code of conduct of the school.* The words in italics are not contained in the Schools Act (see s 5(3)(b)) and are presumably intended to amend the Schools Act indirectly. Section 10 of the policy therefore seems to be invalid (as being in conflict with the Schools Act) and is probably the official response to the practice at certain schools to require parents to subscribe, as a condition of admission, to the school's code of conduct – which includes the school's dress code.

10 Section 11 of the ministerial policy expressly recognises that a learner may be required to undergo a "placement" test after he or she has been admitted to the school (see Visser 1998 *THRHR* 488). However, this power is conferred on the head of the provincial education department and not on the governing body of the school.

11 In terms of sections 19–22 of the ministerial policy, even those who are illegal aliens in South Africa may enrol their children at a public school if they can provide evidence that they have *applied* to legalise their stay in the country in terms of the Aliens Control Act 96 of 1991. This provision is incomprehensible in the light of the acute shortage of vital resources available to satisfy the huge demand in the education sector, as well as reports that there are millions of illegal aliens in the northern parts of South Africa. It is doubtful whether even wealthy and highly developed countries would be able to afford such a generous approach in the provision of state-subsidised education to illegal aliens. And one may also ask why South African parents should have to pay school fees to subsidise the education of illegal aliens.

12 Sections 30–32 of the Minister's policy are apparently aimed at preventing academic under-performance by those learners who have already been admitted to a school from being used as a criterion for their continued admission to the school or their admission to a further grade. Thus the practice at some schools of requiring that learners who fail must re-apply for admission will be in conflict with these provisions. However, section 31 of the policy goes even further and prohibits multiple repetition of one grade. Whilst the policy (in s 32) glibly states, in an attempt to deny the obvious, that this should *not* be construed as implying "automatic promotion", the policy in fact provides for nothing less than (albeit limited) automatic promotion. This clearly devalues the quality of public education.

13 The policy's provisions dealing with school zoning (ss 33–35) provide for so-called "soft zoning" and generally appear to be realistic. These provisions are probably in the public interest and will override any individual school policy on admission. Section 34(d) of the policy describes the order of preference of applicant learners but does not refer to the fact that an applicant with family members (brothers or sisters) who are or were at the school will receive preference merely based on this fact.

14 In conclusion, the following comments on the ministerial policy may be made (on the assumption, of course, that, generally speaking, the policy will be binding on governing bodies of public schools):

(i) The policy is not a well-drafted document. Further work is needed to produce a clear, legitimate, reasonable and coherent policy instrument.

(ii) The policy contains too much irrelevant material which does not relate to admission at all (see eg s 39 on the rights and obligations of parents, ss 41–42 on "home education", s 31, which effectively allows "automatic promotion" of learners, etc).

(iii) The policy's over-generous approach to the admission of children of illegal aliens is unrealistic and will cause further unnecessary pressure on scarce education resources.

(iv) In at least one instance the policy is in conflict with the Schools Act (s 10 of the policy – see par 9 *supra*).

(v) The policy as a whole further erodes the already very limited role of the governing body as the democratic and representative body having primary responsibility for the admission policy of a particular school.

(vi) The legal status of the policy is, as explained above (in par 4), not entirely clear. South Africa can ill afford such a legal uncertainty at a stage when our transforming education system seems to be on the brink of a serious crisis.

(vii) Generally speaking, a "policy" is a workable plan of action to aid the actual implementation of constitutional values and existing legal principles in education. Unnecessary repetition in the policy of certain fundamental rights and provisions of the Schools Act contribute nothing to their actual implementation in practice and demonstrates that the admission "policy" is not in all respects really a policy.

(viii) On a more positive note, it must be remarked that the policy does bring clarity as far as certain procedural issues are concerned (see ss 14–18, 36–38 of the policy).

It is hoped that a second and revised version of the ministerial policy on admission, which addresses at least some of the shortcomings referred to above, will be published soon. It will also be necessary to attempt to obtain greater clarity about the legal status of the ministerial policy and its influence on the policy functions of a governing body based on national legislation.

PJ VISSER
University of Pretoria

DIE LEEMTEBEGRIP BY WETSUITLEG AS ANACHRONISME: 'N REGSANTROPOLOGIESE VERKLARING

1 Inleiding

In 'n saak wat op 25 September 1997 (NJ 1998,77) voor 'n Amsterdamse hof gedien het, het die funksie van die hof by 'n sogenaamde "leemte in die wet" ter sprake gekom. In dié saak het dit gehandel oor die uitleg van die toepassingsveld van artikel 277a gelees met artikel 276 van die Nederlandse Strafproseskode en in besonder oor die bevoegdheid tot verlenging van aanhouding van 'n verdagte voor verhoor ("voorlopige hechtenis"). Sonder om in tegniese detail te verval, kom die benadering wat die hof volg in dié betrokke saak daarop neer dat 'n sinvolle en geregtigheidskonforme reëling binne die wetgewingsdoel ten aansien van aanhouding voor verhoor getref word. In die lig hiervan kan die vraag gestel word of daar in finale instansie werklik van 'n wetsleemte in dié geval sprake kon gewees het (vgl Müller "Richterrecht – rechtstheoretisch formuliert" in *Festschrift der Juristischen Fakultät zur 600 – Jahr – Feier der Ruprecht – Karls – Universität Heidelberg* (1986) 65 85; Winner "Der Richter als Notgesetzgeber. Normenabstinenz und richterlicher Entscheidungszwang" in Grimm et al (reds) *Der Richter und 40 Jahre Grundgesetz* (1991) 39). In die onderhawige aantekening word die vraag of daar, in die lig van die hedendaagse (uitleg- en) regsvormingstaak van die regter, nog sprake kan wees van 'n behoefte aan die begrip wets- of normleemte regsantropologies onder die loep geneem. Onnodige herhaling van verwysings en argumente in voorafgaande publikasies opgeneem, word doelbewus vermy. Hierdie aantekening moet gevolglik as 'n glos op my publikasies, waarna spesifiek in die verdere bespreking verwys word, gelees word.

2 Die geloof in judisiële onfeilbaarheid en die gevolglike gebrek aan 'n behoefte vir beslissingsmotivering

Sagan ("Religion and magic: A developmental view" 1979 *Sociological Inquiry* 87 105–113) wys daarop dat die begrip "almag" binne die menslike psige aan 'n evolusieproses onderworpe is. In die eerste fase van die proses beleef die infans homself as almagtig. In die tweede fase word die ouers as almagtig beleef. Die gode en dié se verteenwoordigers op aarde (soos die koning) word in die derde instansie as almagtig beleef. In die vierde fase word almag aan die staat en gemeenskap toegeskryf, dit wil sê die almagdraer is nou (weer) immanent en aards. In die finale fase word tot die konklusie gekom dat almag nie moontlik is nie. Rasionaliteit en die wetenskap voer in dié fase die botoon (sien ook Labuschagne "Geloof in toorkuns : 'n morele dilemma vir die strafreg?" 1990 *SAS* 246 251–253).

Die hedendaagse regstaatlike vereiste dat regspraak deur 'n onafhanklike regbank en 'n onpartydige regter waargeneem word, is van relatief onlangse oorsprong (Stölzel *Die Entwicklung des gelehrten Richtertums* Bd 1 (1872) 22–23). Die heilige oervader (en sy opvolgers : die stamhoof en koning) het aanvanklik self die regspraak waargeneem. Toe dit egter te omvangryk geword het, het hy dit (aanvanklik gedeeltelik) aan regters bekend as koningsregters oorgedra. Die onfeilbaarheid van die koning wat deur sy heilige status meegebring is, is ook op sy regters geprojekteer (Barnes *The story of punishment* (1972) 368–369; Kern *Geschichte des Gerichtsverfassungsrecht* (1954) 408). Die uitleg van wette, en selfs die verskaf van redes vir 'n beslissing, was in die lig van die aan die regters toegeskrewe onfeilbaarheid onnodig (Bergholtz "Ratio et auctoritas. A comparative study of the significance of reasoned decisions with special reference to civil cases" 1989 *Scandinavian studies in law 11*; Labuschagne "Tussen onafhanklikheid en tirannie: Opmerkinge oor die kontrolemeganismes van die regsprekende gesag" 1993 *De Jure* 347 348–349; Labuschagne "Die heilige oervader, regsevolusie en redematige administratiefregspleging" 1995 *SAPR/PL* 444). Die blote idee van 'n wetsleemte was as sodanig onbestaanbaar met genoemde heilige status van regters. In 1336 verklaar 'n *Parlement de Paris*-regter nog soos volg:

> "For no one should know the secrets of the highest court, which has no superior except God and which sometimes decides . . . contrary to the law, for a cause that is just according to God, its superior . . ." (Engelse vertaling deur Bergholtz 13).

3 Die opkoms van die bedoelingsteorie by wetsuitleg en die ontstaan van die wetsleemte-idee

Namate daar afstand ontwikkel het tussen die heilige oorsprong van wetgewing en die regsprekende gesag, veral as gevolg van die opkoms van moderne demokrasieë, kollektiewe wetgewers en die regstaatlike konsep van die skeiding van staatsmagte, het eers die letterknegtelike en later die bedoelingsteorie by wetsuitleg na vore getree. Die bedoelingsteorie was nog intiem verbind met die staatlike soewereiniteitsleerstuk. In laasgenoemde leerstuk word sterk spore van die heiligheid van die wetgewer (staat) nog steeds aangetref (sien verder Labuschagne "Die opkoms van die teleologiese benadering tot die uitleg van wette in Suid-Afrika" 1990 *SALJ* 569 570–571). Blykens die bedoelingsteorie het regters bloot 'n meganiese funksie by wetsuitleg. Aan die (nog heilige) wetgewer (en staat) se wette kon nie as sodanig verander word nie. Die agterliggende bedoeling van die wetgewer is by wetsuitleg deurslaggewend, met ander woorde wetsuitleg, en ook wysiging van die woorde van 'n wet, kon in finale

instansie slegs bedoelingsmatig geskied. Teen die agtergrond van die bedoelingsteorie het die leemtebegrip beslag gekry. 'n Diskrepansie tussen wetsteks en wetgewersbedoeling (eintlik: die regsgevoel van die regter) het 'n rasionele basis vir die leemtebegrip geskep. Verskeie benaderings oor wat 'n wetsleemte (*casus omissus*) is en wanneer en indien wel onder welke omstandighede dit aangevul kon word, het gewysderegtelik uitgekristalliseer. Hierdie problematiek is by 'n vorige geleentheid gedetailleerd onder die vergrootglas geplaas (Labuschagne "Die leemtebegrip by wetsuitleg" 1985 *TSAR* 55). Die detail daarin opgeneem, is nie vir onderhawige doeleindes van wesenlike belang nie. Die problematiek rondom die leemtebegrip by wetsuitleg het die aandag van groot regsintellektueles in beslag geneem (sien bv Canaris *Die Feststellung von Lücken im Gesetz* (1965) iev en ander skrywers in my artikel in 1985 *TSAR* 55–61 vermeld). Die erkenning van die moontlikheid van 'n leemte in 'n wet, dit wil sê arbeid van die staat wat die laaste onfeilbaarheidserfgenaam van die heilige oervader was, kan aangeteken word as 'n simboliese opstand van die mens teen die "draers van die almagskonsep" wat sy lewe vir soveel miljoene jare oorheers het. Daardeur is duidelik te kenne gegee dat die staat (in die sin van die wetgewer), en bygevolg die heilige oervader, tot oorsigte en foute in staat is (sien ook Labuschagne "Die heilige oervader in die beskuldigdebank: opmerkinge oor die strafregtelike aanspreeklikheid van die staat en die sanksiekrisis in die omgewingsreg" 1997 *TSAR* 335). Die ontstaan van die leemtebegrip by wetsuitleg staan duidelik sterk in die teken van die regsantropologies-universele proses van dereligiëring (ontheiliging) wat in die sosio-juridiese waardestrukture van die menslike gemeenskap werksaam is (sien Labuschagne "Evolusielyne in die regsantropologie" 1996 *SA Tydskrif vir Etnologie* 40; Labuschagne "Die begrip 'godsdiens' in godsdiensvryheid: 'n Bewussynsantropologiese ekskursie na die evolusiekern van die reg" 1997 *De Jure* 118 132–133)

4 Doeldienende wetgewing ter bevrediging van menslike behoeftes, regstaatlikheid en die beklemtoning van rasionaliteit

Die bedoelingsteorie het sosio-emosioneel 'n belangrike oorgangsfunksie vervul. Aan die een kant is, al sou dit bloot simbolies wees, prioriteit verleen aan die primêre status van die staat (wetgewer) as erfgenaam van die heilige oervader. Aan die ander kant is ruimte geskep vir die selfs ingrypende aanpassing van en verandering aan wetgewing deur die howe (sien bv Labuschagne "Op die voetspoor van die wetgewingsproses: dwingende en aanwysende bepalings" in Joubert (red) *Petere fontes LC Steyn-Gedenkbundel* (1980) 74; Labuschagne "Op die voetspoor van die wetgewingsproses: Woord-, punktuasie- en struktuurwysigende uitleg" 1986 *SAPR/PL* 58; Labuschagne "Die woord as kommunikasiebasis in die wetgewingsproses" 1988 *SAPR/PL* 34). Aangesien die bedoelingsteorie slegs in 'n fiktiewe werklikheid kan bestaan, het dit van die staanspoor af geen langtermyn oorlewingskans gehad nie (sien bv Strömholm "Legal hermeneutics – notes on the early modern development" 1978 *Scandinavian studies in law* 213; Labuschagne 1990 *SALJ* 569–571). Die fiksievrye en werklikheidsgetroue standpunt dat die regter nie 'n bloot meganiese funksie – gevolggewing aan die wetgewersbedoeling – by wetsuitleg (regsvorming) vervul nie, word in 'n toenemende mate wêreldwyd aanvaar (Ellis *Regterlike regsvorming en die spreuk judicis est jus dicere non dare* (LLD-proefskrif, UPE, 1987) 270–279; *Labuschagne* "Regsdinamika: opmerkinge oor die aard van die wetgewingsproses" 1983 *THRHR* 420; Bitzilekis "Das richterliche Urteil als rationales Denkverfahren" in Bemmann en Manoledakis (reds) *Der Richter in strafsachen* (1992) 55 60).

In regstelsels op die Europese kontinent, wat 'n leidende rol in dié verband gespeel het, word onderskei tussen die sistematiese, grammatiese, historiese en teleologiese wyses van wetsuitleg, waarna dikwels verwys word as die Savigny-kwartet. Aan die teleologiese metode van wetsuitleg word 'n sentrale en oorkoepelende status toegeken (Adomeit *Rechtstheorie für Studenten* (1979)76; Ekelöf "Teleological Construction of Statutes" 1958 *Scandinavian studies in law* 75). Binne regstaatlike verband word hedendaags verder aanvaar dat die regter ook die taak het om toe te sien dat wetgewing aan menseregtelike standaarde voldoen (Graver "Norms and Decisions" 1988 *Scandinavian studies in law* 49; Devenish *Interpretation of Statutes* (1992) 39-48). Die regter het inderdaad 'n regskeppende funksie en vorm onvermydelik deel van die wetgewingsproses (Labuschagne 1990 *SALJ* 573). Die regter moet as deel van sy wetgewingstaak verseker dat 'n wet (die regsnormatiewe dus) 'n geregtigheidskonforme en regsinvolle einde in 'n betrokke geval het (Labuschagne 1985 *TSAR* 60-61; 1990 *SALJ* 573; Hergenröder *Zivilprozessuale Grundlagen richterlicher Rechtsfortbildung* (1995) 481). In 'n regstaat veronderstel geregtigheidskonforme voortbouing en gevolglike voltooiing van 'n regsnorm deur die regbank, soos reeds hierbo vermeld, in die eerste instansie dat die spesifieke regsnorm nie 'n menseregskendende effek het nie (sien in dié verband ook Botha *Waardeaktiverende grondwetuitleg: Vergestalting van die materiële regstaat* (LLD-proefskrif, Unisa, 1996) 203 ev).

5 Konklusie

Hierdie aantekening is ingelei met verwysing na 'n onlangse saak waarin 'n Amsterdamse hof sonder 'n groot omhaal van woorde 'n "wetsleemte" op 'n geregtigheidskonforme en regsinvolle wyse reggestel het. Daar is gepoog om aan te toon dat daar in die lig van die moderne regsvormingsplig en -taak van die regsprekende gesag nie meer 'n behoefte aan die konsep wetsleemte bestaan nie. Indien daar 'n geregtigheidsmatige of regsinvolheidsmatige gebrek of leemte uit 'n struktuurwet (wetboekwet) blyk, is dit die plig van die regter om dit op so 'n wyse te voltooi dat die gebrek of leemte wegval. Die tradisionele begrip wetsleemte is in die lig van die hedendaagse normvoltooiingsplig van die regter 'n anachronisme. Wat oorgebly het, is slegs regters wat nie hulle plig behoorlik nakom nie. Hierdie konklusie staan duidelik in die teken van die regsantropologies- universele dereligiëringsproses wat die heilige status van die oervader (en dié se opvolgers waaronder die staat in die vorm van die wetgewer) voortdurend erodeer en in 'n toenemende mate 'n rasionele onderbou aan die reg en regspleging verskaf. Kortom, ook die wetgewer se arbeid is vatbaar vir korreksie!

JMT LABUSCHAGNE
Universiteit van Pretoria

VONNISSE

RENAL FAILURE – RIGHT TO HAEMODIALYSIS DENIED

Soobramoney v Minister of Health, KwaZulu-Natal 1998 1 SA 430 (D); 1998 1 SA 765 (CC)

1 Introduction

This case attracted a vast amount of media attention and touched the hearts of many South Africans. A chronically ill man was denied treatment on a dialysis machine, as a direct result of which he died. In the light of the fact that the Constitution of the Republic of South Africa 108 of 1996 confers various fundamental rights on individuals, it might at first appear difficult to understand why medical treatment was denied in this case. The discussion which follows accordingly explains how the decision was arrived at in the High Court, and what the Constitutional Court decided.

2 Facts

The applicant was a 41-year-old unemployed man who suffered from ischaemic heart disease, had chronic renal failure and was a diabetic. He had suffered a stroke as a consequence of cerebro-vascular disease. His condition became critical after the funds from which he was paying privately for haemodialysis became depleted. He applied to the renal unit at Addington Hospital, Durban for haemodialysis, but was refused admission to a programme of treatment. Addington Hospital was the only unit in KwaZulu-Natal that had dialysis machines, other than Grey Hospital in Pietermaritzburg, where there was a small renal unit. As haemodialysis was the only treatment that could prolong his life, he applied to the Durban and Coast Local Division for an order, *inter alia*, directing the respondent to render him ongoing dialysis treatment at the hospital and interdicting the respondent from refusing him admission to the hospital's renal unit. He relied on sections 11 and 27 of the Constitution of the Republic of South Africa 108 of 1996. Section 27(1) states that everyone has the right to have access to health-care services, sufficient food and water, and social security. Section 27(2) provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of those rights. Section 27(3) lays down that no one may be refused emergency medical treatment. The applicant contended that the state was constitutionally obliged in terms of section 27(3) to provide the means for him to receive emergency medical treatment. He also relied on section 11 of the Constitution, which provides that everyone has the right to life.

In opposing the application, the respondent, in an affidavit made by the head of the renal clinic at Addington Hospital, submitted that, owing to the limited resources at the hospital, certain guidelines had been drawn up and applied in order to decide who should receive medical treatment. The guidelines stated that a patient who did not have any prospect of recovering (in the case of acute renal failure) or of receiving a transplant (in the case of chronic renal failure) was precluded from treatment. As the applicant had no prospect of undergoing a kidney-transplant operation owing to his ischaemic heart disease and cerebro-vascular disease, he was refused treatment. The respondent submitted that if the respondent were ordered to render the treatment applied for, another patient who complied with the guidelines and who had a better chance of survival would have to be denied treatment. The Secretary of the Department of Health in the province, in a supporting affidavit, set out the financial problems which faced the respondent, and submitted that there was no possibility of making additional funds available to Addington Hospital for the expansion of its renal clinic.

3 Decision of the High Court

The court held that there seemed to be a popular conception that the rights created in the Constitution were absolute and could be exercised and enjoyed without limitation. The rights were, however, limited by section 36(1) of the Constitution, in terms of law of general application to the extent that the limitation was reasonable and justifiable in an open and democratic society. Furthermore, the rights entrenched in the Constitution were limited by the rights of others, in that a right existed only in so far as it did not infringe upon the right of another person. For instance, the right to freedom of expression was limited to the right of others not to be defamed. There were a number of people suffering from renal failure who enjoyed the same right as the applicant to receive medical treatment as the applicant. It was, however, not the function of the court to determine who should receive treatment, since medical practitioners had to make that decision. The court would interfere only if the medical practitioners exercised their judgment unreasonably, arbitrarily or unfairly discriminated against a patient. In the present case, there was nothing to suggest that the applicant had been unfairly discriminated against. The guidelines applied to decide whether he should receive haemodialysis were followed throughout South Africa and had been formulated on sound medical principles. The applicant could not be cured by receiving haemodialysis, whereas there were other patients who could be so cured.

The court held, further, that it could not direct the state to make additional funds available to the renal clinic for the applicant and others to be treated, as the distribution of state funds was a political decision. In terms of sections 213 and 226 of the Constitution (which came into effect on 1998-01-01) funds could be withdrawn from the National Revenue Fund or from a Provincial Revenue Fund only in terms of an appropriation by an Act of Parliament or a provincial Act, respectively. The court could therefore not make an order with regard to the spending of money from either State or provincial revenues.

With regard to the applicant's contention that the limitation in section 27(2) did not apply to the emergency medical treatment in section 27(3), the court held that section 27(3) did not create a right to emergency medical treatment, but prohibited anyone from refusing emergency treatment. This section had to be read to render implicit in the words "emergency medical treatment" that such treatment was both possible and available. It could not have been the intention of

the legislature that a person requiring emergency medical treatment should receive this treatment regardless of cost and whether funds were available or not, and regardless of whether treatment was available. Furthermore, the legislature could not have intended that the right of access to health care was subject to the constraints of the state's resources and that a patient could be refused treatment, but that when his or her condition deteriorated and reached a critical stage so that emergency treatment was required, he or she would then have a right to treatment irrespective of cost and availability. The applicant could not rely on section 27(3), as he had been suffering from his diseases for many years and had not contracted a sudden illness or sustained unexpected trauma. It was an emergency for him that if he did not receive the treatment, he would die; but this was not the emergency the legislature had envisaged in section 27(3). The application was accordingly dismissed. The applicant then applied to the High Court for a certificate in terms of rule 18(e) of the Constitutional Court rules in force at the time. The certificate was granted, and he applied to the Constitutional Court for leave to appeal against the judgment of the High Court. Leave was granted.

4 The decision of the Constitutional Court

The Constitutional Court pointed out that in our society there are millions of people living in deplorable conditions and in great poverty. As proof of the constitutional commitment to address these conditions, the Constitutional Court referred to the preamble to the Constitution, which states that the Constitution had been adopted as the supreme law of the Republic, *inter alia*, to improve the quality of life of all citizens and free the potential of each person. Sections 26 and 27 of the Constitution reflected the commitment to address those conditions. Section 26 provided that everyone had the right to have access to adequate housing and that the state had to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of that right. Section 27 stated that everyone had the right to have access to health-care services, sufficient food and water, and social security, that the state had to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of those rights, and that no one might be refused emergency medical treatment. The court held that section 27(3) (dealing with emergency medical treatment) had to be construed within the context that the obligations imposed on the state by sections 26 and 27 were dependent upon the resources available for the purposes of fulfilling the obligations set out in those sections, and the rights entrenched in them were limited by reason of lack of resources. Given the significant demands made on available resources (for instance by high levels of unemployment, inadequate social security and a widespread lack of access to clean water or to adequate health services), it would at present not be possible to fulfil those needs fully.

The appellant contended that patients suffering from terminal illnesses who require treatment to prolong their lives are, in terms of section 27(3), entitled to be provided with such treatment by the state, and that the state must provide funding and the necessary resources to fulfil this obligation. The court held that the words "emergency medical treatment" in section 27(3) may be open to a broad construction, which would include ongoing treatment of chronic illnesses for the purpose of prolonging life. This was, however, not the ordinary meaning of the words and, if that had been the purpose of section 27(3), one would have expected it to have been expressed in positive and specific terms.

The appellant further contended that section 27(3) should be construed consistently with the right to life entrenched in section 11, and that everyone requiring life-saving treatment who was unable to pay for such treatment him- or herself was entitled to have the treatment provided at a state hospital without charge. The court held that such a construction of section 27(3) would make it substantially more difficult for the state to fulfil its primary obligations under section 27(1) and (2) to provide health-care services to "[e]veryone" within its available resources. It would also prioritise the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the state for purposes such as preventive health care and medical treatment for people suffering from illnesses or bodily infirmities that were not life-threatening. Much clearer language than that used in section 27(3) would be required to justify such a conclusion. According to the court, the purpose of section 27(3) seemed to be to ensure that treatment was given in an emergency, and was not frustrated by bureaucratic requirements or other formalities. A person who suffered a sudden catastrophe which called for immediate medical attention should not be refused ambulance or other emergency services which were available, and should not be turned away from a hospital which was able to provide the necessary treatment. What the subsection required was that remedial treatment which was necessary and available should be given immediately to avert that harm. This was also the position in India, as reflected in *Paschim Banga Khet Mazdoor Samity v State of West Bengal* 1996 AIR SC 2426. The facts of that case were materially different from the circumstances of the appellant, as the claimant there had received head injuries in a train accident and was turned away at various hospitals. The Supreme Court of India held that section 21 of the Indian Constitution imposed an obligation on the state to safeguard the right to life of every person. Failure by a state hospital to provide timely medical treatment resulted in a violation of section 21. The claimant in the *West Bengal* case was accordingly successful in his claim. In *Soobramoney* the court found that, since the appellant suffered from chronic renal failure and had to be kept alive by dialysis which would be required two to three times a week, his condition was not an emergency calling for immediate remedial treatment. Rather, it was an ongoing state of affairs resulting from an incurable deterioration of his renal function. Section 27(3) therefore did not apply.

The court accordingly held that the appellant's demand to receive dialysis treatment at a state hospital had to be determined in accordance with the provisions of section 27(1) and (2), entitling everyone to have access to health-care services provided by the State "within its available resources", and not in accordance with section 27(3). In the context of budget constraints and cutbacks in hospital services in KwaZulu-Natal, however, there were many more patients suffering from chronic renal failure than there were dialysis machines to treat them, and guidelines had had to be established to assist medical personnel in deciding who should receive treatment and who not. These guidelines had been applied in the appellant's case. More patients benefited from the use of the available dialysis machines in accordance with the guidelines than would have been the case if the machines were used to keep alive people with chronic renal failure. The treatment was directed at curing patients, not simply at maintaining them in a chronically ill condition. The appellant's case had to be seen in the context of the needs the health services had to meet, since if treatment had to be provided to the appellant, it would also have to be provided to all other people in his position. That would make a substantial impact on the health budget.

The provincial administration responsible for health services in KwaZulu-Natal had to make decisions about the funds that should be made available for health care, and how those funds should be spent. The choices involved difficult decisions which had to be taken, first, at a political level in fixing the health budget and, secondly, at a functional level in deciding on the priorities to be met. It was held that any court would be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it was to deal with such matters. The state had a constitutional duty to comply with the obligations imposed on it by section 27 of the Constitution. In the present case, however, it had not been proved that the state's failure to provide dialysis facilities for all people suffering from chronic renal failure constituted a breach of those obligations. The court therefore dismissed the appeal.

5 Discussion

Owing to the sensitivity of the issues raised, this was a difficult case to decide. If the words "emergency medical treatment" in section 27(3) were construed broadly, they would include ongoing treatment of chronic illnesses for the purpose of prolonging life. We would ideally have wanted this to be the case. It is true, as the Constitutional Court held, that that was not the ordinary meaning of the words, and if the prolonging of the lives of sufferers of chronic renal failure had been a purpose which section 27(3) had been intended to serve, the legislature should have expressed it in positive and specific terms.

But even if section 27(3) had been construed broadly and there was a scarcity of funds available for emergency treatment, certain rights would have to be weighed up against others in order to determine who qualified for treatment and who did not. It was, indeed, argued by the applicant that everyone requiring life-saving treatment who was unable to pay for it himself or herself was entitled to have the treatment provided at a state hospital without charge. Another argument was that section 27(3) should be construed consistently with the right to life entrenched in section 11. The court held that such a construction of section 27(3) would make it substantially more difficult for the State to fulfil its primary obligations under section 27(1) and (2) to provide health-care services to everyone within its available resources. The treatment of terminal illnesses would be prioritised over other forms of medical care, causing the resources available for preventive health care and medical treatment for people suffering from illnesses which were not life-threatening to be reduced.

It is a pity that such a well-intended Constitution conferring wonderful rights cannot come to fruition owing to a lack of funds. We do not live in a perfect world, and money is needed to help the Constitution to function properly. It is also sad that certain expectations were created by the Constitution, not only for the individual (in the case of access to health care) but also for the masses (in case of provision of adequate housing and water), which cannot, for financial reasons, be met. One cannot help but ponder the use of an ideal Constitution if the rights embodied in it cannot be fulfilled. Perhaps the answer can be found in the words of Madala J, who explained that the Constitution guarantees to every citizen certain fundamental rights in such a way that he or she can immediately

claim them and assume that they are available on demand (779E–F). Other rights in the Constitution are the ideal and something to be strived for: they are "values which the Constitution seeks to provide, nurture and protect for a future South Africa" (779F–G).

The Constitution in sections 26 and 27 confers certain rights on individuals. Those rights are, however, limited by section 36(1) of the Constitution in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society. And, as pointed out by the High Court in *Soobramoney*, the rights entrenched in the Constitution are also limited by the rights of others, for the rights of one person exist only in so far as they do not infringe upon the rights of others. A number of people suffering from chronic renal failure enjoy the same right as the applicant to receive medical treatment. In the light of the shortage of available resources, their rights were limited not only by the rights of other patients suffering from chronic renal failure with no hope of recovery but also by the rights of people needing "ordinary" emergency medical treatment: the cost of providing dialysis to an individual sufferer from chronic renal failure would infringe upon the rights of other people by consuming the funds needed for their treatment. A decision has therefore to be made, and principled guidelines laid down, as to who should receive treatment. This is a political decision that cannot be made by a court; it was made by the Department of Health in the form of guidelines which stated that a patient who enjoyed no prospect of recovery (in the case of acute renal failure) or of receiving a transplant (in the case of chronic renal failure) was precluded from treatment. As Sachs J (782B) pointed out, Soobramoney was a case that engaged our compassion to the full, and the main judgment (delivered by Chaskalson P) did not merely "toll the bell of lack of resources". In all democratic societies based on dignity, freedom and equality, the rationing of access to life-prolonging resources was regarded as integral to, not incompatible with, a human-rights approach to health care. What could be criticised was not the existence of principled criteria for regulating access to public medical resources, but the lack of such criteria (782C–D). Sachs J validly concluded this viewpoint by saying that if governments were unable to confer any benefit on any person unless they conferred an identical benefit on all, the only viable option would be to confer no benefit on anybody (782E–F). It is thus impossible to confer identical rights on all people.

6 Conclusion

Under the circumstances, in particular the lack of available funds, *Soobramoney*'s case was (with respect) correctly decided. If section 27(3) could have been construed broadly, it would have been correct to recognise the right of a dying person to be afforded emergency medical treatment to prolong his or her life. If the right was recognised but there were no funds available to provide the necessary emergency medical treatment, the right would have to be limited in terms of section 36 of the Constitution, and emergency medical treatment rather be given to a person with a chance of recovery.

MARIÉ BLACKBEARD
University of South Africa

DELIKTUELE AANSPREEKLIKHEID WEENS SENUSKOK AS GEVOLG VAN HOORSÊ

Barnard v Santam Bpk 1999 1 SA 202 (SCA)

Hierdie slegs tweede beslissing van die appèlhof/hoogste hof van appèl op die gebied van deliktuele aanspreeklikheid weens die veroorsaking van senuskok, staan uit as 'n rigtinggewende baken wat ons eie reg op hierdie gebied betekenisvol verruim en selfs buite ons landsgrense invloed behoort uit te oefen.

Die eiseres het ernstige senuskok opgedoen en gevolglike psigiese trauma en verdriet ervaar toe sy van die dood van haar jong seun in 'n motorvoertuigongeluk verneem het. Sy eis vergoeding van die verweerder (die benoemde agent ingevolge die Multilaterale Motorvoertuigongelukkefondswet 93 van 1989) op grond daarvan dat die ongeluk deur die nalatigheid van die bestuurder van die versekerde voertuig veroorsaak is. Die hof moes hom oor die volgende twee regsvrae uitspreek, naamlik of die skok en psigiese trauma weens die eiseres se verneming van haar seun se oorlye en die gevolge daarvan regtens verhaalbare skade verteenwoordig; en of die eiseres se smart as gevolg van die verlies van haar seun regtens gedingsvatbare skade uitmaak. In die hof *a quo (Barnard v Santam Bank Bpk* 1997 4 SA 1032 (T)) beslis regter Swart dat die eiseres se vordering nie ontvanklik was nie, hoofsaaklik omdat haar senuskok volgens hom nie redelik voorsienbaar was nie en beleidsoorwegings bowendien teen die toestaan van die eis gespreek het. Die uitspraak van die verhoorhof is om verskeie oorwegings vatbaar vir kritiek – die belangrikste hiervan is die volgende: die verkeerde byhaal van beleidsoorwegings by die voorsienbaarheidsbeen van die nalatigheidstoets, die onaanvaarbare negering van nie alleen die vraag na juridiese kousaliteit *in casu* nie, maar ook van die onderskeid tussen regsoorsaaklikheid en nalatigheid (wat 'n onlogiese en sinlose toepassing van die nalatigheidstoets tot gevolg gehad het), en die bevraagtekenbare beleidsoorwegings (oa die ietwat oordrewe vrees vir oewerlose aanspreeklikheid) wat tot afwysing van die eis aanleiding gegee het (sien Neethling "Gedingsvatbaarheid van senuskok weens die verneem van 'n kind se dood" 1998 *THRHR* 338–343). In appèl word die beslissing van die hof *a quo* dan ook tereg deur adjunk-hoofregter Van Heerden afgewys. (Dit is interessant om daarop te let dat Van Heerden AHR die advokaat was vir die eiser in die *locus classicus* op die gebied van deliktuele aanspreeklikheid weens senuskok in ons reg, nl *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A), wat die deliksbeginsels op hierdie gebied op 'n suiwer grondslag geplaas het deur weg te doen met kunsmatige Engelsregtelike beperkings (sien Neethling, Potgieter en Visser *Law of delict* (1999) 290).)

Die hoogste hof van appèl aanvaar dat die eiseres senuskok opgedoen het wat tot erkende en beduidende psigiatriese of psigiese letsels gelei het. Die nuus van haar seun se dood het klaarblyklik 'n verwoestende effek op haar gehad en bly hê en sy het bepaaldelik erge senuskok met uiteenlopende *sequelae* opgedoen (208B–C H–I). Vir huidige doeleindes kan 'n psigiese letsel (psigiatriese besering of psigologiese steuring) omskryf word as enige herkenbare nadelige inwerking op die brein- en senustelsel van 'n persoon (vgl *Barnard* 209A F–G;

sien ook *Majiet v Santam Ltd* [1997] 4 All SA 555 (K) 567; *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 775 776 779). Of sodanige letsel bestaan, sal in die reël deur ondersteunende psigiatriese getuienis bewys moet word (*Barnard* 216E; sien ook Neethling en Potgieter "Senuskok of psigiatriese besering – verhaalbaar indien voorsienbaar" 1973 *THRHR* 180–181). Hieruit volg dat blote smart of emosionele verdriet nie as 'n psigiatriese besering geag word nie en daarom ook nie regtens verhaalbare skade verteenwoordig nie (*Barnard* 217A–B). 'n Psigiese versteuring kan uiteraard op enige wyse opgedoen word, byvoorbeeld deur emosionele of senuskok, vreesverwekking of ander geestelike lyding (sien Neethling *Persoonlikheidsreg* (1998) 112–115; Neethling, Potgieter en Visser *Delict* 289–293; vgl *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 145–146). Daarom sluit die feit dat die howe tot dusver in verreweg die meeste gevalle met deliktuele aanspreeklikheid weens die veroorsaking van senuskok te doen gehad het, volgens *Barnard* 208I nie die moontlikheid uit dat die opdoen van 'n psigiese letsel wat nie deur emosionele skok veroorsaak is nie, ook gedingsvatbaar kan wees nie. Trouens, adjunk-hoofregter Van Heerden (208I–209A) is van mening dat daar

> "ongetwyfeld veel te sê is vir die standpunt dat 'senuskok' nie net 'n uitgediende benaming sonder enige spesifieke psigiatriese betekenis is nie, maar ook misleidend kan wees, en dat die enigste tersaaklike vraag is of 'n eiser 'n herkenbare psigiese letsel opgedoen het" (vgl nietemin Neethling, Potgieter en Visser *Delict* 289 vir 'n omskrywing van senuskok).

Omdat die hof nie geroepe is om algemene reëls te formuleer vir aanspreeklikheid weens senuskok wat op nalatige wyse veroorsaak is nie, word die uitspraak streng tot die onderhawige feitestel beperk, te wete dat die eiseres die moeder van 'n jong seun was wat vanweë 'n telefoonoproep die nuus van sy dood verneem het. Adjunk-hoofregter Van Heerden noem hierdie tipe geval 'n *hoorsê geval* en die persoon wat die senuskok opgedoen het, 'n hoorsê slagoffer (209A–C). (Ander hoorsê gevalle wat al voor ons howe gedien het, is interessantheidshalwe bv *Waring & Gillow Ltd v Sherborne* 1904 TS 340 (eiseres hoor van die dood van haar man in 'n ongeval); *N v T* 1994 1 SA 862 (K) (moeder verneem van die verkragting van haar agtjarige dogter); *Boswell v Minister of Police* 1978 3 SA 268 (OK) (tante ingelig, weliswaar valslik, van die dood van haar neef); *Clinton-Parker and Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) (moeders meegedeel dat hulle babas twee jaar vantevore by geboorte omgeruil is); en vergelyk *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 781 (*obiter*). In *Majiet v Santam Ltd* [1997] 4 All SA 555 (K) het 'n analoë geval voorgekom. Hier het die eiseres die lyk van haar seun in die straat aangetref nadat hy deur 'n voertuig omgery is (vgl *Barnard* 210D–F).)

Met die grondslae van *Bester* as vertrekpunt (209F–210B), kom regter Van Heerden na 'n regsvergelykende ondersoek van die posisie van hoorsê gevalle in Engeland, Kanada en Duitsland tot die slotsom dat die hoorsê slagoffer nog nooit enige sukses in eersgenoemde twee lande gehad het nie maar dat die Duitse reg nie 'n hoorsê eis in alle gevalle uitsluit nie. Die Engelsregtelike afwysing van aanspreeklikheid, wat hoofsaaklik op grond van beleidsoorwegings binne die "duty of care" benadering geskied, het egter striemende kritiek ontlok (sien *Barnard* 210F–212H).

Vervolgens keer die regter terug na die bevinding van die hof *a quo* dat die senuskok van die eiseres nie redelikerwys voorsienbaar was nie en dat die

voertuigbestuurder wat haar seun se dood veroorsaak het, gevolglik nie nalatig teenoor haar opgetree het nie. Ten aanvang wys hy tereg daarop dat regter Swart elemente by die redelike voorsienbaarheidstoets betrek, te wete beleidoorwegings, wat nie daar tuishoort nie (212H–J). In hierdie opsig is die beslissing van die hof *a quo* (1997 4 SA 1032 (T) 1069) dus vatbaar vir kritiek (sien ook Neethling 1998 THRHR 338–339). Die hoogste hof van appèl stel dit so (213A–B):

> "Dit is geykte reg dat 'n dader deliktueel nalatig optree indien hy versuim om ter vermyding van 'n benadelende gevolg stappe te neem om die intrede daarvan te verhoed, en 'n redelike persoon in sy plek dit wel sou gedoen het. Om vas te stel of sodanige persoon voorkomende stappe sou geneem het, word dan eerstens gevra of hy die redelike moontlikheid sou voorsien het dat die betrokke daad 'n ander skade kon berokken . . . Hier is dit voldoende om te konstateer dat by 'n evaluering van die redelikheid van 'n moontlikheid beleidsoorwegings geen rol speel nie."

Adjunk-hoofregter Van Heerden staan ook krities teenoor regter Swart se navraag na en antwoorde op die voorkombaarheid (as tweede been van die nalatigheidstoets) van die gewraakte senuskok. Volgens regter Van Heerden kom net die voorsienbaarheidsbeen van die nalatigheidstoets ter sprake aangesien die voorkombaarheidsbeen reeds met betrekking tot die nalatigheid van die voertuigbestuurder ten aansien van die botsing gefinaliseer is. Hy sê (213F–G):

> "Soos reeds gemeld, is die botsing deur Laubscher [die bestuurder] se nalatigheid veroorsaak. 'n Redelike persoon in sy plek sou dus bloot deur sorgvuldig te bestuur die botsing vermy het. Indien dit gebeur het, sou die botsing nie plaasgevind het nie; die appellant se seun sou nie gesterf het nie, en sy nie senuskok opgedoen het nie. Daar is dus nie sprake van verdere stappe (anders as ter vermyding van die botsing) wat die redelike bestuurder ter voorkoming van die appellant se senuskok sou of kon gedoen het nie. (Vergelyk Neethling se bespreking van die uitspraak van die Verhoorhof in 1998 *THRHR* 335 op 340.)"

In hierdie verband kan nie genoeg beklemtoon word dat dit onlogies is om, nadat bevind is dat 'n dader nalatig opgetree het (omdat hy in die lig van redelik voorsienbare gevolge anders moes opgetree het), met verwysing na verdere gevolge weer te vra of die dader anders moes opgetree het. Daar is immers reeds besluit dat hy anders moes opgetree het. Dit is dus sinloos om weer te vra of die dader hom van sy daad moes weerhou het juis met die oog op die waarskynlikheid dat die verwyderde gevolg op sigself sou intree. By verdere gevolge is dit met ander woorde onnodig om weer die tweede been van die nalatigheidstoets (of die dader anders moes opgetree het) toe te pas (sien Neethling, Potgieter en Visser *Delict* 199–200; Neethling 1998 *THRHR* 340; Hart en Honoré *Causation in the law* (1959) 239–240).

Om nou terug te keer tot die vraag na redelike voorsienbaarheid, bevind adjunk-hoofregter Van Heerden, anders as regter Swart, dat die eiseres se senuskok wel redelik voorsienbaar was. Volgens hom bring die feit dat senuskok weens hoorsê selde intree, nie mee dat dit nie as 'n redelike moontlikheid voorsienbaar is nie (213H–214C). Hierdie gevolgtrekking blyk *obiter* ook uit *Bester* (214D). Met verwysing na die betoog dat senuskok net redelikerwys voorsienbaar is as dit voortspruit uit direkte waarneming van die betrokke gebeurtenis of sy onmiddellike nadraai, verklaar die hof (214H–I):

> "Toegegee dat die kans van intrede van senuskok in bogenoemde soort geval heelwat groter is as in 'n hoorsê geval, is daardie kans in laasgenoemde geval na my mening nie een wat 'n redelike bestuurder altyd so gering sou skat dat geen ag op voorkomende optrede geslaan hoef te word nie. Om meer spesifiek te wees, is

> ek van oordeel dat *in casu* die opdoen van senuskok deur die appellant wel as 'n redelike moontlikheid deur die *diligens paterfamilias* in die plek van Laubscher [die nalatige bestuurder] voorsien sou gewees het."

Volgens regter Van Heerden was die skok as 'n redelike moontlikheid voorsienbaar veral vanweë die besonder innige verhouding wat normaalweg tussen 'n moeder en haar jong kind bestaan (215C). As algemene reël formuleer hy (215B) dat

> "hoe nouer die verwantskap of verhouding tussen die primêre getroffene en die geskokte persoon is, hoe geredeliker gekonkludeer kan word dat die veroorsaking van die skok redelik voorsienbaar was" (vgl ook Neethling 1998 *THRHR* 342).

Alhoewel die vraag of nie-verwante kan eis, nog nie pertinent voor die howe gedien het nie, lyk dit nie of *Barnard* sodanige moontlikheid uitsluit nie.

Deur aanspreeklikheid vir senuskok in beginsel op redelike voorsienbaarheid te baseer, volg die hoogste hof van appèl op die voetspoor van 'n reeks voorafgaande gewysdes (sien *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 780–781; *Boswell v Minister of Police* 1978 3 SA 268 (OK) 273 274; *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (K) 342–343; *Majiet v Santam Ltd* [1997] 4 All SA 555 (K) 561–562 568; vgl *Clinton-Parker and Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) 52 ev 57; *Gibson v Berkowitz* 1996 4 SA 1024 (W) 1049–1050). Nou is dit so dat dit by redelike voorsienbaarheid óf om die vraag na nalatigheid, óf om die vraag na juridiese kousaliteit ten aansien van die emosionele skok gaan. By nalatigheid moet die redelike persoon-toets toegepas word (redelike voorsienbaarheid en voorkombaarheid van die psigiese nadeel: sien bv *Kruger v Coetzee* 1966 2 SA 428 (A) 430; Neethling, Potgieter en Visser *Delict* 127–129 137 ev; sien ook *Barnard* 213A), terwyl by regsoorsaaklikheid die soepele benadering geld, te wete dat by die vasstelling of 'n (verwyderde) skadepos (psigiese letsel) die dader toegereken moet word, "beleidsoorwegings ter sprake kom, en dat daarteen gewaak moet word dat 'n dader se aanspreeklikheid nie die grense van redelikheid, billikheid en regverdigheid oorskry nie" (*Barnard* 215E; sien bv ook *S v Mokgethi* 1990 1 SA 32 (A) 40–41). By die toepassing van die soepele benadering kan die bestaande juridiese kousaliteitsmaatstawwe, soos redelike voorsienbaarheid, wel nog 'n subsidiêre rol speel (Neethling, Potgieter en Visser *Delict* 185 ev 201–203).

Daar word aan die hand gedoen dat die vraag na nalatigheid te berde kom indien die senuskok of psigiatriese besering die enigste of minstens (een van) die eerste skadelike gevolg(e) van die dader se handeling was; met ander woorde, ten einde nalatigheid te bepaal, moet die redelike voorsienbaarheid en voorkombaarheid van die betrokke psigiese letsel(s) vasgestel word. Waar die senuskok daarenteen 'n verdere (daaropvolgende of meer verwyderde) gevolg van die dader se reeds gevestigde nalatige handeling is (dws sy nalatigheid is reeds bepaal met verwysing na 'n ander skadelike gevolg wat die senuskok voorafgaan), is die vraag na juridiese kousaliteit voorhande, naamlik of die dader se nalatige handeling as regsoorsaak van (óók) die psigiese letsel geag kan word (sien ook Neethling, Potgieter en Visser *Delict* 292). Goeie voorbeelde is *Majiet v Santam Bpk* [1997] 4 All SA 555 (K) waar die eiseres psigiese trauma opgedoen het toe sy op die lyk van haar jong seun afgekom het waar hy in 'n straat op *nalatige wyse* deur 'n voertuig omgery is; *Clinton-Parker and Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) 55 ev waar die eiseresse se ernstige emosionele ontsteltenis veroorsaak is deur hulle ontdekking dat hulle babas twee jaar vantevore by geboorte *nalatig* omgeruil is; en *Gibson v Berkowitz* 1996 4

SA 1029 (W) 1038–1041 1048–1053 waar die eiseres psigologiese trauma ervaar het toe sy tydens mediese behandeling op 'n *nalatige wyse* met onverdunde suur op haar privaatdele gebrand is. (Vir verdere voorbeelde vgl *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (K); *Mulder v South British Insurance Co Ltd* 1957 2 SA 444 (W); *Lutzkie v SAR &* H 1974 4 SA 396 (W). Of die voorsienbaarheidsvraag in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) oor juridiese kousaliteit dan wel oor nalatigheid mbt die psigiatriese besering gegaan het, bestaan daar meningsverskil (sien Neethling en Potgieter 1973 *THRHR* 178; *Barnard* 210B–C). Dit is waarskynlik daaraan toe te skryf dat die eiser self in gevaar van besering verkeer het toe sy broer omgery is (sy emosionele skok was dus een van die eerste skadelike gevolge van die dader se handeling) en dat die dader se nalatigheid daarom goedskiks ook ten aansien van sy senuskok vasgestel kon word.)

So beskou, het 'n mens in *Barnard* by die vraag na die redelike voorsienbaarheid van die eiseres se senuskok dan eintlik met regsoorsaaklikheid te make aangesien sy die skok opgedoen het toe sy verneem het van haar kind se dood in 'n botsing wat veroorsaak is deur die *nalatigheid* van die betrokke bestuurder. Daarom is adjunk-hoofregter Van Heerden se uitspraak op hierdie punt vatbaar vir kritiek. Sy werkswyse om by die bepaling van nalatigheid ten aansien van die senuskok slegs die voorsienbaarheidsbeen aan te wend, reduseer nalatigheid naamlik ten onregte tot redelike voorsienbaarheid – 'n beskouing wat in die lig van soveel gesaghebbende *dicta* van die appèlhof dat nalatigheid die redelike voorsienbaarheid én voorkombaarheid van skade behels (sien weer Neethling, Potgieter en Visser *Delict* 128–129; *Barnard* 213A), eenvoudig nie steekhou nie. Hieruit volg dat die nalatigheidstoets nie geskik is om aanspreeklikheid vir verwyderde gevolge te bepaal nie. Inteendeel, omdat 'n mens hier die gebied van juridiese kousaliteit betree en die funksie en doel van nalatigheid (vraag na *verwytbaarheid* van die dader) radikaal verskil van dié van juridiese kousaliteit (vraag na *toerekenbaarheid* van skade), behoort die toepassingsgebiede van hierdie twee delikselemente ter wille van begripshelderheid en gesonde regsontwikkeling duidelik uitmekaar gehou te word (sien ook Neethling 1998 *THRHR* 341; Neethling, Potgieter en Visser *Delict* 199). Hiermee word egter nie ontken nie, soos die hoogste hof van appèl tereg opmerk (*Barnard* 210C; sien ook Neethling 1998 *THRHR* 340), dat dit spesifiek wat die voorsienbaarheid van senuskok betref "uit 'n praktiese oogpunt . . . geen verskil [maak] of die een of die ander konstruksie verkies word nie".

Die verskil tussen nalatigheid (wat voorsienbaarheid betref) en juridiese kousaliteit word beklemtoon deur die feit dat beleidsoorwegings net by laasgenoemde 'n rol speel. 'n Oorweging wat volgens die hof dikwels geopper word, is dat aanspreeklikheid weens psigiese letsels tot 'n vloedgolf van litigasie aanleiding sal gee *(Barnard* 215F; sien ook *Majiet v Santam Ltd* [1997] 4 All SA 555 (K) 558 568; *Clinton-Parker and Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) 60–64). Die vrees vir onbeperkte aanspreeklikheid is volgens regter Van Heerden egter oordrewe (215I–216A; sien ook Neethling 1998 *THRHR* 341):

> "Per slot van sake het daar in die kwart eeu sedert *Bester* beslis is nog slegs 'n handjie vol gerapporteerde sake, waarin skadevergoeding op grond van nalatige veroorsaking van senuskok gevorder is, voor ons Howe gedien. En daar is min rede om te glo dat die situasie beduidend sal verander indien die onderhawige appèl sou slaag. Hier dien weereens beklemtoon te word dat die opdoen van senuskok in 'n hoorsê geval iets is wat selde voorkom."

Bowendien kan bedoelde vrees besweer word deur 'n korrekte toepassing van die beginsels van die onregmatige daad wat op die gebied van die veroorsaking van senuskok of psigiese letsels toepassing vind (sien Neethling 1998 *THRHR* 341–342). Volgens regter Cleaver in *Majiet v Santam Ltd* [1997] 4 All SA 555 (K) 558 speel veral twee beginsels 'n rol:

> "[T]he consequences must have been foreseeable by a reasonable person and ... the emotional shock must not be inconsequential and of short duration."

'n Tweede beleidsoorweging wat die hof noem en wat veelal teen aanspreeklikheid op grond van psigiatriese beserings aangevoer word, is dat dit tot gesimuleerde eise sal lei. Hierop verskaf regter Van Heerden die volgende duidelike antwoorde (216E–F):

> "Eerstens kan ook 'n persoon wat beweer dat hy senuskok opgedoen het weens direkte waarneming van, sê, die dood van 'n naasbestaande 'n bedrieglike eis instel of die omvang van die skok doelbewus aandik. Tweedens moet 'n eiser natuurlik bewys dat hy 'n erkende psigiatriese letsel opgedoen het en sal hy dus in die reël op ondersteunende psigiatriese getuienis aangewese wees. Derdens is dit sekerlik nie ongehoord dat in die geval van 'n suiwer fisiese besering 'n eiser 'n beweerde nagevolg daarvan in sy geheel of ten dele simuleer nie."

Adjunk-hoofregter Van Heerden kom gevolglik tot die slotsom dat beleidsoorwegings, in besonder die voorskrifte van redelikheid en billikheid, nie teen die gevolgtrekking spreek dat die betrokke bestuurder se nalatige optrede met betrekking tot die kind se dood as regsoorsaak van die eiseres se senuskok aangemerk word nie (216I–217A).

Ten slotte is dit interessant dat die beleidsoorwegings wat by juridiese kousaliteit ter sprake kom, asook die oorwegings van redelikheid, billikheid en regverdigheid wat die soepele benadering in hierdie verband kenmerk, in wese nie verskil van die oorwegings wat in die Engelse reg 'n rol speel by die vraag of die dader 'n "duty of care" teenoor die psigies benadeelde persoon gehad het nie. Van der Walt ("Skoktoediening: Wie sal die aftreksom maak?" *Huldigingsbundel vir WA Joubert* (1988) 256–260) sluit hierby aan. Hy voer aan dat die regspligbenadering tot onregmatigheid waar redelikheid as beleidsmaatstaf deurslaggewend is (sien Neethling, Potgieter en Visser *Delict* 37 ev 55 ev), eerder as redelike voorsienbaarheid as kousaliteitsmaatstaf, aangewend moet word om aanspreeklikheid weens senuskok binne perke te hou. Volgens Van der Walt en Midgley *Delict. Principles and cases* (1997) 76 is die voorsienbaarheidsmaatstaf trouens "out of step with current legal thought". In hierdie verband moet egter beklemtoon word dat al het die howe redelike voorsienbaarheid in baie gevalle aangewend om regsoorsaaklikheid by psigiese letsels te bepaal, dit nie die deurslaggewende maatstaf is nie aangesien die soepele benadering tot juridiese kousaliteit – waar die voorsienbaarheidskriterium net 'n subsidiêre (maar weliswaar belangrike) rol speel – toegepas moet word (sien bv Clinton-Parker and *Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) 55 ev; *Gibson v Berkowitz* 1996 4 SA 1029 (W) 1038–1041 1048–1053; *Majiet v Santam Ltd* [1997] 4 All SA 555 (K) 561–562 568–569; *Barnard* 215–217; sien ook Neethling en Potgieter "Emosionele skok, juridiese kousaliteit en bydraende nalatigheid" 1997 *THRHR* 549–550; Neethling 1998 THRHR 339–340). In *Majiet v Santam Ltd* [1997] 4 All SA 555 (K) 562 vat regter Cleaver die posisie soos volg saam:

> "The position in South Africa today is accordingly that instead of simply applying the reasonable foreseeability test referred to in *Bester's* case, a more composite test is now applied, namely, a test which is referred to as a 'soepele maatstaf' by Van Heerden JA in *Mokgethi's* case or the composite, supple or 'smorgasbord' test as it has been described by Burchell in *Principles of Delict* (1993) at 94 and 121."

So gesien, is die benutting van redelike voorsienbaarheid nie strydig nie maar op een lyn met hedendaagse regsdenke om die omvang van aanspreeklikheid deur juridiese kousaliteit te beperk en daarmee die vrees vir oewerlose aanspreeklikheid hok te slaan. (Sien bv *Clinton-Parker and Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) 55 ev; *Majiet v Santam Ltd* [1997] 4 All SA 555 (K) 561–562 568–569; vgl *Barnard* 215–217. Vgl veral ook Van Aswegen ("Policy considerations in the law of delict" 1993 *THRHR* 192 193) se geldige kritiek teen die howe se aanwending van die onregmatigheidselement om die omvang van aanspreeklikheid weens suiwer ekonomiese verlies te bepaal (sien ook Neethling, Potgieter en Visser *Delict* 299 vn 137).)

J NEETHLING
Universiteit van Suid-Afrika

Vergelykende oorweging kan, soos ten oorvloede uit talle van ons gewysdes en regsverhandelinge blyk, 'n besonder dienstige middel wees om tot helderheid te geraak omtent die beste toepassing, aanpassing of uitbouing van eie beginsels. Om die bevrugtende inwerking van verwante regstelsels te wil uitsluit, sou nie slegs 'n onbegonne taak wees nie, maar ook 'n verarmende kortsigtigheid waaraan ek geen deel sou wil hê nie.

Hoofregter LC Steyn in Trust Bank van Afrika v Eksteen *1964 3 SA 402 (A) 411D–E.*

BOEKE

CUSTODY AND VISITATION DISPUTES: A PRACTICAL GUIDE

by H BOSMAN-SWANEPOEL, A FICK AND NA STRYDOM

Butterworths Durban 1998; xii and 149 pp

Price R169,86 (soft cover)

The inter-disciplinary approach to the issue of custody and visitation disputes which the authors of this book have adopted is both long overdue and extremely welcome. In the foreword to the book, Adv Fouche of the office of the Family Advocate stresses that the authors intend the work to convey information of a practical nature to laymen, students and professionals (v). The authors therefore set themselves the unenviable task of dealing with an extremely complex legal problem in a manner appropriate to a diverse readership.

A short preface to the work and its objectives, written by the authors, is followed by a comprehensive table of contents. The work is divided into six parts. Part one, comprising a single chapter, is of an introductory nature. Part two dealing with legal processes comprises three chapters dealing with statutory aspects, the High Court and African customary law. The dedication of a full chapter of this work to African customary law is to be applauded. Part three of the book deals with parental capacity. It, too, is divided into three chapters which deal with general psycho-social aspects of parental capacity, the assessment of parental capacity, and children's needs. Part IV relates to preventative recommendations and consists of a single chapter on filial therapy and divorce mediation. The authors' conclusions are contained in Part V. Part VI contains statutory information in the form of copies of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997, the Prevention of Family Violence Act 133 of 1993 and the Mediation in Certain Divorce Matters Act 24 of 1987, its appendices A and B and extracts from the regulations under that Act. The book is completed by the inclusion of a table of references, a table of cases and a subject index.

The slim-line volume is attractively bound and the layout is visually appealing, although the type-face is a little small for comfortable reading. Unfortunately the text is marred by numerous errors of an editorial nature which take the form of, *inter alia*:

Incorrect language usage, for example: "Negative rights of children can be described as the right not be subjected to neglect or abuse" (3); "Coming from a broken home is a reality situation" (4); "a man or a woman who: . . . (c) who . . ." (13 paragraph 2.3.1); "These methods of service differ somewhat from that

prescribed . . ." (17); "This it is possible . . ." (26); "As regards the variation of orders, A court . . ."(27); " . . . supported by an affidavit stating tha facts . . ." (32), "Most families fall somewhere between engagement and enmeshness." (63), and so on.

Incorrect or absent punctuation, for example: "When parents divorce changes in the personal relationships and role expectations within the family are unavoidable" (59).

Inconsistencies in the use of the singular and the plural, for example: "Owing to the civil nature of the enquiry the parties requesting the enquiry, for instance, the social worker, may be regarded as the applicants and the opposing party, the parents and/or the child, as the respondents" (11).

Inconsistencies in referencing techniques, for example; inconsistency in footnotes, compare "Stafford 1995 124" (4 fn 3) with "Schaffer H 1990 166" (5 fn 8). On page 4 the authors refer to "UNICEF" but in line 1 of page 13 and in footnote 9 of the same page they refer to "UNISEF". The authors cite "The Natural Fathers of Children Born out of Wedlock Act 86 of 1997" (Header 109) but refer to "The Natural Fathers of Children Born out of Wedlock Act 86 of 1977" (Header 111, 113, 115). The references at 135–136 are also inconsistent. In some cases the place of publication of books appears together with the publisher's details, date of publication and the pages of the work referred to, whereas in others some or all of this information is missing. Names of cases listed in the table of cases are not italicised (137). (The list of cases referred to is extremely limited.)

These are just a few of the errors which proliferate throughout this book. It is not my purpose to edit the book so I shall move on.

Despite the fact that the authors of this book have taken the positive and innovative step of approaching the topic of custody and visitation from the child's perspective, I found the contents of the book to be disappointing. Chapter 2 of the book refers, *inter alia*, to provisions of the Child Care Act 74 of 1983 and the Magistrates' Courts Act 32 of 1944. Unfortunately the authors do not include excerpts from the relevant sections of these Acts. Readers must thus revert to the statutes themselves in order to establish the contents of the provisions to which they are referred. One example of this is "A child can be found a child as in circumstances described in section 14(4)(b) of the Child Care Act:", another is: "It must be noted that the definition of a court in section 1 of the Magistrates' Courts Act is a magistrate's court." (9).

Statements such as: "Courts have different functions and it is thus not possible to use the children's court as a means of saving costs" are unhelpful. (9) Further explanation is required. This statement does not follow from the one which precedes it.

The discussion of the Child Care Act 74 of 1983 does not include any mention of the South African Law Commission's 1998 proposals (South African Law Commission Project 110). A short note on the Commission's ongoing review of children's rights could have been expected.

The Prevention of Family Violence Act 133 of 1993 is also discussed in chapter 2. The discussion is again somewhat superficial and thus disappointing. The authors repeatedly refer to prescribed forms for certain purposes (13ff) but do not include specimens of such forms or a reference to the place where they can be located. This is an important omission in a work which purports to be a

practical guide. On a number of occasions the authors raise issues but do not elaborate on them. For example, in relation to the Prevention of Family Violence Act 133 of 1993 the authors indicate that they find the omission of a provision allowing for the hearing of viva voce evidence, or the conducting of an in-depth enquiry by the presiding officer when such matters are considered, to be a severe shortcoming of the legislation (19). They do not, however, indicate why they hold this view or what they would suggest should be done to remedy the defect. The authors also indicate that the peace officer has a discretion as to whether or not to execute the warrant for arrest in the event that it is presented to him together with an affidavit regarding the breach of the conditions of an interdict issued under the Prevention of Family Violence Act 133 of 1993 (21). They fail to indicate under which circumstances the peace officer may refuse to execute the warrant.

On page 24, as in a number of other places in the book, the authors quote extensively from the legislation referred to. They do not indicate which passages are direct quotations and, indeed in places the quotations are incorrect.

The book is not structured to form a logical sequence. The chapter of the book on the High Court (ch 3) contains information of a basic nature relating to custody, access, visitation, and the role of the family advocate that should have been included before the discussion of the statutes contained in chapter 2. The copies of the statutes that appear in the back of the book are also not arranged in any logical sequence. They are neither arranged alphabetically nor in the order in which they are discussed in the work.

Chapter 4, dealing with African customary law, was not written by any of the three authors of the work but by Mr Danny Fourie, a theology graduate from the University of Stellenbosch. This chapter, too, is disappointing in that it is out of date. The author fails to include references to many of his sources: for example, in the first line of the first paragraph of the chapter he writes: "A writer suggested . . ." without advising the reader who that writer was or where he made the suggestion (41). This failure to refer to the authorities used is found throughout the chapter (see, *inter alia*, par 4 1 2 6 line 10 45, table 46, par 4 1 5 2 line 1 50, par 4 1 5 3 line 1 51, par 4 1 6 1 line 1 52, fifth par line 1 55, etc). Footnote 4 (43) contains a reference to Martin Chanock. This reference is not in the same style as the references in the rest of the book. In addition, the reference is incomplete. No page reference appears and, as Chanock does not appear in the bibliographical information on the book, the reader does not know whether Mr Fourie is referring to a book or an article.

Chapters 5, 6 and 7 relate principally to the psychological and social-welfare aspects of custody and visitation disputes. Despite the fact that the errors which mar the other chapters of this work are present in these chapters too, the inclusion of this information in a book of this nature will be of considerable value to the lawyer who is not schooled in psychology or social work. As a lawyer I am not qualified to comment on the quality of the information contained in these chapters. Certainly the information is interesting and easily understood.

The authors have limited their preventative recommendations in chapter 8 to a very brief, three-page discussion of the values of filial therapy and divorce mediation. Innovative suggestions regarding the broad approach to custody and visitation are sadly lacking. Chapter 9, containing the authors' conclusions, comprises a single page in which a call is made for a more interdisciplinary approach to the determination of the best environment within which to place the children of divorce.

The book is of an extremely superficial nature; so much so, that it is ambiguous and inaccurate in places. The chosen topic cannot be dealt with adequately in 99 pages of text. The law of custody and visitation disputes cannot be adequately canvassed in so short a book, let alone the psychological and social implications of such disputes. Vital topics such as parental abduction do not receive a mention, even though they are pressing legal problems associated with custody and visitation disputes.

The authors of this work had an extremely good idea which, unfortunately, fails to live up to its potential. There is unquestionably a need for an interdisciplinary approach to the review of children's law in South Africa and a book that attempts to follow such an approach would be a vital addition to the library of social workers, psychologists, family lawyers and any other person who is involved in child care. This work, unfortunately, does not meet the case.

CAROLINE NICHOLSON
University of Pretoria

ADMINISTRATIVE LAW UNDER THE 1996 CONSTITUTION
by YVONNE BURNS
Butterworths Durban 1998; iv and 352 pp
Price R200,64 (soft cover)

Recent years have seen many publications on constitutional issues, focusing largely on fundamental rights and the Bill of Rights in the Constitution in particular. Since the seminal works of Wiechers, Baxter and Boulle, Harris and Hoexter in the eighties, publications on administrative law have lagged far behind. In fact, Boulle *et al* (the latest in the trio) appeared in 1989 and Cora Hoexter's supplement to Baxter in 1991; no textbook on this topic has seen the light of day in this country since then. The enormous advances in this branch of the law brought about by, first, the interim Constitution, and thereafter the 1996 Constitution, have been discussed in numerous articles and at many seminars and conferences, but there has been no up-to-date reference book for students, practitioners or all the many officials and bureaucrats who deal with this branch of the law daily. For this reason alone, Yvonne Burns has rendered a great service and this book must be welcomed.

This, of course, would be empty praise if the content did not meet the need. The cover immediately attracts the eye – a swirl of bright, slightly unfocused national flag colours.

The work is introduced by a thought-provoking foreword by the father of South African administrative law, Marinus Wiechers. The book comprises eight chapters, all of which are clearly set out with headings and sub-headings in the contents – facilitating quick reference.

The first chapter deals with basic constitutional concepts, because, as Professor Burns correctly points out in her brief introduction, administrative law is

really a specialised branch of constitutional law, and a thorough knowledge of basic constitutional-law principles is therefore a prerequisite if one is to become properly conversant with administrative law. These basic concepts, which include the general characteristics of the Constitution, also serve to define various terms used in the book. The fact that not only the initiated are addressed makes the work available and of benefit to a far wider audience. Terminology and jargon are briefly explained throughout.

The general principles of administrative law are discussed in chapter two, dealing with the place of administrative law in the legal system and the various state functionaries and organs involved in the administrative-law relationship. Since the introduction of a whole chapter on co-operative government in the 1996 Constitution (incidentally also chapter three!), the addition of a chapter on this topic in an administrative-law textbook which deals with the applicable principles is extremely welcome. Experience has proved that co-operative government is not something public representatives and officials are familiar with or particularly keen to embrace.

Chapter four deals with the sources of administrative law (in other words where the legal rules can be found) as distinct from the sources of administrative power. The administrative-law relationship, who the legal subjects in the relationships are and administrative acts are fully and clearly canvassed in chapter five.

Chapter six forms the heart of this textbook. It deals with the concept of just administrative action and although the whole book is written in the context of the 1996 Constitution, it is here where the constitutional right to administrative justice is examined in depth. Our administrative-justice clause is briefly compared to the concept of administrative justice in Canada, the United Kingdom, the USA and Namibia, before the position in South Africa is dealt with. On page 135 the statement is made that "[u]ntil such time as section 33 comes into operation, section 24 of the interim Constitution applies". If one wants to be pedantic, one could take issue with this statement. It is, strictly speaking, item 23(2)(b) of schedule 6 which applies, and although the wording is virtually identical to section 24 of the interim Constitution (so that nothing turns on the difference), it is not section 24.

A very thorough treatment of just administrative action, procedural fairness, the giving of reasons and justifiability/reasonableness follows. The last-mentioned topic includes a discussion of the principle of proportionality, setting out the position in English, German, Canadian and European law and the specific inclusion of all the elements of this principle in section 36 of the Constitution (the limitation clause).

Chapter seven deals with the control of administrative action, in other words the remedies for unjust administrative action. It includes a valuable section on procedure and evidence, including the onus of proof. Apart from all the usual methods of control, those created by the Constitution, such as the public protector and the human rights commission are also examined and explained. Unfortunately, after the first few pages of this chapter the running heads went awry and refer one back to the administrative-law relationship.

The book concludes with a comprehensive discussion of all the elements of state liability, again within the context of the Constitution. A useful addition under the heading of compensation is a brief discussion of redistribution and restitution of land in terms of the various statutes which regulate this as it pertains to administrative-law principles.

Professor Burns is to be congratulated on this book – it fills a sorely felt need. One of the user-friendly features of the work is the provision of summaries throughout at the end of important sections of the work. There is a comprehensive table of cases, table of statutes and index for easy reference. My only real criticism is the lack of a bibliography. Although all the references are fully tabulated in the footnotes, it is frustrating for anyone wishing to research more widely. Given the fact that the book was produced fairly soon after the coming into operation of the Constitution, it is relatively free of typographical errors. Here and there statements are repeated giving the impression that they were garnered from different sources without careful enough screening.

On the whole, though, the book is a must for students and practitioners; and it is also to be hoped that it will be intensively studied by all members of the state administration at every level who deal with the rules and procedures of administrative law on a daily basis.

ISABEAU SOUTHWOOD
University of South Africa

ADMINISTRATION OF ESTATES AND DRAFTING OF WILLS

by LA KERNICK

Third edition: Juta Cape Town 1998; 364 pp

This book provides a valuable guide to anyone involved in the administration of estates or the drafting of wills. Like its predecessors, it aims to guide the executor of an estate through the whole process of administration. As a starting point the executor is seen as someone of whom "the prime characteristic . . . is probably common sense" (123). This executor, whether experienced in matters of law or a complete layman, is led through the process from the moment of calling the deceased's family to gather the relevant papers to finalising the liquidation and distribution account. From the outset checklists for the executor are provided, by means of which he can ensure that he follows the process correctly. Details of all documents needed are given and procedures to be followed, for example when opening a cheque account for the estate, are explained. The executor is also alerted to possible problems that may arise from the will such as problems with the formalities or possible interpretation problems (eg massing, *fideicommissa*, etc). The book also provides a short summary of the important provisions of the Wills Act relevant to the interpretation of the will, for example section 2B regarding the effect of divorce or annulment of a marriage on a will.

The book, furthermore, not only supplies the addresses of the different Master's offices, but also provides the current Master's fees as well as examples of all documents to be filled in and handed in at the Master's office. Valuable advice on interpersonal relations with staff at the Master's office as well as with the widow of the deceased is also included. The importance of involving the widow or other concerned family members in the process, thereby facilitating the executor's role, is stressed.

A new section on the drafting of wills has been added to the third edition. In the preface it is suggested that the experienced administrator of estates is generally the ideal person to draft a will as he is aware of most of the practical problems which may arise in the administration of the estate. The author highlights problems arising from various forms of bequests such as usufructs, *fideicommissa* and trusts. He points out that of these, the first two are to be avoided, while it is recommended that trusts be used. The pitfalls and costs involved in the setting up of a trust are, however, clearly explained.

In the section regarding the drafting of wills, the author has included an example of the so-called "letter of wishes" (136) as well as a "living will" (137). Furthermore, a specimen will (138) is provided – its value enhanced by the fact that examples of wording to be avoided are also supplied (see, eg, 143).

The appendices to the book, which take up more than half of the book, provide everything the drafter of a will or executor of an estate may need. They contain all the Acts, regulations, notices and forms that may be needed and therefore simplify the executor's task considerably.

Overall, this book is one which any person involved with any aspect of an estate, be it as an experienced executor, a student, a clerk or a layman, should not be without.

JUANITA JAMNECK
University of South Africa

[There is an] ever-continuing struggle between the executive and the subject, a struggle in which the former with the aid of apt phraseology seeks to make regulations enabling it to exercise arbitrary powers, whilst the subject seeks to resist its claims.

Commissioners of Customs and Excise v Cure and Deeley Ltd *1961 3 All ER 641 652A.*

BRIEWE

Die volgende brief is deur die redakteur ontvang:

Geagte professor Neethling

Frans Viljoen se pleidooi vir eenvoudiger en juister regstaal (November 1998 *THRHR* 714) is lofwaardig. Om die snoeiskêr te ywerig te gebruik, kan egter ook tot misverstand lei. Die skrywer sê in sy paragraaf 3 dat dit onnodig is om die geslag van die partye tot die egskeidingsgeding – jammer, in die skeisaak – te noem. Sy rede: "Die eiename laat geen rede vir onsekerheid nie." Waar kom hy vandaan? Ek het 'n Lizzie Bezuidenhout geken wat vader van vier seuns was. Ja, sy voornaam was Elizabeth met nog 'n vroumens-voornaam by. Raai wat sy ouers bestel het voor hy gebore is. (Hy het nie hulle voorbeeld gevolg met *sy* vierde kind nie.) En hoeveel keer sien mens nie in die lys van die name van studente wat grade gaan ontvang (*graduandi* is dalk te moeilik?) by gradeplegtighede die byvoegsel "Mej" na 'n tipiese seunsnaam nie? Raai wat wou *hulle* ouers gehad het! Voeg by dat dit mode geword het onder ons mense om voomame te skep wat geen voorsaat vernoem nie. Ek kry uit twee eksemplare van hierdie week se *Burger* wat toevallig byderhand is, "Noldé" en "Megèl" . Mens sal darem seker selde twee sulke voorname by beide lede van 'n egpaar raakloop.

Die probleem is eintlik dat mens moet *dink* om alles wat nodig is, in eenvoudige taal te skryf. Die geykte formules is lange jare al ingeburger en regslui is, nouja, konserwatief. Was dit nie Churchill nie, wat gesê het dat dit ure neem om 'n tien-minuutlange toespraak voor te berei, maar om ure te klets verg slegs tien minute se notas krap? Ek vind nie die aanhaling nie, wel een van Mark Twain: "It usually takes more than three weeks to prepare a good impromptu speech."

Met tong in die kies maar opregte goeie wense vir 'n puik *Tydskrif* waarvan ek vanaf 1951 intekenaar is.

Leo van den Heever
Chesterfieldweg 20
Oranjezicht 8001

[Wat die eie name betref, kan daar ook gewys word op die groei in die gebruik van androgene name, en dan natuurlik ook op die feit dat baie tradisionele inheemse name aan Westerlinge, met hul Eurosentriese kultuur, onbekend is! Redakteur.]

Domicile of choice and *animus*: how definite is indefinite? (*continued*)

Elsabe Schoeman
BLC LLB LLD
Senior lecturer, Department of Jurisprudence, University of South Africa

4 STATUTORY INTERVENTION: THE DOMICILE ACT 3 OF 1992

Section 1(2) of the Domicile Act[100] requires an intention to settle in a particular place *for an indefinite period* for the acquisition of a domicile of choice. The word *indefinite* is not a strange or uncommon term to the South African lawyer when it comes to the law of domicile. In *Udny v Udny*,[101] a Scottish case often cited in South Africa,[102] the intention required for the acquisition of a domicile of choice was described as having to be "general and *indefinite* in its future contemplation".[103] After the decision in *Winans v Attorney-General*[104] and the acceptance of Westlake's interpretation of the English cases,[105] the courts began to refer to the requisite intention as one to settle *permanently*,[106] presumably because Westlake's interpretation was regarded as conforming to the Roman-Dutch authorities on this point.[107] In a few cases, *permanent* and *indefinite* were regarded as synonymous:

> "In other words, what was his permanent home – because domicile only means home; where did he mean to reside indefinitely?"[108]

In its report on domicile,[109] the South African Law Commission came to the conclusion that the requisite *animus* for the acquisition of a domicile of choice should be to settle in a place for an *indefinite period*.[110] Pollak[111] was quoted in

---

100 Act 3 of 1992.
101 1869 LR 1 Sc & Div 441.
102 See the discussion under 3 South African case law in the first part of this article.
103 *Udny v Udny* 1869 LR 1 Sc & Div 441 458 (my italics).
104 1904 AC 287.
105 See *Johnson v Johnson* 1931 AD 391, discussed under 3 South African case law in the first part of this article.
106 See, eg, *Webber v Webber* 1915 AD 239 242 249 258; *Hutchison's Executor v The Master (Natal)* 1919 AD 71 74; *Deane v Deane* 1922 OPD 41 43; *Johnson v Johnson* 1931 AD 391 398; *Moncrieff v Moncrieff* 1934 CPD 208 210–211; *Carvalho v Carvalho* 1936 SR 219 221; *Ex parte Ralston's Estate* 1937 TPD 46 53; *Cook v Cook* 1939 CPD 314 316; *Eilon v Eilon* 1965 1 SA 703 (A) 720–721.
107 See under 3 South African case law in the first part of this article.
108 *Gunn v Gunn* 1910 TS 423 427. See also *Carvalho v Carvalho* 1936 SR 219 221: "[T]here must . . . be not only residence but the intention to remain permanently and indefinitely."
109 1990 (Project 60).
110 Para 3.44.
111 1933 *SALJ* 449 465.

support of this statement. In order to shed some light on the recommendations of the Law Commission, one needs to take a closer look at the four kinds of intention mentioned by Pollak in his article, namely:

> "(1) An intention to reside in the country for a definite period, eg, for the next six months, and then to leave.
>
> (2) An intention to reside in the country until a definite purpose is achieved, eg, until a particular piece of work is completed, and then to leave.
>
> (3) An intention to reside in the country for an indefinite period, ie, until and unless something, the happening of which is uncertain, occurs to induce the person to leave.
>
> (4) An intention to reside in the country for ever."[112]

In his article Pollak indicated that the first and second types of intention were clearly not sufficient for the acquisition of a domicile of choice.[113] While the fourth kind of intention would, according to South African case law, have sufficed, there was some doubt about the third type of intention. At the time the most recent decision was that of the Appellate Division in *Johnson v Johnson*;[114] that case was regarded by Pollak as definite authority against the third type of intention mentioned by him.[115]

It was the third type of intention described by Pollak which was adopted by the Law Commission, but without the tag "until and unless something, the happening of which is uncertain, occurs to induce the person to leave".[116] On closer inspection, it appears that Pollak's third type of intention is, by implication, a combination of a positive and a negative formulation of the requisite *animus*. It is positive in the sense that it requires an intention to reside for an indefinite period. As Pollak points out, however, the positive formulation of the *animus* also implies the negative, since the intention to remain indefinitely[117] implies the absence of any intention of leaving, in other words the negative formulation. But the negative formulation does not necessarily imply the positive: a person may reside in a country without any present intention of leaving and yet not have the intention to reside in that country indefinitely.[118] In this sense, the positive formulation is far more restrictive than the negative.

In opting for a rigid positive formulation, however, the Law Commission decided to use *indefinite* instead of *permanent*. The reason given for this was that it would result in a more flexible *animus* requirement, since less is required to establish an intention to settle for an *indefinite period* than an intention to settle *permanently*. Thus the South African Law Commission regarded *permanent* as a more rigid term than *indefinite*.[119] It is interesting to note that Pollak himself distinguished between the intention to reside in a country for an *indefinite* period and the intention to reside in a country *forever*: to reside for an *indefinite* period,

---

112 *Ibid.*
113 *Ibid.*
114 1931 AD 391. See the discussion under 3 South African case law in the first part of this article.
115 1933 *SALJ* 449 467.
116 *Idem* 465.
117 Pollak uses the word "permanently" in his argument, but the same holds true for the term "indefinitely".
118 1933 *SALJ* 449 463–464.
119 Para 3. 44.

means to stay "until and unless something, the happening of which is uncertain, occurs to induce the person to leave", whereas no tag is attached to *forever*.[120] Within the context of Pollak's article, it is clear that *indefinite* is regarded as a more lenient criterion than *forever*. Given that South African case law has inclined towards use of the term *permanent*, rather than *indefinite*,[121] and has even used the two terms in the same breath,[122] it must be determined whether there is a difference in meaning between *indefinite* and *permanent*. Since Pollak relied very heavily on English law in his article[123] and our courts have also adopted, rightly or wrongly, the English decisions on this point,[124] reference must be made to the 1987 report of the English and Scottish Law Commissions on domicile.

Report of the English and Scottish Law Commissions on Domicile[125]

This report states that the current position in English and Scottish law is that the intention should be to make one's home in a specific country *permanently or indefinitely*,[126] but that the content and nature of the requisite intention is unclear.[127] In the past, according to the report, the intention required for the acquisition of a domicile of choice was interpreted as an intention to remain *permanently* in the sense of *perpetually*. That meant that even a vague hope of returning to a country of a previous domicile excluded the necessary intention. Recently, a more lenient attitude has been adopted, as is evident from the following extract quoted by the Law Commissions:

> "[A] domicile of choice is acquired only if it be affirmatively shown that the propositus is resident within a territory subject to a distinctive legal system with the intention, formed independently of external pressures, of residing there indefinitely. If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, eg, the end of his job, the intention required by law is lacking; but, if he has in mind only a vague possibility, such as making a fortune (a modern example might be winning a football pool), or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required by law. But no clear line can be drawn: the ultimate decision in each case is one of fact – of the weight to be attached to the various factors and future contingencies in the contemplation of the propositus, their importance to him, and the probability, in his assessment, of the contingencies he has in contemplation being transformed into actualities."[128]

The Law Commissions make it clear in the report that to require an intention to settle *permanently* would be too rigorous a requirement and would result in

120 Pollak 1933 *SALJ* 449 465.

121 See, eg, *Webber v Webber* 1915 AD 229 242 249 258; *Hutchison's Executor v The Master (Natal)* 1919 AD 67 74; *Deane v Deane* 1922 OPD 41 43; *Johnson v Johnson* 1931 AD 391 398; *Moncrieff v Moncrieff* 1934 CPD 208 210–211; *Carvalho v Carvalho* 1936 SR 219 221; *Ex parte Ralston's Estate* 1937 TPD 46 53; *Cook v Cook* 1939 CPD 314 316; *Eilon v Eilon* 1965 1 SA 703 (A) 720–721.

122 See, eg, *Gunn v Gunn* 1910 TS 423 427; *Carvalho v Carvalho* 1936 SR 219 221.

123 1933 *SALJ* 449 450 fn 8.

124 See, eg, *Webber v Webber* 1915 AD 239 242.

125 *Private international law: the law of domicile, 1987*: Law Commission No 168; Scottish Law Commission No 107.

126 Para 2.6(b).

127 Para 5.8.

128 *In the Estate of Fuld (No 3)* 1968 P 675 684–685, quoted in para 5.8 of the report.

people being unable to acquire a domicile of choice. This would, in turn, lead to unrealistic and artificial decisions in cases where it is clear that a person has abandoned his previous domicile, but cannot meet the requirement of permanency in regard to a new domicile. The approach adopted in *In the Estate of Fuld (No 3)*[129] to the effect that the intention should be to settle *indefinitely* was preferred by the Law Commissions and incorporated into their recommendations. In their decision to opt for *indefinite* instead of *permanent*, the Commissions were influenced by the following factors:

(1) It has the merit of simplicity; yet the courts would have a measure of flexibility to deal with "hard cases".

(2) It would provide a measure of harmonisation with legislation in other Commonwealth countries which use *indefinitely* as a criterion in the sphere of domicile.

(3) To provide fuller guidance would lead to very detailed and complex rules in order to deal with the infinite variety of circumstances which may play a role in regard to the acquisition of a domicile of choice.[130]

The doubts expressed in regard to the use of *indefinite* were the following:

(1) Would it be possible to establish the requisite intention if a person intends leaving the country on the happening of a more or less probable contingency?

(2) Would the test be able to accommodate instances of long-term employment abroad or prisoners abroad?

(3) Concern was expressed over the uncertainty of the test.[131]

The Law Commissions concede that *indefinite* is not sufficiently clear in itself[132] and attempt to explain the content of the term by the use of examples.

The first example deals with the following case: a person settles in country A without the present intention to move back to a previous domicile or to settle in another country in the future. This person will have acquired a domicile in country A. This does not mean, however, that his intention should be immutable or irrevocable; neither should he intend to live in country A until he dies.[133] It is interesting to note that, even though the test for the requisite intention is formulated positively, namely to settle in a country for an indefinite period, this example adopts a negative formulation, namely the absence of a present intention to settle elsewhere in future.[134]

The second example deals with the question whether an intention to reside for a limited time or for some temporary or special purpose (for example, when a job is completed) will suffice for purposes of a domicile of choice. The Law Commissions decided that such an intention will not be sufficient.[135] Once the Law Commissions opted for *indefinite*, they could not escape this conclusion,

---

129 1968 P 675 684–685, quoted above.
130 Para 5.11.
131 *Ibid.*
132 Para 5.12.
133 Para 5.13(a).
134 See above under 1 Our Roman-Dutch heritage for a discussion of positive and negative formulations of the *animus* requirement.
135 Para 5.13(b).

since *indefinite* automatically rules out any intention which is limited in time or linked to the fulfilment of a particular purpose.

The third example deals with contingencies.[136] It is stated that the requisite intention should not be conditional on a future event. However, "future event" must be qualified: vague and indefinite contingencies must be disregarded. Thus, contingencies like "when I have made a fortune" or "if my health should deteriorate" will not defeat an intention to settle indefinitely. Should the "future event" be clearly defined and there be "a real likelihood or sufficiently substantial possibility that it might occur",[137] however, the intention requirement will not have been met.

The desirability of rebuttable presumptions to facilitate proof of the acquisition of a domicile of choice was thoroughly debated.[138] In the end it was decided not to incorporate any of the presumptions into the draft bill relating to domicile, one of the objections against their incorporation being that concepts used in the presumptions are often more difficult to interpret than domicile itself. For instance, if it is presumed that a person intends to live permanently in the country where *he has his home*, it would be no easier to determine where a person's home is than to establish his domicile.[139] A cogent argument for the use of presumptions was, however, advanced in the area of administrative matters where the issue of domicile is unlikely to go to court, but nevertheless needs to be determined.[140] This means that a person's whole life story must be investigated in order to determine his domicile. In such cases presumptions could have been of great assistance, but the Commissions decided that the benefits of making it easier to establish the requisite intention were outweighed by the risk of injustice to too many people.[141]

5 TOWARDS AN INTERPRETATION OF THE TERM *INDEFINITE*

From the reports of the South African Law Commission, as well as the English and Scottish Law Commissions, it is abundantly clear that *indefinite* is intended to have a more flexible meaning than *permanent*. Although a case can be made out that *permanent* in fact means *indefinite*,[142] this is not the interpretation which has been accorded to the two terms by the English case law. That interpretation, in turn, has been followed by the South African courts.

Indefinite itself is difficult to explain. Part of the problem seems to be that a term which is negative in itself is more difficult to explain than a positive term. A dictionary definition of *indefinite* is "not certain or determined; unsettled".[143] What the legislator had in mind, however, was probably a more *permanent* time frame than the grammatical meaning of the term *indefinite* seems to convey. It is

136 Para 5.13(c).
137 *Ibid.* The report refers to the cases of *Inland Revenue Commissioners v Bullock* 1976 1 WLR 1178 (CA) and *In the Estate of Fuld (No 3)* 1968 P 675.
138 Paras 5.15–5.22.
139 Para 5.15, read with para 5.16.
140 Para 5.21.
141 Para 5.22.
142 According to the *Collins English dictionary* (1998) 1155, *permanent* means "not expected to change for an indefinite time; not temporary: *a permanent condition*".
143 *Collins English dictionary* (1998) 782.

indeed an interesting feature of the statutory *animus* requirement that the legislator opted for a positive formulation of the *animus* requirement; yet the legislator chose a negative term, "indefinite", to define it.

Mindful of the aims of the South African Law Commission, I suggest that the *animus* requirement for the acquisition of a domicile of choice may be interpreted as follows:

5 1 Indefinite period

The intention must certainly be to reside for an *indefinite period*. This was the test adopted by Stratford JA in his minority judgment in *Johnson v Johnson*,[144] as well as by Rumpff and Williamson JJA in their respective minority judgments in *Eilon v Eilon*.[145] Cognisance will therefore have to be taken of these judicial interpretations of *indefinite*, even though they were minority judgments. They may well set the tone for future decisions on domicile, since existing precedents, predicated upon the stringent requirement of an intention to settle *permanently*, will be of little assistance in regard to the new statutory requirement. An unfortunate result of the statutory intention requirement to settle for an indefinite period is that residence for a limited period or for a specific purpose, even though it may involve a very lengthy period, will be excluded. This means that a person may reside at a particular place for a period of ten years (in terms of a contract of employment, for example) and not be able to acquire a domicile there.

5 2 Time factor

Secondly, the *propositus* must have the intention to settle for an indefinite period *at the time when his domicile is relevant*. It must be borne in mind that the acquisition of a domicile is always linked to a specific time in the life of the *propositus*: when he entered into marriage; when proceedings for divorce are instituted; when he died; and so on. Thus the relevant intention is always linked to a date or a specific period. This may be problematical where, for example, the domicile of a deceased person at the time of his marriage must be established. Events subsequent to his marriage may not be taken into account:

> "This *ex post facto* ascertainment of a man's intention in the light of what subsequently happens to him, I cannot but regard as unsound."[146]

Carter also berates the English and Scottish courts for launching a historical and chronological investigation into an individual's whole life story in order to determine his domicile at, for example, the time of his death.[147] He points out that the English and Scottish courts commence their enquiry with the domicile of origin of the *propositus*, and trace all the acquisitions, abandonments and revivals of domicile throughout his lifetime until the final acquisition, abandonment

144 1931 AD 391 411; see above under 3 South African case law in the first part of this article.

145 1965 1 SA 703 (A) 705B–C and 716H, respectively; see above under 3 South African case law.

146 *Per* Stratford JA in *Johnson v Johnson* 1931 AD 391 411. See also *Eilon v Eilon* 1965 1 SA 703 (A) 709C–D: "[T]he enquiry does not involve, in my view, a scrupulous and solicitous investigation as to whether perhaps in the future he might not in certain circumstances decide to remove his permanent home to Israel."

147 "Domicil: the case for radical reform in the United Kingdom" 1987 *ICLQ* 713 722.

or revival immediately prior to the relevant time in regard to which his domicile must be determined. Not only may the major part of the early history of the *propositus* have no bearing on his last domicile, but the enquiry is also concluded prematurely. The last domicile is, in fact, determined on the basis of the last acquisition, abandonment or change of domicile, which may have occurred ten years before the individual's death.[148] Carter proposes a different approach:

> "A more rational, but quite different, approach would involve looking first of all to the situation as it existed at the very moment in time to which the enquiry relates, and asking directly what was *then* his home, which was the community with which he was *then* most closely connected, which is the community to which it would be most reasonable to say that he *then* belonged."[149]

This does not mean that historical antecedents are not relevant in the determination of an individual's domicile: where they are relevant, they must be taken into account. The emphasis should, however, be on the *moment in time* to which the enquiry relates.

5 3 Contingencies

Thirdly, the question of contingencies remains. It has been said that, in order to prevent the acquisition of a domicile of choice, a contingency should be certain or foreseeable.[150] The Domicile Act[151] does not say anything about contingencies, however, and this raises the question whether contingencies are relevant to the *animus* requirement at all. Two examples from our case law may shed some light on the matter.

Ricketts v Ricketts[152] concerned the domicile of the defendant husband in a divorce action. The husband was a chemist of drunken habits who had not resided in any place in such a manner that it could be said that he had acquired a domicile there. The only place where he had had residence of any significance before his marriage was Port Elizabeth, but he deserted his wife a few months after the marriage. At the time of the institution of the divorce proceedings, he was residing in Cape Town and stated that Cape Town was his domicile. When the question was put to him, however, he admitted that he would be willing to accept a position at Port Elizabeth or elsewhere should better terms of employment be offered to him. On the basis of this admission, Graham JP decided that

---

148 *Ibid.*

149 *Idem* 722–723.

150 *Eilon v Eilon* 1965 1 SA 703 (A). The English and Scottish Law Commissions explained it as follows in their Report (para 5.13(c)): "The intention to reside at the moment of acquisition of the domicile must not be conditional on a future event. However, contingencies which are vague or indefinite ought to be disregarded. Thus a person who contemplates departure from the new country of residence on the happening of an ill-defined or indefinite event, or where the contingency is no more than a vague hope or aspiration, such as 'when I have made a fortune' or 'if my health should deteriorate', would not be precluded from acquiring a new domicile in that country. On the other hand, if the person in question intends to depart on the happening of some clearly defined event and there is a real likelihood or sufficiently substantial possibility that it might occur, he should not be held to be domiciled in the new country of residence" (*Private international law: the law of domicile, 1987*: Law Commission No 168; Scottish Law Commission No 107).

151 Act 3 of 1992.

152 1929 EDL 221.

the defendant could not have had the intention to reside permanently in Cape Town.[153] It was decided, somewhat arbitrarily, that the defendant was domiciled in Port Elizabeth: "In one sense it may be said that even at Port Elizabeth the parties never had a permanent home . . ."[154]

Now, the contingency of more lucrative employment must be something contemplated by many, if not most, people. The fact that this contingency persuaded the judge to rule against a Cape Town domicile is somewhat surprising. The possibility of more lucrative employment does not satisfy the requirement of certainty of a contingency, although it may be foreseeable. In the case of the defendant in *Ricketts*, however, it could hardly have been foreseeable, since he had previously lost positions owing to his drunken habits. What is more, the contingency was actually "ascribed" to the defendant, since he did not mention it until he was asked about it. It is clear that the contingency of more lucrative employment, however inappropriate in the defendant's case, was used in order to assume jurisdiction to grant relief to the plaintiff. Be that as it may, this kind of contingency should ideally be individualised. In other words, each case should be assessed on its own merits. Whereas for one person the possibility of better terms of employment may be very real, for someone else it may not. The certainty or foreseeability of a contingency such as this should not be judged by the *propositus* himself, but rather objectively by the court with due regard to the circumstances of each individual. This would result in an individualised objective assessment, which would take into account the personal circumstances of the *propositus*.

Quayle v Quayle[155] concerned the return of a husband, who had previously left his wife, on the understanding that he would settle in Southern Rhodesia with his wife and child should the parties be able to reconcile their differences. Therefore the continued residence in Southern Rhodesia depended upon the success of his marriage. The marriage, however, broke down again and his wife instituted an action for divorce. The defendant husband's domicile had to be determined for purposes of divorce jurisdiction.[156] Tredgold J decided that the husband had acquired a domicile in Southern Rhodesia, despite the fact that he would probably return to England once the marriage was dissolved. The judge decided that at the time when the husband returned to his family in Southern Rhodesia, he had had the intention to settle there indefinitely. Since he was, at the time of institution of the divorce proceedings, still residing there, he had retained his domicile of choice. With regard to the husband's intention to settle conditionally in Southern Rhodesia, the judge had the following to say:

> "I think that, in saying that he had a mental reservation and that his return here was conditional, he is allowing what has proved true in the event to influence his impressions of his own mental attitude at the time when he came here . . ."[157]

This is a difficult kind of condition to deal with, since it may be argued that the establishment and continued existence of a matrimonial home is always conditional upon the success of the marriage. Even though there may be room for

---

153 *Ricketts v Ricketts* 1929 EDL 221 223.
154 224.
155 1949 SR 203.
156 In terms of the domicile of dependence, the wife followed the domicile of her husband and his domicile therefore was decisive.
157 *Quayle v Quayle* 1949 SR 203 206.

arguing that the judge ruled in favour of a Southern Rhodesian domicile in order to accommodate the divorce action on behalf of the wife, the court was probably correct in attaching little significance to the condition relating to the success of the marriage. In referring to the condition as having influenced the defendant husband's *own* impressions of his mental attitude, but not those of the court, the judge indicated that he viewed the contingency in an objective fashion.[158]

It is interesting to note that, in the two cases discussed above, the contingency ascribed to the defendant in the *Ricketts* case[159] was heeded by the court, while the condition formulated by the defendant in the second case, *Quayle v Quayle*,[160] was rejected. It seems as if the subjective perceptions of the *propositus* will have little credibility, and that if contingencies are to play a role in the determination of the requisite *animus*, their certainty or foreseeability should be judged objectively.

There seem to be few, if any, contingencies which should be considered seriously. Contingencies such as more lucrative employment opportunities, success of a marriage, residence as long as a person enjoys good health, contemplation of a move should the *propositus* be predeceased by his/her partner and the like[161] are the kind of future event which may occur during the lives of most people and are not always consciously contemplated as such. It may be argued that these contingencies operate in a resolutive manner. In other words, they do not actually prevent the acquisition of a domicile; they terminate domicile when they materialise. Thus they are resolutive in regard to the continued existence of a domicile. Explained in this way, these kinds of contingency should not jeopardise the acquisition of a domicile. The investigation should simply be whether the residence and *animus* in regard to it amount to domicile or not. It is difficult to conceive of a contingency which will, from the moment that it occupies the mind of the *propositus*, exclude the requisite *animus*. A contingency such as "I shall remain here until my job is completed" will certainly qualify as a certain or foreseeable contingency, but then it may more appropriately be classified as a limitation on the requirement of an *indefinite period*. It will therefore negate the acquisition of a domicile on the ground that it does not meet the requirement of an *indefinite* period, not because it constitutes a certain or foreseeable contingency.

6 CONCLUSION

It is clear from the above that our courts have not been provided with an easily ascertainable *animus* requirement by the Domicile Act.[162] It may be asked whether a negatively formulated *animus* requirement, in terms of which the absence of a present intention to depart would have sufficed, might not have suited our purposes better. It is probably easier and definitely more realistic to prove the non-existence of an intention to depart than to prove that the *propositus* had the intention to settle indefinitely. In this sense it would have provided a more flexible yardstick with the added advantage of referring to a specific point

158 *Ibid.*
159 *Ricketts v Ricketts* 1929 EDL 221.
160 1949 SR 203.
161 See also *Jooste v Jooste* 1938 NPD 212 214, where the *propositus* said that he was prepared to remain in Natal for so long as he was able to make a reasonably good living.
162 Act 3 of 1992 s 1(2).

in time, namely "present" in the context of "the time when domicile is relevant". Be that as it may, the Domicile Act requires a positive intention to settle for an indefinite period,[163] and so the minority judgments in *Johnson v Johnson*[164] and *Eilon v Eilon*,[165] as well as the decision in *Ley v Ley's Executors*,[166] will provide assistance in the interpretation of the *animus* requirement.

> *Without implied terms of some sort, contracts simply would not be susceptible to construction. Imagine, for example, that the parties have been silent on the time and place of performance, damages in the event of breach, the consequences of dramatically changed circumstances, or the consequences of a partial default. Implied terms are an unavoiable part of the process of construing contractual silences and terms, and they provide the background against which people enter into agreements.*
>
> *To a large degree, interpretive principles serve the same function in public law. They too help judges to construe both statements and silences; they too should not be seen as the intrusion of controversial judgments into ordinary interpretation. But there are differences as well as similarities.*
>
> *Cass Sunstein* After the rights revolution *150.*

163 *Ibid.*
164 1931 AD 391.
165 1965 1 SA 703 (A).
166 1951 3 SA 186 (A).

The quest for justice in Plato's *Republic*

Andrew Domanski
Bsc (Ind Chem) LLB Hdip Co Law LLM
Associate Professor of Law, University of the Witwatersrand

"Let there be justice for all." (Nelson Mandela *Inaugural statement*, May 1994.)

"Though the human race and its works disappear tracelessly by time or bomb, the sun does not falter in its course; the stars keep their invariable vigil. Cosmic law cannot be stayed or changed, and man would do well to put himself in harmony with it. If the cosmos is against might, if the sun wages no war in the heavens but retires at dueful time to give the stars their little sway, what avails our mailed fist? Shall any peace indeed come out of it? Not cruelty but good will arm the universal sinews; a humanity at peace will know the endless fruits of victory, sweeter to the taste than any nurtured on the soil of blood." (Yogananda *Autobiography of a yogi* (1989) 293.)

OPSOMMING

Die soektog na geregtigheid in Plato se *Republic*

Wat is geregtigheid? Is geregtigheid voordeliger as ongeregtigheid? Hoe verskil geregtigheid in die individu van geregtigheid in die staat? Wat is die beloning vir geregtigheid en ongeregtigheid onderskeidelik? Dit is sommige van die groot vrae wat in Plato se dialoog, die *Republic*, ondersoek is. Die doel van hierdie artikel is om die draad van die debat om geregtigheid tussen Socrates en sy genote te gryp en te volg, om die verskillende formulerings van geregtigheid wat te voorskyn kom, te beskou, en om tot die kern van die Sokratiese begrip van volkome geregtigheid deur te dring. Relativistiese leerstukke van reg en geregtigheid het veel om te verantwoord, want hulle moet ten minste deels verantwoordelik gehou word vir die ongelukkigheid, oneerlikheid en sedelike verwarring wat ons by die wisseling van die duisend jaar omsingel. Die tyd het sekerlik aangebreek om hierdie mislukte relativistiese idees oorboord te gooi en in hul plek Plato se waardes van volkome waarheid en geregtigheid tot die troon te verhef.

1 INTRODUCTION

Plato's dialogue, the *Republic*, may fairly claim to be the founding charter of Western civilisation. In its pages are debated matters philosophical, political, economic, legal, constitutional and spiritual. The debate, which throughout is at the level of fundamental principle, ranges from the origins and evolution of the state to the education of children, to the position of women in society, to the different forms of government, to the character of the ideal ruler, to the progress of the soul after death, and to other great questions.

The focus in this article, however, is on the central theme of the *Republic*: the inquiry – perhaps the most sustained, penetrating and exhilarating in Western literature – into the nature of justice. The debate between Socrates and his associates Polemarchus, Thrasymachus, Adeimantus and Glaucon stops and starts, ebbs and flows, flares up and subsides, winds its way in and out of the

discussion of other weighty matters. Many of the arguments used by Socrates are fine demonstrations of the power of reason. Indeed, reason is the golden thread that runs through and informs the debate from start to finish.

What is justice? Is justice more profitable than injustice? How does justice in the individual differ from justice in the state? What are the rewards of justice and injustice? These are some of the questions – all of them of timeless importance to mankind[1] – that are so vigorously and profoundly explored in the Republic. In Bloom's words: "No other philosophic book so powerfully expresses the human longing for justice while satisfying the intellect's demands for clarity."[2]

The literature on this work is immense, as well it should be, and much of it lies in the realms of abstract philosophy and of political science.[3] In contrast, the perspective here is essentially practical: the aim is to seize and follow the thread of the great debate on justice between Socrates and his associates,[4] to examine

---

1 In South Africa, a country long ravaged by injustice, the present Chief Justice recently said (Bram Fischer Memorial Lecture, delivered by Chief Justice I Mahomed at the House of Assembly, Cape Town, 1998-02-03): "Law does not constitute its own justification. Law cannot be built on law. It must be built on justice. In the words of Professor Ernest Barker in his seminal treatise *Principles of Social and Political Theory* (Oxford 1951) 202: 'The supreme sovereign which stands in the background of any politically organized community is justice, justice in the sense of that right order of human relations which gives to the greatest possible number of persons the greatest possible opportunity for the highest possible development of all the capacities of their personality.'

It is the pursuit of justice which must in principle be the rationale for all law . . . The pursuit of justice is an autonomous, sovereign and self-legitimizing justification for law . . . The submisson, therefore, that there must be a necessary and symbiotic relationship between law and justice sparkles in philosophical insights through the age from Aristotle to Cicero through Grotius and Thomas Aquinas, and in modern times – through varying angles – in Mahatma Gandhi, Gustav Radbruch, Professor Lon Fuller of Harvard and Professor Dworkin of Oxford."

2 *The Republic of Plato* (1991) ("Bloom") vii.

3 Sadly, too much modern academic writing on Plato is infested with hairsplitting triviality, technical detail and prolixity. No wonder that the universality of the Platonic teaching has been lost.

4 I had best make a full confession of my failings at the outset. First, I rely almost entirely on Benjamin Jowett's translation, which I find graceful and readable, although somewhat dated. Proof of its enduring value is the fact that it is still in print. But Jowett has always had his critics. Two of them are Crossman *Plato today* (1937) 301 and Cornford *The Republic of Plato* (1941) ("Cornford") vi–ix. Cornford's own translation and views are subjected to searching criticism by Bloom (xiv–xx). Secondly, my habit of referring to the views of Socrates and Plato more or less interchangeably will be unacceptable to some. My defence is that in a study which deals with the substance, not the provenance, of the teaching on justice in the *Republic*, such an unscholarly practice does not result in material distortion or inaccuracy. Moreover, a number of writers, eg Guthrie *The Greek philosophers from Thales to Aristotle* (1951) ("Guthrie") 107, maintain that it is difficult to be sure where the thought of Socrates ends and that of Plato begins. According to Guthrie (in Cantor and Klein (ed) *Ancient thought: Plato & Aristotle* (1969) ("Cantor & Klein") 157), Socrates and Plato are an inseparable unity. See also on this question Rowe *Plato* (1984) 1–4; Field *Plato and his contemporaries* (1967) 61–63; Penner in Kraut (ed) *The Cambridge companion to Plato* (1992) ("Kraut") 121ff. Thirdly, for the sake of brevity, I have done violence to the form of the Socratic dialogue by presenting the views of Socrates as though they were his unilateral pronouncements. In fact, each of these views is, in form if not in substance, a consensus position arrived at by Socrates and his interlocutor by way of a bilateral process of question and answer. I believe, however, that I have done no violence to the substance – and it is exclusively with the substance that this study is concerned – of the Socratic teaching on justice in the *Republic*.

the various formulations of justice[5] that emerge, to penetrate and to extract the essence of the Socratic notion of justice. In tracing the thread of justice, I shall adhere as closely as possible to the sequence in the text, deviating only where this is unavoidable. Finally, lessons will be drawn. After all, Plato's voice is widely held to be universal. If that is so, his teachings must be, and must be seen to be, directly applicable to us, here and now.

Many would reject out of hand any attempt to synthesise or systematise the ideas contained in the Platonic dialogues. Here is a typical view:[6]

> "Plato is averse to providing the reader with answers to questions; since such generosity on his part would remove from the reader that very sense of wonder which is the stimulus to speculation . . . . So Plato, in his dialogues, is not giving formed and finished ideas to the reader; he is assisting the reader to bear his own intellectual children.
>
> "Plato's philosophy is not a system; and it evades any formulation in a deductive pattern. His mind does not seem to stop at any definite idea and rest there; it is in movement."

To fly in the face of such entrenched opinion, as I do in this article,[7] may be folly. Let the reader decide.

At the most fundamental level, the notion of justice championed by Socrates in the *Republic* is not political, not legal, not social, nor even economic. Instead Platonic justice is, in essence, a spiritual quality, a facet of absolute, unchanging truth. There is, of course, no originality in this assertion. But the spiritual character of Plato's teaching is today so frequently overlooked, if not ignored or denied, that a reminder may be timely. John Burnet[8] put it well early in this century:

> "[G]reek philosophy is based on the faith that reality is divine, and that the one thing needful is for the soul, which is akin to the divine, to enter into communion with it."

Closely allied to justice is the concept of natural law. The works of Plato are, the Bible excepted, the greatest repository of natural law in the Western canon. According to the classical view, natural law is one, perennial, absolute, immutable, universally valid, identical to human reason, and of divine origin.[9] In contrast,

---

5 The *Republic* is not, of course, the only Platonic dialogue in which the nature of justice is discussed. The *Protagoras*, the *Gorgias* and the *Laws* also have much to say on the subject. In this study, however, the focus is exclusively on the *Republic*, which presents a full, coherent and self-contained view of justice. See, in relation to the theme of justice in the *Republic*, Vlastos *Platonic studies* (1973) 111; Kraut 311.

6 Demos in his introduction to the Jowett translation: *The dialogues of Plato* (1937) vol 1 viii. See also Edman *The works of Plato* (1927) ("Edman") xi–xii; Taylor *Plato: the man and his work* (1926) ("Taylor") vii.

7 See, in particular, section 17 of this article.

8 Burnet *Greek philosophy* (1914) 10; and see, more recently, Cascarelli 1996 *Am JJ* 229 259–262, who points out that "there cannot be Justice if there is no divine rule".

9 There is probably no better formulation of the classical doctrine of natural law than the famous one of Cicero: "True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting ... We cannot be freed from its obligations by Senate or People, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times, and there will be one master and one ruler, that is God, over us all, for he is the author of this law, its promulgator, and its enforcing judge" (Cicero *De Republica* 3 22 33 transl D'Entréves).

most modern jurists would have us believe that justice and natural law are relative, subjective notions. Relativistic doctrines of law and justice have much to answer for: they must be held at least partly responsible for the unhappiness, dishonesty, uncertainty and moral confusion which surround us in the late twentieth century. Now, with the turn of the millennium almost upon us, the time has surely come to discard these relativistic notions, and to enthrone in their place Plato's values of absolute truth and absolute justice. These values lie as much at the heart of the Advaita Vedanta philosophy of ancient India, and of the Judaeo-Christian tradition, as at the heart of the Platonic teaching.

The richness and depth of the Socratic concept of justice stand in sharp contrast to the rather narrow, one-dimensional views presented elsewhere in ancient Greek literature. In the *Oresteia* of Aeschylus, for example, the view of justice hardly extends beyond the sphere of crime and punishment. So too, the story of Gyges and Candaulés, recounted by the historian Herodotus (18–12), portrays justice as absolute and inexorable, but is confined to the sphere of retribution. Even the celebrated concepts of distributive and corrective justice in the fifth book of Aristotle's *Nicomachean Ethics* are restricted in their operation.

The time is ripe for the voice of Plato, pristine and free from the millstone of overlays and interpretations (including those contained in this article) to be heard again in our universities, our legislatures, our courts and our communities. If that were to happen, its healing and nourishing effect on our afflicted age would be incalculable.

2 THE QUEST BEGINS: POLEMARCHUS PRESENTS SIMONIDES'S VIEW OF JUSTICE

In the opening pages of the *Republic*,[10] Socrates asks the old man Cephalus: "[C]oncerning justice, what is it? – to speak the truth and to pay your debts – no more than this?" These words, tossed off almost casually, mark the beginning of the great quest for justice.[11] Polemarchus, interposing, replies that this definition, which he attributes to the poet Simonides, is correct. The definition suggests a link, a valuable one, between justice and truth.[12] The link is not explored at this point and the discussion turns instead to the latter part of the definition, namely the payment of debts. Socrates shows[13] that what Simonides really understood justice to mean was not the repayment of a debt as such, but the broader idea of giving to each what is proper to him.

---

10 331c.

11 The word "justice" is used in many senses. Here are a few, taken from Funk and Wagnall's *Standard dictionary of the English language* vol 1 (1901) 972:

* "Conformity in conduct or practice to the principles of right or of positive law . . . strict uprightness; regard for or fulfilment of obligations; rectitude; honesty; . . . the body of principles by which actions are determined as right or wrong . . .
* Adherence to truth or fact; impartiality . . .
* The rendering of what is due or merited . . .; reward or punishment allotted according to desert, or in vindication of law or right; just requital . . .
* The quality of being just or reasonable; equitableness . . .
* Exactness or precision; justness."

On the face of it, Socrates's definition of justice (to be considered later) bears little resemblance to any of these meanings. Yet, remarkably, it embraces all of them!

12 The vital link between justice and truth is examined by Socrates much later in the dialogue: see section 13 of this article.

13 332c.

Socrates neither expressly endorses Simonides's definition, nor challenges its soundness. It may be that he sees no need to challenge Simonides, for Socrates's own definition of justice, as we shall see, is of sufficiently wide scope to embrace that of Simonides. The latter definition, while admittedly applicable at all times and in all places, is confined in its operation to the settling of accounts and scores. Thus Simonides's notion of justice is a legal, and more particularly a judicial, one: giving to each his due is all about meting out punishments and rewards according to deserts. In this definition, there is a proportionality or balance which satisfies one's inherent sense of fairness. Of course, this concept of justice is not confined to the courtroom – it finds application equally in the home, the office and the nursery – but its orientation, for all that, remains legal and indeed penal. Small wonder, then, that it has been so well received by lawyers in later ages.

Alone, perhaps, of all the formulations of justice derived from antiquity, that of Simonides has survived to become enshrined in the founding institutional works of both major Western legal systems, the Roman and the English. Simonides's definition lies at the very root of Roman and of English law: it is the concept of justice favoured by both Justinian[14] and Blackstone.[15] Its influence on Western legal thought has been immense: it was adopted by the leading institutional writers on the Roman-Dutch law.[16]

What Socrates does object to is the way in which Simonides's definition is distorted by Polemarchus. The latter interprets it[17] to mean that justice is the art of doing good to one's friends and harm to one's enemies. This, Socrates proceeds to demonstrate,[18] could not have been what Simonides meant, not even when one's friends are good and one's enemies are evil. The underlying principle, a fundamental one, at which Socrates arrives here is that the injuring of another can never be just. The rationale is that he who is injured is necessarily diminished in justice – that is, he is made unjust.[19] In the words of the Persian poet Omar Khayyam: "If, because I do evil, Thou punishest me by evil, what is the difference between Thee and me?"

Neither Socrates nor Simonides is suggesting that wrongdoers ought to escape punishment: that would be a travesty of justice. It follows that when a court imposes an appropriate punishment on a wrongdoer, there is no injury and thus no injustice is done. On the contrary, such punishment is a necessary corrective which will ultimately redound to the benefit of the wrongdoer.[20] Elsewhere in

---

14 II 1 *pr*: "Justice is the set and constant purpose which gives to every man his due" (transl Moyle). The positioning of this definition at the very start of the Institutes indicates the paramount importance of justice to Justinian.

15 Blackstone *Commentaries on the laws of England* Bk I Introduction ("Blackstone") 2 40.

16 See eg Voet *Commentarius ad Pandectas* 1 1 7; Huber *Heedendaegse rechtsgeleertheyt* 1 1 4.

17 332d.

18 335e.

19 335c.

20 591b–c. Unacceptable though it may be to many, this principle applies even when the punishment takes the form of the death penalty. A consideration of the principle in relation to capital punishment would require a discussion of the doctrine of rebirth or reincarnation, a doctrine which forms part of the Platonic as much as of the Pythagorean teaching. Such a discussion, however, falls beyond the province of this study.

the Dialogues,[21] Socrates lays emphasis on this point. Socrates, in other words, holds that the aim of punishment is the rehabilitation or reformation of the offender.[22]

Socrates, to repeat, does not reject Simonides's concept of justice. But neither does he endorse it, and in his conversation with Polemarchus justice is confined largely to the context of not doing injury to others. This underscores the point made earlier, namely that Simonides's definition of justice, influential though it may have been over the centuries, is inherently limited in its sphere of operation.

3 THRASYMACHUS

The calm, rational tenor of the debate suddenly changes as Polemarchus steps aside and the aggressive, blustering rhetorician Thrasymachus enters the arena. He immediately launches a tirade against Socrates and loudly proclaims that justice is "nothing else than the interest of the stronger".[23] At the level of government, Thrasymachus means that the ruler or stronger – provided he does not misconceive his interest, in which case he does not deserve the name of ruler – always commands that which is in his own interest, and the subject or weaker, in obeying such commands, acts justly.[24] Justice then, according to Thrasymachus, is the obedience which the subject or weaker renders to commands which promote the interest of the ruler or stronger.

If, as Thrasymachus claims, there is "everywhere one principle of justice, which is the interest of the stronger", this principle must apply in the arts, professions and other spheres of activity, as much as it does between ruler and subject. Thus in the relationship between doctor (the stronger) and patient (the weaker), or between lawyer (the stronger) and client (the weaker), the interest of the stronger is to receive payment. Justice, it would then follow, is performance by the patient of the obligation to pay the doctor for medical treatment received, or performance by the client of the obligation to pay the lawyer for legal advice rendered.

Is this right? Many today would reject Thrasymachus's argument in the political sphere (that is, in the ruler-subject context), but would readily accept its application in the other cases mentioned. Yet Socrates shows that the argument is without foundation. In doing so, he touches on a principle of fundamental importance to our economic, social and personal well-being. Socrates forces us to confront the popular idea that people practise their chosen professions in order to make a living. They believe, in other words, that their reason for working is to be paid. This belief, as Socrates shows, is false. He asks[25] whether the true physician is a healer of the sick or a maker of money. He shows that, in truth, medicine (the "stronger") considers not its own interest, but the interest of the patient (the "weaker"). The art of medicine is concerned, and concerned exclusively, with curing the patient's body of illness.[26] It follows that the interest of the true practitioner of medicine is likewise the curing of the body and nothing

21 See eg *Gorgias* 476a, 478d, 479d.
22 This view is not shared by all modern criminologists and penologists.
23 338c.
24 341a.
25 341c.
26 341e.

else. Similarly, the art of ruling a state (like its practitioner, the ruler) considers the interests, not of itself, but of the subjects.[27] Again, justice has an interest which is not that of the judge, but of those who come under his sway. The same is true of all other arts, professions, and their true practitioners: they do not care for themselves, for they have no needs; they care only for their subjects.[28] Socrates concludes[29] that no science or art considers or enjoins the interest of the stronger or superior, but only the interest of the subject and weaker. This conclusion, of course, completely overturns the definition of justice proposed by Thrasymachus.

The principle established here by Socrates is none other than that of service. It is a principle which, if it were widely acknowledged, could radically transform modern attitudes towards work. But it also raises questions. How, for instance, does Socrates deal with the matter of remuneration? For while the various arts (and their practitioners) may be serving the interests of the subjects over whom they preside, the practitioners will not practise their respective arts unless they are adequately paid.[30] The truth, says Socrates,[31] is that while the art of medicine gives health, and the art of the builder builds a house, another art attends them, which is the art of pay.[32] This art of payment is a completely autonomous, independent art which is in no sense to be confused with, or traded off against, the arts whose practitioners are being remunerated by way of such payment. Thus there is no *quid pro quo*: the true businessman, that is the stronger, serves nothing but the needs of his customer, the weaker; in the completely independent art of payment, the customer, now the stronger, serves the interest of the businessman, now the weaker. This principle, when put into operation, ensures that the quality of the service, the level of care and attention rendered by the businessman, is affected neither by whether nor by how much he will be paid for his efforts. Of course, there is an inescapable economic relationship between the two independent arts involved here: if at any stage there exists the danger that the art of payment may fail him, the businessman will decline to practise his occupation in relation to the defaulting client. Trust, therefore, is an indispensable ingredient of the recipe. The difference between Plato's view and our common view of relationships in the workplace may at first appear to be elusive and impalpable, but it is real and it matters. As Socrates puts it,[33] the art of payment has the special function of giving pay, but we do not confuse this with other arts, any more than the art of the pilot is to be confused with the art of medicine merely because the health of the pilot happens to be improved by a sea voyage.

Despite the fact that his definition of justice has been shown to be unsound, Thrasymachus adheres to it.[34] At the same time, however, he changes tack and brings in a new proposition when he says[35] that the just is always a loser in

27 342e, 346e, 347d.
28 342d. According to Cornford 22: "When Socrates talks of the art or craft in this abstract way as having an interest of its own, he means the same thing, as if he spoke of the interest of the craftsman *qua* craftsman."
29 342e.
30 346d.
31 *Ibid.*
32 *Ibid.*
33 346b.
34 344c. Bloom (332–334) does not accept that Thrasymachus's definition has been refuted.
35 343d.

comparison with the unjust. He argues, in other words, that the life of the unjust is more advantageous than that of the just. This applies as much in the field of private contracts as in the individual's dealings with the state. Thus when a partnership is dissolved, an unjust partner always profits at the expense of a just one in the division of assets. Likewise, the just man will pay more tax, and the unjust less on the same income.[36] But these are petty offenders: the happiest man of all, says Thrasymachus, is he who is in a position to commit injustice on a large scale. Conversely, his victims or those who refuse to do injustice are the most miserable.[37] Here Thrasymachus is referring to the tyrannical ruler, who by force and fraud takes away the property of others, not little by little, but wholesale. This the tyrant presumably achieves through Draconian laws concerning taxation, expropriation of property and restrictions on the personal freedom of his subjects. Such a tyrant, far from incurring reproach, is termed happy and blessed, not only by the citizens, but by all who hear of his having attained the pinnacle of injustice. For, according to Thrasymachus, people censure injustice, fearing that they may become victims of it, and not because they shrink from committing it.[38] Socrates is now confronted with the proposition that injustice writ large is more gainful than justice. He is required, in other words, to examine and evaluate justice and injustice side by side.

This comparative evaluation of justice and injustice proceeds in three stages: Socrates shows, first, that justice is wisdom and virtue, while injustice is ignorance and vice; secondly, that justice imparts harmony, unity and friendship, while injustice creates divisions and hatreds; thirdly (contrary to Thrasymachus's assertion), that justice is more advantageous than injustice.

In the first stage, justice (whatever it may ultimately turn out to mean) is shown to be a human faculty of the highest order. In identifying justice with wisdom and goodness, Socrates shows it to be a facet of truth itself.[39] This identification is worth noting, for (as we shall see) Socrates later treats justice and wisdom as distinct members of the class of four cardinal virtues.

In the course of establishing the second proposition, Socrates notes[40] that the wholly unjust person – assuming that such a person exists – would be incapable of action in concert with others. Thus, if a group of people – be it the cabinet or a criminal gang – engage in a collaborative enterprise, they cannot succeed unless each of them possesses a minimal residue of justice. Says Socrates:[41]

> "[T]o speak . . . of men who are evil acting at any time vigorously together, is not strictly true, for if they had been perfectly evil, they would have laid hands upon one another; but it is evident that there must have been some remnant of justice in them, which enabled them to combine; if there had not been, they would have injured one another as well as their victim; they were but half-villains in their enterprises; for had they been whole villains, and utterly unjust, they would have been utterly incapable of action."

---

36 *Ibid.*
37 344a.
38 344c. See Lindsay's introduction to his translation of the Republic: *The Republic of Plato* (1935) xx–xxii.
39 While this point is not made explicit in the text until much later, I suggest that the inference is already inescapable.
40 352c.
41 *Ibid.*

Justice, therefore, sets us free to act, while injustice inhibits action. This link between justice and collective action is as surprising as it significant. Its significance is that it applies to every collaborative human activity: justice – undefined though it may be at this stage – is essential to the success of such activity, in the view of Socrates. This topic will be revisited later, when we turn to consider the Socratic notion of justice in relation to the individual.[42]

It is already clear, from the first two stages of this comparative discourse, that the just have a better and happier life than the unjust.[43] Socrates, however, wishes to put the issue beyond dispute for, as he says,[44] "no light matter is at stake, nothing less than the rule of human life". At the conclusion of the third stage, Thrasymachus grudgingly concedes[45] that injustice can never be more profitable than justice.

In the course of establishing this proposition, Socrates explains the function of justice in the human soul: justice, he says,[46] is the characteristic or essential quality[47] of the soul which enables it to perform its proper function of superintending, commanding, deliberating and the like. It follows that justice is closely connected with such qualities as watchfulness, attentiveness and carefulness. It follows also that justice must always be present in the human soul, even if in an infinitesimal degree: there cannot exist a person in whom, or a group in which, justice is entirely absent. Thus even in the most evil and depraved soul, under the covers of blinding darkness, there resides the divine spark of justice.

When the soul is in greater or lesser degree deprived of justice, she cannot fulfil her ends of superintending, commanding and deliberating. This follows necessarily from the link, established earlier, between justice and coherent action. A soul so deprived is an evil soul, which is necessarily an evil ruler and superintendent, just as the soul well-endowed with justice is a good ruler.[48]

So much for Thrasymachus. His withdrawal from the arena marks a natural break in the dialogue. Socrates pauses to reflect:[49] he notes that the main object of the quest, namely the nature of justice, has yet to be discovered. That task has been put to one side for the moment, for (as we have seen) he has been constrained to turn instead to the comparison of justice with injustice. The result of the whole discussion up to this point, says Socrates, is that he knows nothing at all.[50] He declares:[51]

> "For I know not what justice is, and therefore I am not likely to know whether it is or is not a virtue, nor can I say whether the just man is happy or unhappy."

---

42 See section 9 of this article.

43 Blackstone 2 40 explains the relationship between justice and happiness thus: "[The creator] . . . has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter."

44 352d.

45 354a.

46 353d–e.

47 Or "excellence", in Jowett's translation (353e).

48 353e.

49 345b–c.

50 Socrates is enshrined in history as the man who knew nothing. The lesson that Plato learnt from him, according to Cornford (xxix), was that "wisdom begins when a man finds out that he does not know what he thinks he knows".

51 354c. See also 337e.

4 THE CHALLENGE OF GLAUCON AND ADEIMANTUS

The dialogue and the inquiry into justice might so easily have ended at this point, to our irreparable loss. Fortunately, Glaucon and his brother Adeimantus now join the debate.[52] The challenge which they pose is a mighty one, and Socrates soon realises that he is not to have a short day at the office after all: in fact, the remainder – by far the greater part[53] – of the dialogue is taken up with his response to their arguments. It is precisely Socrates's response to Glaucon and Adeimantus that places the *Republic* among the very few immortal works of Western literature. Thus, we have good reason to be grateful to the brothers. Their contribution, as we shall see, consists not merely in persuading Socrates to continue with the inquiry: of equal importance is the standpoint from which they mount their challenge.

Glaucon bluntly declares that Socrates has failed to persuade him that to be just is always better than to be unjust. Socrates maintains[54] that justice is to be desired both for its own sake and for the sake of its results. Glaucon, however, reminds him[55] that most people have a very different view of the matter. For them, justice is to be pursued only for the sake of its rewards and of the reputation it may bring; in itself, it is disagreeable and to be avoided.

Glaucon proposes[56] to revive the argument of Thrasymachus, whom he believes has been too easily swayed by Socrates. He begins by considering the nature and origin of justice according to the popular view. He emphasises,[57] however, that he does not himself adhere to this view; in putting it forward, he is merely playing devil's advocate. Glaucon, therefore, proceeds from a position of impartiality and detachment. In this attitude, so different from the truculence of Thrasymachus, lies the force of Glaucon's arguments. Socrates is not slow to acknowledge this.[58]

Most people, says Glaucon,[59] desire the power to do injustice without being punished. But they know that there is a price to pay for this power: they must in turn accept the risk of suffering injustice without the power of retaliation. This is too high a price to pay, and so a compromise is sought. The law reflects this compromise: a person forfeits the desirable power to inflict injustice without being punished, and, in return, the law promises that, should he become the victim of injustice, the wrongdoer will be punished. Justice, on the popular view, is a compromise or mean between these two extreme positions. Such a conception of justice has, of course, nothing to do with principle; it is a shabby trade-off, to which men submit only because they have no choice. Those who practise

---

52 Bloom (337–338) describes them well: "They are potential Athenian statesmen, men whose goals transcend the horizon of sensuality and money . . . They are lovers of honour, which lends nobility to their souls, frees them from the goals which rendered Thrasymachus's notion of advantage so crude and narrow, and gives them the spiritual substance required for the sublimating experience of Socratic education."

53 In the Vintage Classics Edition (1991) of the Jowett translation, this part comprises 340 pages out of a total of 397.

54 358a.

55 *Ibid.*

56 358b.

57 358c.

58 367e–368b.

59 359a.

justice, in other words, do so unwillingly and because they do not have the power to be unjust.[60] It follows on this cynical view that whenever anyone thinks that he can safely practise injustice, he will do so, for men believe in their hearts that injustice is far more profitable to the individual than justice.[61]

Glaucon proposes[62] to show that the life of the unjust is far better than that of the just. He hopes that in this way he will provoke Socrates into proving that the opposite is the truth.

Glaucon considers two extreme cases.[63] He postulates, first, the perfectly unjust man who, while doing the most unjust acts, has acquired the greatest reputation for justice. To this man he opposes the perfectly just man who in his nobility and simplicity wishes to be and not merely to seem good. He is the best of men, while being thought the worst. Which of these men is the happier, asks Glaucon? The unjust man who is thought to be just is as familiar to us as he was to Plato. He is commonly to be found today in politics, industry and business (and, no doubt, in many professions). In describing him,[64] Glaucon does not overlook his lavish donations to fashionable charities:

> "[H]e is thought just, and therefore bears rule in the city; he can marry whom he will, and give in marriage to whom he will; also he can trade and deal where he likes, and always to his own advantage, because he has no misgivings about injustice; and at every contest, whether in public or private, he gets the better of his antagonists, and gains at their expense, and is rich, and out of his gains he can benefit his friends and harm his enemies; moreover, he can offer sacrifices, and dedicate gifts to the gods abundantly and magnificently, and can honour the gods or any man who he wants to honour in a far better style than the just, and therefore he is likely to be dearer than they are to the gods. And thus, Socrates, gods and men are said to unite in making the life of the unjust better than the life of the just."

Little has changed since these words were spoken. But what, in contrast, is the fate that awaits the man of pure justice? Jesus and Socrates knew it only too well. Says Glaucon,[65] maintaining his attitude of detachment:

> "I ask you to suppose, Socrates, that the words which follow are not mine – let me put them into the mouths of the eulogists of injustice: They will tell you that the just man who is thought unjust will be scourged, racked, bound – will have his eyes burnt out; and, at last, after suffering every kind of evil, he will be impaled: Then he will understand that he ought to seem only, and not to be, just . . ."

The argument, therefore, is that society does not readily tolerate just men. Is it not better to play it safe, enjoy the reputation of justice, and live comfortably? Should we not devote ourselves to appearance which, in the words of Adeimantus,[66] "tyrannizes over truth and is lord of happiness"? Adeimantus reiterates and reinforces[67] the arguments of Glaucon. He adds:[68]

---

60 359b.
61 360d.
62 358d.
63 360e–362c.
64 362b–c.
65 361e–362a.
66 365b–c. This question will be addressed by Socrates later on: see section 15 of this article.
67 362d–367e.
68 366d.

> "[M]en are not just of their own free will; unless, peradventure, there be some one whom the divinity within him may have inspired with a hatred of injustice, or who has attained knowledge of the truth – but no other man."

He notes[69] in astonishment that no eulogist of justice

> "has ever blamed injustice or praised justice except with a view to the glories, honours and benefits which flow from them.[70] No one has ever adequately described ... the true essential nature of either of them abiding in the soul, and invisible to any human or divine eye; or shown that of all the things of a man's soul which he has within him, justice is the greatest good and injustice the greatest evil".

Adeimantus concludes[71] by challenging Socrates not only to prove that justice is better than injustice, but also to show the essential good and evil which justice and injustice work in those who possess them.

The scene is set: with Socrates at centre stage, the quest takes off in earnest.

5 SOCRATES ANNOUNCES HIS MODUS OPERANDI

Socrates praises the brothers, admires the detached manner in which they have presented their case, and acknowledges the scale and difficulty of the task before him.[72] He proceeds to explain[73] the method by which he proposes to arrive at the truth, first, about the nature of justice and injustice, and secondly, about their respective advantages.

In each of us, says Socrates, there are the same principles and habits which exist in the state. From the individual they pass into the state. Thus justice, the subject of our inquiry, is as much a virtue of the state as of the individual. Since a state is larger than an individual, it follows that justice is likely to be larger and more easily discernible in a state than in an individual. Socrates accordingly proposes[74] to inquire into the nature of justice and injustice, first as they appear writ large in the state, and secondly, as they appear in the individual, proceeding from the greater to the lesser and comparing them. Applying this method, Socrates proceeds directly to construct[75] his famous model of the ideal state. I shall not follow him in this exercise, for my concern here is the theme of justice only.[76]

---

69 366e.
70 See the text to fn 55 above.
71 367e.
72 367e–368c.
73 368d–369b.
74 369a.
75 369b–427d.
76 It has been asked whether the quest for justice, which is Plato's professed aim in the *Republic*, or the construction of the state is the principal argument of the work. It should be clear from what is said in this section that justice is the central theme. Jowett (*The works of Plato*) Introduction and analysis ("Jowett") 8–9, however, says: "The answer is, that the two blend in one, and are two faces of the same truth; for justice is the order of the State, and the State is the visible embodiment of justice under the conditions of human society. The one is the soul and the other is the body, and the Greek ideal of the State, as of the individual, is a fair mind in a fair body ... Or, described in Christian language, the kingdom of God is within, and yet develops into a Church or external kingdom ... Or, to use a Platonic image, justice and the State are the warp and woof which run through the whole texture. And when the constitution of the State is completed, the conception of justice is not dismissed, but reappears under the same or different names throughout the work, both as the inner law of the individual, and finally as the principle of rewards and punishments in another life."

It may be asked, however, whether the method adopted by Socrates is sound. Is it true in principle that a quality such as justice is more easily discoverable in the large than in the small, in the macrocosm than in the microcosm? Is not the opposite true? Socrates's associates do not challenge him on this point, but there are those who would differ: in accordance with the famous oracular injunction "know thyself", they would hold that self-knowledge must precede all other knowledge and, therefore, that the practical operation of justice and injustice is most easily observed within oneself. Socrates would doubtless have had an answer to this challenge, and it would be most interesting to know it.

6 THE FOUR VIRTUES IN THE IDEAL STATE

We rejoin the debate at the point where, with the completed model of the ideal state before him, Socrates[77] poses the question: "But where, amid all this, is justice?" He begins[78] with the assumption, first, that his model state, if rightly ordered, is perfect. Secondly, in such a perfect state, the four virtues of wisdom (*sophia*), courage (*andreia*), temperance (*sóphrosyné*) and justice (*dikaiosyné*) are made manifest.[79]

At this point, it would be tempting, but wrong, to pass over the first three virtues and proceed directly to our objective, justice. For one thing, it is only by a process of elimination of wisdom, courage and temperance that Socrates arrives at justice. Moreover, the four Socratic virtues are not independent: as we shall see shortly, they are closely interrelated. It is therefore necessary to follow Socrates here and to examine, albeit briefly, the nature of the first three virtues, before turning to consider justice. I shall not offer any detailed comment on Plato's treatment of wisdom, courage and temperance. While these virtues are of cardinal significance for any age, and Plato's treatment of them is deserving of the closest study, they are peripheral to the present theme.

First, then, wisdom. According to Socrates, this virtue (*areté*) involves knowledge, not of any particular activity or thing within the state, but of the wholeness and unity of the state.[80] Thus a city renowned for the skill of its carpenters could not be considered wise,[81] for wisdom requires an all-embracing view which includes every facet of the life of the state. The people in the state most likely to possess such wisdom are those entrusted with the rule and care of the state. Socrates calls them guardians[82] and says that if this governing class, the smallest in the state, possesses this holistic knowledge, then the state as a whole, being thus constituted in accordance with nature, will be wise.[83]

The second virtue is courage. This is defined by Socrates[84] as a "sort of universal saving power of true opinion, in conformity with law, about real and false

77 427d.
78 427e.
79 See, on these four civil virtues (which later became the cardinal virtues), *The letters of Marsilio Ficino* transl School of Economic Science (1975) vol I ("Ficino") 208, note to Letter 19.
80 428d.
81 428b.
82 428d; see also 412b–414b, where the character and qualifications of a guardian are described.
83 429a.
84 430b.

dangers". Thus courage is not the spontaneous, uninstructed response to danger that it is commonly taken to be. On the contrary, the essence of courage is a conviction or opinion, methodically implanted by education, fixed, immovable and unchanging from one individual to another, about the nature of things respectively to be feared and not be feared.[85] The inference, surprising to say the least, is that courage is a teachable virtue. After more than two millennia, Plato still has the power to startle! While his teaching is in essence simple, it is always inventive, abounding in the unexpected and the unpredictable. Courage, then, is this opinion, constant under all circumstances. Its repository, as in the case of wisdom, is a particular class in the state. Here at least is no surprise, for this class is that of the warriors, whom Plato calls the auxiliaries. The primary function of this warrior class is to support and uphold the principles of the guardians or rulers.[86]

We come next to the virtue which Jowett[87] translates as temperance, although terms like restraint, measure, balance, moderation or self-control may sound more familiar to modern ears. Socrates's description of temperance is plain enough: it is, he says,[88] the ordering or controlling of certain pleasures and desires. In a nutshell, it is self-mastery. Socrates explains[89] that there exist in the human soul a better principle and a worse principle. The better principle comprises the simple and moderate desires which follow reason. This principle predominates in the best-educated people.[90] Competing with the better principle, and overwhelming it in the great majority of people, is the worse principle. This includes the manifold, complex and meaner pleasures, desires and pains. The words "temperance" and "self-mastery" express the rare situation in which the better principle rules over the worse.[91]

Three points are worth noting here. The first is the sense in which Plato refers to education when describing the better principle. Clearly, education for Plato goes beyond the one-sided and fatally flawed modern notion of training only the mind or intellect, and ignoring all else. This notion is widespread in universities today, and it exerts its dark influence also in the field of secondary education. By contrast, it is implicit in Plato's treatment of temperance that education must extend to the whole person, to character as much as to intellect. This is not the place to elaborate on the subject, but the question is one of critical importance for our wellbeing. Plato knew only too well what we have largely forgotten.

Secondly, Plato's description should not mislead us into believing that temperance can operate only at the level of the individual: like the other Platonic virtues, it applies equally in the context of the state.[92] Excess and lack of self-restraint, he points out, are as damaging to the state as to the individual. An example which resonates strongly for lawyers is the widespread tendency of modern countries to overlegislate.[93]

---

85 429d.
86 414b.
87 430d–432b.
88 430e.
89 431a.
90 431c.
91 431a.
92 Plato demonstrates this neatly at 425c–427a.
93 *Ibid.*

Thirdly, temperance, in Plato's view, has a special quality which sets it apart from wisdom and courage. Unlike those virtues, it is not confined to a particular class in the state; it cuts across all classes and extends to the whole of society.[94] Its effect, in short, is to impart harmony, whether to the state or to the individual.[95]

7 THE SOCRATIC CONCEPT OF JUSTICE

We come at last to our objective, the Socratic notion of justice. In approaching it, Socrates invokes the analogy of hunters closing in on their prey.[96] He confesses[97] that justice has long been staring him in the face and he has failed to recognise it:

> "You remember the original principle which we were always laying down at the foundation of the State, that one man should practise one thing only, the thing to which his nature was best adapted; now justice is this principle or a part of it .... Further, we affirmed that justice was doing one's own business, and not being a busybody; we said so again and again, and many others have said the same to us."[98]

Justice, he adds,[99] is "the having and doing what is a man's own and belongs to him".

Moreover:[100]

> "[E]ach individual should be put to the use for which nature intended him, one to one work, and then every man would do his own business, and be one and not many; and so the whole city would be one and not many."

Socrates's definition, as portrayed in these statements, looks disarmingly simple. Simple it is, but not shallow: as I shall try to show, the notion is subtle and wide-ranging in its application both to the state and to the individual. Before the practical operation of Socratic justice is examined, several preliminary points may be noted.

First, these definitions show that Socratic justice is rooted in human nature. It follows that Socratic justice is indissolubly linked to natural law: violation of one is violation of the other.[101]

Secondly, an element common to these formulations is human activity, whether of mind or of body. The Socratic concept of justice therefore contemplates human beings in action. Can we then infer that where there is no activity

---

94 432a.

95 *Ibid*.

96 432b–d. Socrates in this passage urges Glaucon to "watch ... and strive to catch a sight of her, and if you see her first, let me know". In the exchanges that follow, Glaucon displays humility and trust in his teacher: "Would that I could! but you should regard me rather as a follower who has just eyes enough to see what you show him – that is about as much as I am good for."
"Offer up a prayer with me and follow."
"I will, but you must show me the way."

97 432e.

98 433a, d. Perhaps the simplest formulation of Socratic justice is "doing one's own duty": Hare "Plato" in *Founders of thought* (1991) 49.

99 434a.

100 423d.

101 See further text to fnn 182–183 below. For exploration of the interplay between Platonic justice and natural law, see generally Van Zyl *Justice and equity in Greek and Roman legal thought* (1991) ("Van Zyl").

of mind[102] or body, the question of justice or injustice cannot arise? Surely not, for the tenor of these statements does not support such an inference. Moreover, Socrates would have been only too well aware of what in modern law is known as liability for omissions. Thus where the law imposes a duty to act, the failure to do so may entail criminal or delictual liability. Such an omission is often also unjust. An example is the case of a passer-by who, although he is a good swimmer, walks past and ignores a drowning child. Doing nothing in these circumstances would certainly amount to injustice in terms of the Socratic definitions quoted above.

Thirdly, it was noted earlier that Socrates arrives at his definition by a process of elimination: justice, as he defines it, is the only virtue which remains in the ideal state when the other virtues of wisdom, courage and temperance are removed.[103]

Fourthly, there is a causal nexus between justice and the other virtues: justice, according to Socrates, is the ultimate cause and condition of their existence.[104] Justice, then, is fundamental, the *sine qua non* of the other virtues. It follows that wisdom, temperance and courage have no independent existence: they all depend on justice. Equally, if any one of the three former virtues exists in the state, justice too must be present.[105] The conclusion is that the cultivation of justice, as Socrates conceives it, is of paramount importance for the wellbeing of every state.[106]

Fifthly, it is implicit in the text[107] that Simonides's legalistic definition of justice, considered earlier,[108] is but one aspect of Socrates's far broader conception. Suits at law, Socrates points out, are always decided on the ground that a man may neither take what is another's, nor be deprived of what is his own.[109] This is merely a paraphrase of Simonides's view[110] that justice is the giving to each man of what is proper to him. It now becomes clear why Socrates, at the start of the inquiry, did not reject Simonides's definition, which is now seen to be correct,

---

102 Mental activity pertains to the individual rather than to the state. I shall therefore deal with it when I turn to consider the operation of Plato's definition of justice in relation to the individual; see section 9 of this article. The relationship between justice and action is significant; compare Blackstone 2 38, where law is defined as a rule of action.

103 433b.

104 *Ibid.* Later on, however, there is a passage (518e–519a) which appears to be inconsistent with what is said here.

105 The Pythagorean Polus Lucanus echoes the Platonic teaching: in the fragment of the book *On justice*, preserved in Stobaeus (*Florilegium* ix 54), he holds justice to be "mother and nurse of the other virtues" and defines it as "harmony and peace of the whole soul with one rhythm". Jowett 83 is of the view that "justice seems to differ from temperance in degree rather than in kind; whereas temperance is the harmony of discordant elements, justice is the perfect order by which all natures and classes do their own business, the right man in the right place, the division and co-operation of all the citizens".

106 Socrates himself concludes, although not expressly, that of these four virtues, justice is the one which, by its presence, contributes most to the excellence of the state: 433c ff. In the light of this, Bloom's view (374) that justice adds nothing to the state that is not accomplished by the other three virtues cannot be supported.

107 433e.

108 Section 2 above.

109 433e.

110 Articulated earlier by Socrates at 332c.

but too narrow. It emphasises only one aspect of justice, namely justice in the context of retribution. In contrast, Socrates's definition is universal and all-embracing; it applies to all human activities, within or outside the legal sphere.[111]

Finally, the third definition quoted above shows that Socratic justice works towards unity on both the individual and the collective plane. This causal relationship between justice and unity is surely the key to ameliorating the social upheaval which plagues so many communities today.

We turn now to examine the operation of Socratic justice, first in the state (that is, in the external world of day-to-day human activity), then in the individual (that is, internally or within man). This examination will shed light on the essential nature of Socratic justice.

to be continued

> *The basic problem [with the textualist approach] is that words are not self-defining; their meaning depends on both* culture *and* context. *There is no such thing as a preinterpretive text, and words have no meaning before or without interpretation. Statutory terms are indeterminate standing by themselves . . . To say this is not to say that the words used in statutes could mean anything at all . . . But it is to say that the significance of . . . enactments necessarily depends on background norms about how words should be understood, and those norms are rarely supplied by the legislature itself. Indeed, the legislature itself must operate within the prevailing interpretive culture; it has no power to change it, at least not in any fundamental way.*
>
> *Sunstein 114.*

111 See, generally, on the Socratic notion of justice, Boyd *An introduction to the Republic of Plato* (1904) 51ff; Nettleship *Lectures on the Republic of Plato* (1951) 145ff; Boyd *Plato's Republic for today* (1962) 71ff; Irwin *Plato's moral theory* (1977) 204ff; Jones *The law and legal theory of the Greeks: an introduction* (1956) 3–4; Havelock *The Greek concept of justice* (1978) 13–14; Van Zyl 52–56. Del Vecchio *Justice* (1953) 20, while finding the Platonic principle inadequate to solve completely the problem of justice, concedes that "[n]o one can fail to recognize the breadth and profundity of this doctrine which makes justice one with harmony, with perfection and with beauty". Arnheim's attack on Plato's reasoning (*Aristocracy in Greek society* (1977) 173–178) is entirely justified.

'n Reg op omgewingsinligting in Duitsland*

Willemien du Plessis
BJur LLD
Professor in die Regte aan die Potchefstroomse Universiteit vir CHO

SUMMARY

A right to environmental information in Germany

Germany introduced legislation providing for access to environmental information after the introduction of European Directive 90/313/EEC. Germany (like South Africa) had a closed administration and the dawning of a new freedom of information era came as a shock.

The Access to Environmental Information Act (*Umweltinformationsgesetz*) provides for access to environmental information in the hands of public authorities. Provision is made for various exemptions – for example, trade secrets, personal data and public security. Criticism against the German Act is that the exemptions are too widely formulated, that not all public authorities are included and that excessive fees are asked for information. Individuals experience various problems in accessing information.

Various other legislative measures force private institutions to provide information regarding air quality, water quality, planning and security control measures. The state has an obligation to provide information for litigation purposes as well as in the case of registration of deeds.

The experience in Germany can serve as an example to South Africa. It is suggested that South Africa is in need of an access to environmental information Act, and that the Open Democracy Bill will not be able to meet this need. Exemptions should be formulated clearly. It is further recommended that the Act should be enforced not only against public authorities but also against private institutions.

1 INLEIDING

Die Europese Unie het in 1990 Riglyn 90/313/EEC[1] waarin lidstate verplig word om vir 'n reg tot omgewingsinligting voorsiening te maak, aanvaar. Duitsland (soos Suid-Afrika)[2] het vir baie jare 'n tradisie van 'n professionele maar geslote staatsadministrasie gehad en 'n lid van die publiek se toegang was hoofsaaklik

* Die finansiële steun van SWO word met dank erken.

1 90/313/EEC OJ No L 158 23.6.1990 56; vgl ook Schomerus, Schrader en Wegener *Umweltinformationsgesetz Kommentar* (1995) 21–46; Röger "Die europarechtlichen Vorgaben der Umweltinformationsrichtlinie" in Hegele en Röger *Umweltschutz durch Umweltinformation* (1993) 1–31; Turiaux *Zugangsrechte zu Umweltinformationen nach der EG-Richtlinie 90/313 und dem deutschen Vewaltungsrecht* (1994) 125–183; Jans *European environmental law* (1995) 286–288 – aangeleenthede ten aansien van besoedeling wat oor grense strek, is hierby ingesluit en is nie beperk tot inligting in die lidstate self nie.

2 Suid-Afrika het tot 1994 ook 'n geslote staatsadministrasie gehad – vgl Du Plessis *Reg op inligting en die openbare belang* (1986) 288–406.

beperk tot administratiewe verrigtinge waaraan hy of sy deelgeneem het.[3] Die moeite om die vereiste wetgewing naamlik die *Gesetz zur Umsetzung der Richtlinie 90/313/EWG des Rates vom 7.6.90 über den freien Zugang zu Informationen über die Umwelt*[4] deurgevoer te kry en te implementeer, moet in die lig hiervan beoordeel word.[5] As gevolg van die druk van omgewings- en ander belangegroepe het die verskillende *Länder*[6] vroeg reeds bindende administratiewe reëlings geformuleer om die Europese riglyn te interpreteer en toe te pas.[7]

In Suid-Afrika maak artikel 24 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996[8] voorsiening vir 'n reg op 'n gesonde en skoon omgewing. Dié artikel moet met artikel 32 wat vir 'n reg op inligting voorsiening maak, gelees word. Die reg op inligting moet verder in wetgewing omskryf word. 'n *Draft Open Democracy Bill*[9] is in Oktober 1997 vir kommentaar gepubliseer. Die wetsontwerp bevat nie 'n algemene reg op omgewingsinligting nie. Klousule 9 van die wetsontwerp plaas wel 'n verpligting op 'n hoof van 'n staatsdepartement om inligting wat 'n ernstige openbare veiligheid of omgewingsrisiko inhou, te openbaar. Indien die inligting van 'n derde party ontvang is, moet sodanige persoon in kennis gestel word. Geleentheid word gebied vir beswaarmaking teen nie-openbaarmaking.[10] *Die Draft Open Democracy Bill* is net teenoor die staat afdwingbaar terwyl artikel 32 van die Grondwet voorsiening maak vir afdwinging teen die staat en privaat individue.

---

3 § 29 VwVfG; Gebers "Germany" in Hallo *Access to environmental information in Europe* (1996) 95; Winter "Zusammenfassender Bericht" in Winter G (red) *Öffentlichkeit von Umweltinformationen* (1990) 7–8; Burmeister en Winter "Akteneinsicht in der Bundesrepublik" in Winter (red) 88–93; Röger (1995) 15; vgl ook Du Plessis "Inligtingsreëlings in Duitsland" 1989 *De Jure* 85–100 – die publiek het wel 'n reg op persoonlike inligting ingevolge die *Bundesdatenschutzgesetz* (BDSG).

4 1994-07-08 BGBl I 1490 (Federale Vryheid van Toegang tot Omgewingsinligtingwet) hierna *Umweltinformationsgesetz*. Vgl Taeger "Freier Zugang zu Informationen über die Umwelt: Problemlage und Vorgeschichte" 1993 *Jur-PC* 1951–1953.

5 Vgl ook Fluck, Lemp en Meyer-Rutz *Freier Zugang zu Umweltinformationen* (1993) 1–11; Hegele "Der lange Weg der Umsetzung der Umweltinformationsrichtlinie in das Deutsche Recht – Defizite und Chancen" in Hegele en Röger *Umweltschutz durch Umweltinformation* (1993) 101–145; Röger (1995) 20–26; Erbguth "Zum Entwurf eines Umweltinformationsgesetzes" 1994 *Umwelt und Planungsrecht* 81–93; Scherzberg "Der freie Zugang zu Informationen über die Umwelt" 1992 *Umwelt und Planungsrecht* 12(1):51–54.

6 *Bavarië-Bayrischer Landtag, Drucksache* 12/9995 vom 4.2.1993; *Hesse – Hessisches Ministerium für Umwelt, Energie und Bundesangelegenheiten, Kabinetsvorlage vom* 19.05.1993; *Schleswig-Holstein – Erlass vom* 21.04.1993 *Amtsblad Schleswig-Holstein*, 1993 p 426 – sien Hallo (1996) 98–99; vgl ook Fluck, Lemp en Meyer-Rutz 13–23.

7 Vgl bv Schomerus, Schrader en Wegener *Umweltinformationsgesetz Kommentar* (1995) 305–312: bv § 39 *Verfassung des Landes Brandenburg* GVBl Brandenburg v 20.8.1992 S 298: "Das Land, die Gemeinden und Gemeindeverbände sind verpflichtet, Informationen über gegenwärtige und zu erwartende Belastungen der natürlichen Umwelt zu erheben und zu documentieren: Eigentümer und Betrieber von Anlagen haben eine entsprechende Offenbarungspflicht. Jeder hat das Recht auf diese Informationen, soweit nicht überwiegende öffentliche und private Interessen entgegenstehen." *Verfassung des Landes Mecklenburg* – Vorpommern GVBl Mecklenburg-Vorpommern v 23.5.1993 S 372 A 6(3): "Jeder hat das Recht auf Zugang zu Informationen über die Umwelt, die bei der öffentlichen Verwaltung vorhanden sind."

8 Hierna 1996-Grondwet.

9 GK 1514 in *SK* 18381 van 1997-10-03.

10 A 9(2)–(7).

Die doel van die Duitse *Umweltinformationsgesetz* is om vryheid van inligting rakende die omgewing in die hande van openbare owerhede te verleen en om sekere voorwaardes vir toegang te stel.[11] Geen reëlings word ten aansien van privaatmaatskappye getref nie. Die openbare owerhede word beperk tot daardie owerhede wat direk omgewingsinligting hanteer. Dié wat oor die algemeen omgewingsaangeleenthede in ag moet neem, is uitgesluit.[12] Die omgewingsinligting kan mondeling of skriftelik oorgedra word.[13] Spesiale reëlings word getref waar aansoeke vir dieselfde inligting deur groepe van meer as 50 persone ingedien word.[14] Die uitsonderings van die EG-riglyn is in die Duitse wetgewing oorgeneem en verder uitgebrei.[15]

Die *Umweltinformationsgesetz* is aan felle kritiek onderwerp omdat dit owerhede wat nie direk met omgewingsaangeleenthede werk nie, toelaat om te argumenteer dat die wet nie op hulle van toepassing is nie. Ander kritiek teen die wet is dat die uitsonderings van die riglyn net so oorgeneem is en dat daar nie vir 'n kostestruktuur voorsiening gemaak is nie.[16]

Die doel van hierdie artikel is om vas te stel hoe die reg op omgewingsinligting in Duitsland gereël word en om aanbevelings vir Suid-Afrika te maak. Eerstens word 'n kort oorsig van die EG-riglyn gegee en daarna word die *Umweltinformationsgesetz* en ander inligtingsreëlings wat voorkom, bespreek. In die slot word aanbevelings gemaak. Daar is ook in Suid-Afrika toenemend druk van omgewingsgroepe dat omgewingsinligting vrygestel moet word. Beskikbaarheid van inligting is verder 'n vereiste wat deur self-reguleringvoorskrifte[17] gestel word. Sekere wette[18] maak wel daarvoor voorsiening dat omgewingsinligting aan die staat geopenbaar moet word. Daar is egter geen verpligting (buiten a 32 van die 1996-Grondwet) op die staat om dié inligting aan privaat persone te verskaf nie.

2 EG-RIGLYN

Volgens Riglyn 90/313/EEC moet inligting deur openbare owerhede[19] aan enige natuurlike of regspersoon (dus ook omgewingsgroeperinge)[20] beskikbaar gestel

---

11 § 1. Vgl ook Röger (1995) 27–31; Wolf R "Grundrechtseingriff durch Information?" 1995 *Kritische Justiz* 340–350.

12 § 3.

13 § 4.

14 § 6. Taeger 1993 *Jur-PC* 1953 is van mening dat maatstawwe neergelê behoort te word om die uitsonderings rakende persoonlike data en handels- en beroepsgeheime te interpreteer.

15 § 7 en 8. Vgl ook Hallo (1996) 105–106.

16 'n Aansoeker het die stad Bamberg versoek om inligting rakende 'n uitlaatpermit, die afdwinging deur openbare owerhede van die permit, die uitslag van die meting van uitlate en die afvalbestuur van die betrokke instansie te openbaar. Twee maande later het die aansoeker 'n brief ontvang waarin vermeld is dat die koste DM 800 sou wees. Soortgelyke gevalle het voorgekom en Duitsland is deur die EG aangespreek oor die buitensporige heffing van koste asook die omskrywing van openbare owerhede – vgl Hallo (1996) 100–101; 109.

17 SABS/ISO *Environmental management systems – General guidelines and principles, systems and supporting techniques* ISO 14001 UDC 504.06/ICS 13.02.0 SABS/ISO (1996).

18 Bv Waterwet 54 van 1956; Wet op Voorkoming van Lugbesoedeling 45 van 1965.

19 "Public authorities" sluit in liggame op plaaslike, streeks- en nasionale vlak (uitgesluit die instellings met wetgewende bevoegdheid) en "bodies with public responsibilities for the environment and who are under the control of public authorities" – a 2(b) en 6.

20 Bv wildlewe verenigings, *Greenpeace* ens.

word sonder dat hulle hul belang daarin hoef aan te toon.[21] Die klem word op passiewe[22] eerder as aktiewe[23] toegang tot inligting geplaas.[24]

Omgewingsinligting[25] moet binne twee maande[26] na die aansoek verskaf word en redes vir nie-verskaffing moet vermeld word.[27] Die individu of regspersoon hoef nie 'n belang aan te toon nie.[28]

Inligting kan geweier word op grond van onder meer[29] handels- of industriële geheimhouding (insluitend immateriële goed)[30] vertroulikheid van persoonlike data of lêers; vertroulikheid van vergaderings van openbare owerhede; internasionale verhoudinge en nasionale verdediging; openbare veiligheid; *sub-judice* aangeleenthede of aangeleenthede wat aan ondersoek onderworpe is; inligting wat deur 'n derde party verskaf is sonder dat daar 'n regsplig op die persoon gerus het om dit te verskaf en inligting wat, as dit beskikbaar gestel sou word, waarskynlik meer skade aan die omgewing gaan veroorsaak. Inligting kan verder geweier word as dit neerkom op die verskaffing van onvoltooide dokumentasie, of verband hou met interne kommunikasie of indien die aansoek te algemeen geformuleer is.[31] Inligting kan gedeeltelik vrygestel word indien slegs sekere gedeeltes van die inligting onder die uitsonderings val.[32]

As toegang tot inligting geweier word, behoort daar voorsiening vir judisiële of administratiewe hersiening ooreenkomstig die betrokke lidstaat se regstelsel gemaak te word.[33] Redelike koste kan vir die verskaffing van 'n dokument gehef word.[34] Die staat moet alle nodige stappe doen om algemene inligting rakende die stand van die omgewing in die vorm van 'n periodieke publikasie of beskrywende verslae te publiseer.[35]

---

21 A 2(1). Vgl ook a 2(b) – dié plig word nie op privaatinstansies gelê nie.
22 Die staat reageer op versoeke vir inligting – vgl Du Plessis 171.
23 Die staat verskaf uit eie beweging inligting – vgl Du Plessis 173.
24 Hallo (n 2) 18.
25 A 2(a); gedefinieer as "any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes".
26 In sommige state is 'n korter tydperk afhangende van die sensitiewe aard van die inligting ingevoer – Hallo (1996) 16.
27 A 3(4).
28 A 3(1).
29 A 3(2). Vgl ook Jans 287–288; Krämer 303–306; Winter (fn 2) 90–93; Hallo *Openbaarheid van milieu gegewens: transatlantische beschouwing* in Van den Broek, Van der Meijden en Hallo (red) *Openbaarheid van milieurelevante bedrijfsgegevens* (1993) 62–70.
30 Handelsgeheime word nie omskryf nie, maar omskrywings daarvan kan in ander wetgewing opgespoor word waar meestal verwys word na "commercial and industrial secrets which an enterprise legitimately wishes to keep confidential in order to protect its competitive position, technological know-how and production methods" – vgl Krämer 304–305.
31 A 3(3). Dit kan as formele gronde beskou word – vgl Krämer 306.
32 A 3(2).
33 A 4.
34 A 5.
35 A 7.

3 UMWELTINFORMATIONSGESETZ

3 1 Doel van die wet

Die doel van die *Umweltinformationsgesetz* soos uiteengesit in § 1 kom ooreen met artikel 1 van die EG-riglyn naamlik om die vrye toegang en disseminasie van omgewingsinligting wat deur die openbare owerhede hanteer word te verseker en om die reëls en voorwaardes waaronder dit vrygestel sal word, uiteen te sit. Die ander maatreëls van die wet moet in die lig van § 1 uitgelê word.[36]

Die idee dat elke persoon vryelik (behalwe in die uitsonderingsgevalle) 'n reg op inligting het, hef die lang tradisie om alle administratiewe handelinge as vertroulik te ag op.[37] Skrywers beveel aan dat uitsonderings op die reël eng uitgelê behoort te word sodat die reg op inligting nie onnodig daardeur beperk word nie. Die doel is om deur middel van deursigtigheid die nakoming van omgewingsmaatreëls te verseker.[38] Die betrokkene wat aansoek om inligting doen, hoef nie 'n belang in die inligting aan te toon nie. Die beperking wat die wetgewing ten aansien van inligting in die hande van bepaalde amptenare oplê, beperk egter die algemene doel van die Wet en die EG-riglyn.[39]

3 2 Aanwendingsgebied

Die wet geld ten aansien van omgewingsinligting (soos omskryf) wat beskikbaar is by sowel staatsamptenare (van die Federasie, *Länder* en plaaslike owerhede) as by privaat, natuurlike en regspersone wat handelinge vir die staat op die gebied van omgewingsbeskerming waarneem en onder die toesig van amptenare staan.[40] Slegs dié amptenare wat 'n spesifieke of aanvullende opdrag het om die omgewing te beskerm, word geraak.[41]

Omgewingsinligting sluit alle skriftelike en beeldmateriaal of rekenaarmatige data oor die toestand van water, lug, grond, dier- en plantlewe en hulle natuurlike leefruimte, handelinge wat 'n oorlas veroorsaak (bv geraas of maatreëls wat dit toelaat of kan vererger), optrede, maatreëls (insluitend regsreëls en tegniese voorskrifte) en programme wat die beskerming van die omgewing ten doel het, in.[42] Die toestand van die omgewing sluit die vorige, bestaande en toekomstige

---

36 Schomerus, Schrader en Wegener 48.

37 Vgl ook Blumenberg "Die Umweltinformations-Richtlinie der EG und ihre Umsetzung in das Deutsche Recht" 1992 *Natur und Recht* 8–16.

38 Schomerus, Schrader en Wegener 48–49.

39 Vgl Schomerus, Schrader en Wegener 57–58.

40 § 2 Abs 1 en 2. Vgl Schomerus, Schrader en Wegener 60–79; Turiaux *Zugangsrechte zu Umweltinformationen nach der EG-Richtlinie 90/313 und dem deutschen Vewaltungsrecht* (1994) 51–54; Röger (1995) 33–44, 61–74.

41 § 3 Abs 1. Uitgesluit is *Bundes-* en *Landesbehörden* wat wetgewing of regsverordeninge opstel (in ooreenstemming met die EG-riglyn moet dit so uitgelê word dat dit net die voorbereidingstadium van wetgewing raak), amptenare wat die algemene nakoming van regsvoorskrifte opstel (bv die versameling van afvalstowwe; voorgeskrewe inhoud van uitlate by kragstasies of verwarmingsaanlegte), geregs-, straf en dissiplinêre amptenare (in ooreenstemming met die EG-riglyn sou dit die regsprekende bevoegdheid raak). Diegene wat dus af en toe met omgewingsaangeleenthede te make het, is nie ingesluit nie. Vgl ook Schomerus, Schrader en Wegener 81–104, 123–124. Amptenare in ander lidstate van die EG het dieselfde pligte en sou dus nie uitgesluit kan word van die uitleg van die term "beamptes" in die heel wydste sin nie – vgl Röger (1995) 55–56.

42 § 3 Abs 2; Schomerus, Schrader en Wegener 104–102; Hegele "Der lange Weg der Umsetzung der Umweltinformationsrichtlinie" 114–116; Turiaux 50–51; Röger (1995)

vervolg op volgende bladsy

stand daarvan in, terwyl skrif en beeldmateriaal net op bestaande inligting dui. Sowel voorkomende as reaktiewe maatreëls moet dus geopenbaar word.[43]

3 3 Reg op omgewingsinligting

Elke persoon[44] het vrye toegang tot omgewingsinligting en 'n amptenaar of privaatpersoon kan die inligting oordra, insae in dokumente verleen of toegang tot die draer van die inligting verleen.[45] Die aanvraag moet duidelik wees en aantoon watter inligting (in die sin van § 3 Abs 2) benodig word. Die rede hoef nie vermeld te word nie.[46] Slegs dié inligting wat voorhande of beskikbaar is, hoef vrygestel te word. Daar is geen verpligting om die inligting op navraag van oraloor te versamel nie.[47] Redes moet verskaf word indien inligting geweier word.[48] Die aanvraer moet die geleentheid gegun word om die besluit van die beampte aan te veg.[49]

Die inligting moet binne twee maande verskaf word.[50] Die amptenare is nie verplig om vir die korrektheid van inligting in te staan by insae in dokumentasie of die verlening van toegang tot die inligtingsdraer nie.[51]

Die amptenare wat in beheer van die inligting is, moet dit verskaf. In die geval van natuurlike of regspersone moet die toesighoudende persoon die inligting verskaf. Die *Länder* kan hulle eie reëlings in die verband tref.[52]

Indien meer as 50 persone 'n versoek onderteken het of verskillende gelykluidende navrae ingehandig is, geld §§ 17-19 van die *Verwaltungsverfahrensgesetz*.[53] As die aansoek deur middel van 'n middelpersoon gerig word, kan die inligting op 'n bepaalde plek bekendgemaak word.[54]

Artikel 3 van die EG-riglyn is slegs gedeeltelik oorgeneem deur §5, wat die administratiewe implementering van die reg op inligting aan algemene administratiefregtelike reëls oorlaat.[55]

75–86; Theuer "Der Zugang zu Umweltinformationen aufgrund des Umweltinformationsgesetzes (UIG)" 1996 *Neue Zeitschrift für Verwaltungsrecht* 329–330.

43 Schomerus, Schrader en Wegener 124–125.

44 Dit sou ook regspersone kon insluit – vgl Schomerus, Schrader en Wegener 129.

45 § 4 Abs 1. Alle ander aansprake op inligting word nie hierdeur gewysig nie – vgl § 4 Abs 2; Schomerus, Schrader en Wegener 127–153; Hegele 117–118; Theuer 1996 *Neue Zeitschrift für Verwaltungsrecht* 327–329; Röger (1995) 87–110. Röger (1995) 102–103 vermeld dat daar sover moontlik insae in dokumente verleen moet word om te verhoed dat inligting weerhou of toegcsmeer word. Schomerus, Schrader en Wegener 128 verwys na die reg op omgewingsinligting as 'n publiekregtelike subjektiewe reg en 'n "Grundrecht auf Informationszugang."

46 § 5 Abs 1. Vgl ook Schomerus, Schrader en Wegener 174; Röger *Umweltinformationsgesetz* 111–122.

47 Schomerus, Schrader en Wegener 152; Röger *Umweltinformationsgesetz* 96–97.

48 Schomerus, Schrader en Wegener 174–175.

49 Volgens a 4 EG-riglyn. Schomerus, Schrader en Wegener 127. Die administratiefregtelike prosedures volgens die § 36 VwVfG en §§ 68 cv VwGO en §§ 80 Abs 1 en 80a VwGO kan gevolg word – vgl 164–175.

50 Die inligting kan op enige wyse verskaf word – oa mondeling, per faks, elektronies, per disket of telefonies – vgl Schomerus, Schrader en Wegener 158–159.

51 § 5 Abs 2. Vgl ook Schomerus, Schrader en Wegener 157–175.

52 § 9.

53 BGBl I S 1253.

54 § 6. Vgl ook Schomerus, Schrader en Wegener 177–181; Röger (1995) 123–127.

55 Schomerus, Schrader en Wegener 174–175.

Daar word geen spesifieke reëlings getref indien 'n amptenaar sou versuim om die inligting beskikbaar te stel soos in die EG-riglyn vereis nie. Die gewone administratiefregtelike prosesse behoort egter gevolg te kan word.[56]

3 4 Uitsonderings

Bepaalde uitsonderings ten aansien van beide openbare en privaatinstellings is geformuleer.[57] Die reg op omgewingsinligting kan beperk of uitgesluit word ter beskerming van openbare belange indien[58]

- die bekendmaking van die inligting internasionale betrekkinge, die landsverdediging of die vertroulikheid van interne gesprekke van amptenare skend of 'n onoorkomelike gevaar vir die openbare veiligheid veroorsaak;
- 'n regsgeding (straf en siviel) nog nie afgehandel is nie;
- die bekendmaking van die inligting die beskerming van die omgewing in gevaar sal stel;
- daar nog nie afgehandelde dokumentasie beskikbaar is nie of die inligting in 'n voorbereidende fase is;[59]
- dit blyk dat die prosedure misbruik word, byvoorbeeld wanneer die persoon reeds in besit van die inligting is;[60]
- die inligting vrywillig deur 'n derde persoon aan die amptenare oorgedra is. In so 'n geval kan dit slegs met toestemming van die derde vrygestel word.[61]

Die bewoording van dié uitsonderingsparagraaf is verwarrend. Elke sin word anders ingelui om aan te toon dat die inligting nie vrygestel kan word nie. Hierdie formulering kan volgens skrywers tot regsonsekerheid lei.[62] Die aantal en trefwydte van die uitsonderings is strydig met die EG-riglyn en hou moontlik verband met die Duitse amptenare se vrees vir deursigtigheid.[63] Die uitsonderings behoort eng uitgelê te word en nie gesamentlik om soos Schomerus, Schrader en Wegener[64] dit stel, as "blokkade" vir die reg op inligting te dien nie.

Privaatbelange kan die reg op omgewingsinligting beperk of uitsluit[65] indien die openbaarmaking van die inligting beskermingswaardige belange van die betrokkene in gedrang sal bring of die beskerming van intellektuele goedere in gedrang is.[66] Handels- of beroepsgeheime behoort nie geopenbaar te word nie.

---

56 *Idem* 152–153; Röger "Rechtsschutz zur Durchsetzung des Umweltinformationsanspruchs" in Hegele en Röger *Umweltschutz durch Umweltinformation* (1993) 147–167.

57 Schomerus, Schrader en Wegener 183–245; Hegele "Der lange Weg der Umsetzung der Umweltinformationsrichtlinie" 118–124; Turiaux 54–76; Röger (1995) 129–173; Scherzberg 1992 *Umwelt und Planungsrecht* 12(1):53–54; Theuer 1996 *Neue Zeitschrift für Verwaltungsrecht* 330–332.

58 § 7 Abs 1.

59 § 7 Abs 2.

60 § 7 Abs 3.

61 § 7 Abs 4 gelees met § 8 Abs 1.

62 Bv "besteht nicht", "soll abgelehnt werden", "sind abzulehnen" en "dürfen nicht zugänglich gemacht werden" – vgl Schomerus, Schrader en Wegener 211.

63 *Idem* 212.

64 *Ibid.*

65 Vgl Röger (1995) 175–209; Raum "Umweltschutz und Schutz personenbezogener Daten" 1993 *Computer und Recht* 9(3):162–170.

66 § 8 Abs 1.

Die inligting moet egter as sodanig op die dokument aangedui wees.[67] Die amptenare moet die betrokkenes aanhoor voordat daar tot 'n besluit gekom word.[68]

Die verskillende uitsonderings word nie gedefinieer nie maar slegs gelys en word soms negatief en soms positief bewoord. Die inhoud daarvan moet in oorleg met ander regsvoorskrifte en definisies sowel as die doel van die wet geïnterpreteer word.[69] Beskermingswaardige belange moet afgeweeg word. Die term "afweging" kom ook in ander Duitse wetgewing voor maar die afweging was nog altyd meer ten gunste van geheimhouding gewees wat nie die uitgangspunt in die geval van omgewingsinligting kan wees nie. Die afweging van beskermingswaardige belange moet dus in die lig van die doel van die wet – dit wil sê openbaarheid – gedoen word. Schomerus, Schrader en Wegener[70] beveel aan dat die uitsonderings- en afwegingsgronde behoorlik herformuleer word.

Volgens die EG-riglyn het elke persoon insae in omgewingsinligting. Daar kan egter 'n konflik ontstaan wanneer handels- of beroepsgeheime moontlik geopenbaar kan word.[71]

3 5 Kostes

Die wet maak voorsiening vir die heffing van hanteringsfooie, kopieë en die dek van alle voorsienbare kostes. Kostereëlings in ander wetgewing word nie geraak nie.[72] Dié bepaling is een van die mees omstrede bepalings in die wet. Volgens artikel 5 van die EG-riglyn kan relatiewe kostes gehef word. In die Duitse reg

---

67 Fluck "Der Schutz von Unternehmendaten im Umweltinformationsgesetz" 1994 *Neue Zeitschrift für Verwaltungsrecht* 1048–1056 is van mening dat die beskerming nie voldoende vir ondernemings is nie. Vgl ook Engel "Das freie Zugang zu Umweltinformationen nach der Informationsrichtlinie der EG und der Schutz von Rechten Dritter" 1992 *Neue Zeitschrift für Verwaltungsrecht* 111–114. Cosack en Tomerius "Betrieblicher Geheimnisschutz und Interesse des Bürgers an Umweltinformationen bei der Aktenvorlage im Verwaltungsprozess" 1993 *Neue Zeitschrift für Verwaltungsrecht* 841–846 pleit dat daar 'n behoorlike afweging van belange moet plaasvind alvorens inligting aan derdes oorgedra word.

68 § 8 Abs 2.

69 Schomerus, Schrader en Wegener 244.

70 245.

71 Klewitz-Hommelsen *Ganzheitliche Datenverarbeitung in der öffentlichen Verwaltung und ihre Beschränkung durch den Datenschutz* (1996) 81. Röger (1995) 215–216 (vgl ook 211–220) stel voor dat die volgende prosedure gevolg word ten einde vas te stel of inligting vrygestel moet word of nie: Is daar enige aanduiding dat die inligting 'n beroeps- of handelsgeheim is. Indien nie, vrystelling, indien wel, moet betrokkenes nav § 8 Abs 2 Satz 1 aangehoor word. Bestaan daar enige twyfel of die inligting geheim moet wees, moet die betrokke instansie 'n voorlegging maak ten aansien van die openbaarmaking van die inligting. Indien geen aansoek om geheimhouding gedoen word nie, dan moet die volgende vrae beantwoord word: (i) is die inligting van so 'n aard dat verdere ondersoek nie ingestel moet word nie; (ii) is die inligting net aan bepaalde persone bekend; (iii) wil die instansie die inligting geheim hou; (iv) bestaan daar 'n beregbare belang by geheimhouding of (v) sal die blootlegging van die inligting enige beskermingswaardige belange tref? Indien nie, word die inligting blootgelê; indien wel, word die aansoeker in kennis gestel dat die inligting nie vrygestel kan word nie. Kennis van die besluit moet aan alle betrokkenes verskaf word.

72 § 10 Abs 1. Die Federale regering kan kostes vir die ampshandelinge van amptenare daarstel dmv regsordening en die toestemming van die parlement is nie nodig nie – Abs 2. Vgl ook Schomerus, Schrader en Wegener 255–284; Röger (1995) 225–246.

word die kostevoorskrifte van ander wetgewing gebruik wat soektyd insluit en nie net die kopieerkoste nie. Dié interpretasie van kostes is in stryd met die EG-riglyn.[73]

3 6 Openbaarmaking van toestand van die omgewing

Die bondsregering moet elke vier jaar 'n verslag oor die toestand van die omgewing voorlê waarvan die eerste einde 1994 voorgelê moes word.[74] Dié bepaling vorm deel van moderne idee van 'n "aktiewe meedelende en beïnvloedende" eerder as "bevelende" staat.[75] Die rol van die staat is nie beperk tot die verslag nie en die Duitse Federasie het al verskeie ander inisiatiewe in dié verband geneem ten einde meer gereeld inligting oor die stand van die omgewing vry te stel.[76]

3 7 Hofsake

Hofsake in Duitsland het tot dusver meestal gehandel oor die direkte toepassing van Riglyn 90/313/EEC.[77] Die *Oberverwaltungsgericht* van Münster[78] het 'n aansoek van 'n afvalbestuurder afgewys wat inligting oor sy mededingers aangevra het. Hy wou vasstel of hulle aan dieselfde streng maatreëls as hy onderwerp word. Die hof het bevind dat sy aansoek in stryd is met die doel van die riglyn omdat hy eerder nakoming van omgewingsmaatreëls wil vermy as om die beskerming van die omgewing te verbeter.

Verskeie hofsake is al oor die *Umweltinformationsgesetz* wet beslis. In *Case M*,[79] 'n beslissing van 'n laer administratiewe hof in Münich, het die hof bevind dat dokumente wat handelsgeheime bevat net onder spesiale voorwaardes geweier kan word. Daar moet omvattende redes vir die weiering van toegang gegee word sodat die applikant kan besluit of hy of sy om hersiening aansoek gaan doen of nie. Indien inligting deur derdes verskaf is, moet hulle eers gekonsulteer word alvorens die inligting geweier of toegestaan word. Elke aangeleentheid moet volgens die hof afsonderlik beoordeel word.[80] In Schleswig-Holstein het die hof beslis dat omgewingsinligting handelinge van owerhede wat 'n invloed op die omgewing kan hê, insluit. Hierdie beginsels is in die Suid-Afrikaanse *Open Democracy Bill* geïnkorporeer.[81]

---

73 Theuer 1996 *Neue Zeitschrift für Verwaltungsrecht* 332–333.

74 § 11; Schomerus, Schrader en Wegener 285–291; Röger (1995) 247–254.

75 Schomerus, Schrader en Wegener 285.

76 *Ibid* 285–286.

77 "*VG Minden Urt* v 5.3.1993 Az 8 K 1536/90" 1993 *Zeitschrift für Umweltrecht* 285; Scherzberg 1992 *Umwelt und Planungsrecht* 12(1):54–56; teenoor *VG Stade Urt* v 21/4/1993 Az A79/92 waarin beslis is dat die Riglyn nie direkte aanwending vind nie. State word 'n bepaalde tyd gegee (bv 3 jaar) om 'n riglyn in werking te stel. Die vraag is wat voor implementering gebeur en wat gebeur indien 'n staat nie die riglyn implementeer nie. Vgl hieroor Weatherhill *Cases and materials on EEC law* (1992) 75–93; Lenaerts en Van Nuffel *Europees Recht in Hoofdlijnen* (1995) 556–566; Oppermann *Europarecht* (1991) 199–201; Haller "Unmittelbare Rechtswirkung der EG-Umweltinformations-Richtlinie im nationalen deutschen Recht" 1994 *Umwelt und Planungsrecht* 88–93.

78 Urt v 27.9.1993 Az 21 A 2565/92.

79 16 K 93,4444 ZUR 2/96 94.

80 Vgl Hallo (1996) 108.

81 KI 9(3)–(7).

4 ANDER TOEGANGSREËLINGS

Buiten die *Umweltinformationsgesetz*, maak die Duitse reg in 'n mindere of meerdere mate vir toegang tot inligting in die volgende gevalle voorsiening:[82]

(a) 'n aktiewe inligtingsplig wat die administrasie in sommige gevalle opgelê word;

(b) 'n passiewe inligtingsplig waar dit deur wetgewing vereis word; en

(c) 'n "Registerpflicht" waarvan die voorbereiding en bekendmaking deur wetgewing gereël en gevorder word (in Suid-Afrika sou registrasie van aktes hieronder val).

4 1 Aktiewe inligtingspligte

Op verskeie gebiede word die staat verplig om inligting te bekom en bekend te stel, naamlik onder meer op die gebied van lugkwaliteit, waterbenutting, die toelaatbaarheid van bepaalde produkte, maatreëls rakende infrastruktuur en bouplanne.

4 1 1 Lugkwaliteit

Indien 'n persoon 'n industrie of 'n proses wil begin wat die lugkwaliteit kan benadeel, moet hy of sy om 'n lisensie aansoek doen.[83] Die beamptes kan die persoon met die opstel van die aansoek behulpsaam wees.[84] Alle nodige dokumentasie (bv 'n uiteensetting van die uitlate, die uitwerking van die nuwe aanleg op die omliggende gebiede en die groter omgewing) moet by aansoek aangeheg word. Die aansoek word in die dagpers gepubliseer en die aansoek met aanhangsels lê vir twee maande in 'n nabygeleë kantoor van die administrasie ter insae. Indien die dokumentasie enige handels- of beroepsgeheime bevat, moet die aanvraer die beampte nader met 'n voorlegging waarom die inligting nie bekendgemaak mag word nie. In die geval van handelsgeheime moet die projek so omskryf word dat derdes steeds kan bepaal in watter mate hulle deur die projek geraak kan word, sonder dat die handelsgeheim geopenbaar word.[85]

Enige persoon kan in die blootleggingstyd teen die moontlike geheimhouding beswaar aanteken. Die besware word met hom of haar bespreek.[86] Indien beswaar nie in hierdie stadium aangeteken word nie, kan dit beteken dat verdere regsprosesse uitgesluit word.[87] Die lisensiebeampte moet in die lig van ander administratiewe voorskrifte ander beamptes (bv bou- en waterbeamptes) van die aansoek in kennis stel.[88]

'n Inventaris van die hoeveelheid lugbesoedeling, die fisiese en tydverspreiding daarvan en die omstandighede waaronder lugbesoedeling vermeerder, moet na aanleiding van monitering deur die verantwoordelike beamptes in bepaalde

82 Burmeister en Winter 93; Turiaux 76–98.

83 § 4 Abs 1 *Bundesimmissionsschutzgesetz* (BImSchG) van 1990-05-14 BGBl I 880 soos gewysig; vgl die tegniese instruksies van lugkwaliteit (*Technische Anleitung Luft*) van 1986-02-27 GMBl 95.

84 § 10 Abs 1 BImSchG en § 2 Abs 2 Satz 9 BImSchV.

85 § 10 Abs 2 BImSchG.

86 § 10 Abs 4 BImSchG.

87 § 10 Abs 3 BImSchG.

88 Burmeister en Winter 94–95.

toegewysde gebiede opgestel word.[89] Lugkwaliteitsplanne (*Luftreinhaltepläne*) word ook opgestel. Die doel van die verskillende planne is om onder meer optrede te bepaal wanneer lugkwaliteit die gevaargrense oorskry, om oor die langtermyn behoorlike lugkwaliteit te bereik en te onderhou[90] en gereedheidsplanne van kleiner omvang vir 'n bepaalde gebied of aard op te stel.[91] Daar is geen aktiewe of passiewe openbaarmakingsplig wat in dié verband opgelê word nie.

Praktiese probleme kan insae bemoeilik. Die amptenare is nie altyd behulpsaam nie en in die landelike gebiede word die aansoekers soms vertel dat insae nie daar moontlik is nie. Waar insae wel toegelaat word, word daar nie 'n kantoor of ruimte vir die insae beskikbaar gestel nie. Waar die betrokke amptenaar se tafel benut word, gaan die gewone kantooraktiwiteite voort en dit bemoeilik konsentrasie. Kopieerfasiliteite word nie altyd beskikbaar gestel nie en aantekeninge moet per hand afgeneem word. Insae kan ook net tydens normale kantoorure verkry word en 'n belanghebbende word soms gedwing om verlof te neem om insae te bekom.[92] In bepaalde gevalle word die bylae nie beskikbaar gestel nie omdat 'n aansoek om geheimhouding geslaag het. Meestal (veral in die chemiese industrie) aanvaar en bevestig die amptenare bloot die aansoeker se versoek om geheimhouding, terwyl daar geen rede is om die inligting geheim te hou nie. Selfs inligting wat reeds byvoorbeeld op 'n ander wyse bekendgemaak is (in literatuur, patentaansoeke ens), word geweier. Die feit dat nie al die inligting bekendgemaak word nie verswaar die posisie van die persoon wat beswaar wil aanteken.[93]

In bepaalde gevalle is daar 'n aktiewe plig op die amptenare om inligting vry te stel[94] en 'n openbare register aan te hou. In laasgenoemde geval is daar egter geen verpligting tot openbaarmaking nie.[95]

Die verkryging van lisensies kragtens die BImSchg[96] het sedert die tagtigerjare 'n nuwe rigting ingeslaan. 'n Onderskeid moet gemaak word tussen industrieë wat prosesse gewysig het[97] en ander wat met nuwe prosesse begin het.[98] In eersgenoemde geval kan daar van die openbaringsplig afstand gedoen word en word daar gewoonlik in die literatuur nie veel aandag aan hierdie proses gegee nie alhoewel dit tog 'n uitwerking op die omgewing kan hê. Volgens 'n empiriese ondersoek in Noordryn-Wesfalen (1980–1984) het dit geblyk dat slegs 20

89 §§ 44 en 46 BImSchG.
90 § 47 BImSchG.
91 § 40 BImSchG.
92 Burmeister en Winter 95.
93 *Idem* 95–96; Führ 132.
94 § 10 Abs 4 – in die plaaslike pers.
95 Burmeister en Winter 96.
96 § 4.
97 § 15. Bv in die geval van wysigings aan die ligging, aard of inwerkingstelling van installasies. Vir 'n praktiese illustrasie van die toepassing van § 15, vgl Führ "Umweltinformationen im Genehmigungsverfahren: eine Fallestudie" in Winter (red) *Öffentlichkeit von Umweltinformationen* (1990) 129–158. Die projekbestuurder is verplig om aan die einde van twee jaar kennis te gee van enige wysigings wat aangebring is sedert die aanleg in bedryf gestel is – § 16. Die bedryf moet 'n register aanhou waarin die uitlate vir ten minste vyf jare aangeteken word; dié inligting moet op aanvraag aan die owerhede geopenbaar word – § 31.
98 § 5.

persent nuwe aansoeke ontvang is, terwyl alle ander aansoeke met veranderde prosesse te make gehad het. Negentig persent van wysigingsaansoeke is nie geopenbaar nie. Dit het uit steekproewe geblyk dat nie een van die wysigings wesenlike omgewingsbesoedelingsprobleme meegebring het nie. Twee-en-sewentig persent van alle lisensieaansoeke word nie geopenbaar nie.[99]

4 1 2 Waterbenutting

Daar bestaan feitlik geen regsvoorskrifte wat 'n aktiewe inligtingsplig ten aansien van wateraangeleenthede reël nie. In die geval van watergebruik kragtens die *Wasserhaushaltgesetz*[100] moet in bepaalde omstandighede 'n permit (*Erlaubnis* – herroepbaar)[101] of 'n konsessie (*Bewilligung* – onherroepbaar)[102] bekom word. Indien dit blyk dat die toestaan van 'n konsessie bepaalde negatiewe gevolge vir ander persone kan inhou en daardie persoon beswaar aanteken, kan die konsessie nie toegestaan word tensy die gevolge vermy word nie. 'n Persoon kan skadevergoeding verhaal indien die verlening van die konsessie in die algemene belang is.[103] Daar is geen plig op die owerhede om enigeen van die aansoek in kennis te stel nie.

Die houers van bepaalde regte, permitte en konsessies kan verplig word om dit binne drie jaar na openbare kennisgewing in die waterregister[104] te registreer. Regte wat nie geregistreer is nie, verval tien jaar na kennisgewing. Regte wat in die aktesregister aangeteken is, word nie hierdeur geraak nie.[105]

Die registers bevat verwysings na die verskillende permitte, konsessies, ou waterregte en waterbeskermingsgebiede.[106] Die registers het ten doel om waterbeamptes en geïnteresseerde partye 'n oorsig te bied van die verskillende regsverhoudinge en die gemagtigde gebruikers van die water. Die registers bevat nie inligting oor uitlate soos die Britse registers nie.[107] Inligting oor uitlate moet bekom word deur gebruikmaking van § 29 VwVfg of die *Umweltinformationsgesetz*.[108]

Die verwerking van afvalwater moet sodanig geskied dat dit nie die algemene belang skaad nie. Die verskillende *Länder* moet openbare instansies aanwys wat vir die verwerking van afvalwater verantwoordelik is. Planne vir die wegdoen/verwerking van afvalwater moet na aanleiding van streeksbelange opgetrek word. Die planne moet die ligging, fasiliteite, gebied wat dit bedien, basiese reëls vir die behandeling van die water en die verantwoordelike owerhede uiteensit.[109]

---

99 Burmeister en Winter 94.
100 (WHG) van 1986-09-23 BGBl I 1529 soos gewysig 1992-08-26 BGBl I 1564.
101 § 7 WHG. Indien 'n omgewingsinvloedverslag vereis word, sal 'n permit slegs uitgereik word indien aan die voorgeskrewe vereistes voldoen is.
102 § 8 WHG. Sien ook § 9 oor omgewingsinvloedverslae.
103 § 8 Abs 3. Indien beswaar aangeteken is en dit nie moontlik is om vas te stel wat die aard en omvang van die nadelige gevolge sal wees nie, kan die besluit om bepaalde voorwaardes op die gebruik van die water te lê, uitgestel word. Sodanige besware en aansoeke om vergoeding kan tot drie jaar na aanvang van die projek ingedien word – § 10.
104 § 37.
105 § 16.
106 § 37 Abs 1 en 2 gelees met §§ 7, 8 en 16 WHG.
107 Vgl Winter *German environmental law* (1994) 35–36.
108 Vgl 1 en 3.
109 § 18a.

'n Lisensie word vereis in die geval van die bou en inbedryfstelling van die vervoer van gevaarhoudende stowwe tensy die vervoer daarvan op die perseel van die nywerheid plaasvind of vir stoordoeleindes gebruik word.[110]

Gebruikers wat meer as 750 kubieke meter afvalwater per dag stort, moet waterbesoedelingsbeamptes aanstel[111] wat onder meer die taak het om toe te sien dat alle voorskrifte en voorwaardes nagekom word. Hulle moet die werknemers inlig van enige waterbesoedeling wat veroorsaak word asook wyses om dit te voorkom. 'n Jaarlikse verslag moet oor die gebruik van die water voorgelê word.[112] Die beampte kan te eniger tyd verslae aan die betrokke staatsdepartement deurgee indien na sy of haar mening 'n besluit geverg word.[113]

Die *Länder* moet waterbestuurskemas (*Bewirtschaftspläne*) opstel wat verband hou met die bewaring van die water as deel van die ekosisteem, die redelike gebruik van grondwater en die vereistes wat vir die gebruik van water gestel word.[114] Die planne moet voortdurend by veranderde omstandighede aangepas word. Enige persoon wie se belange deur die besluitneming of optrede van die amptenare aangetas word, kan steeds van § 73 VwVfg[115] gebruik maak. Daar moet voldoende inligting verskaf word sodat 'n persoon vir sy of haar saak kan voorberei. Die *Landesgesetze* maak wel voorsiening vir insae in waterbestuurskemadokumente. Dié insae berus egter op die diskresie van die beamptes.[116]

Kragtens die *Abwasserabgabêngesetz*[117] moet die hoeveelheid afvalwater deur die staat of aangewese instansies gemonitor word. Waar afvalwater gestort word, word bepaalde bedrae gespesifiseer wat deur die industrieë betaal moet word. Die hoeveelhede en bedrae word by openbare kennisgewing gepubliseer.[118] Daar moet kennis aan die owerhede gegee word indien die afvalwater die hoeveelhede oorskry of minder is as wat toegelaat is.[119] Die *Länder* kan besluit onder welke omstandighede vrystelling van die kostes verleen kan word.[120] Die wet bevat geen aktiewe inligtingsplig nie.

Die *Abfallgesetz*[121] reël alle aangeleenthede rakende afval. Die algemene uitgangspunt van die wet is dat die afvalareas so hanteer moet word dat die menslike gesondheid of welstand nie geraak word nie, die diere, plant- en vislewe beskerm word, watersamestelling en grond nie besoedel word nie, lug- en geraasbesoedeling uitgeskakel word, die belange van die natuurbewaring, landskapbestuur en stadsbeplanning voldoende in ag geneem word en die openbare veiligheid en orde nie daardeur geraak word nie.[122] Afval kan slegs in gelisensieerde

110 § 19a. Die lisensie kan onderworpe aan bepaalde voorwaardes uitgereik word – § 19b.
111 § 21a.
112 § 21b.
113 § 21e.
114 § 36b.
115 Vgl 1.
116 Burmeister en Winter 97.
117 1990-11-06 BGBl I 2432.
118 § 4. Indien daar afvalstowwe in die water voorkom wat nie in die kennisgewing vermeld is nie, moet die gebruiker die owerhede in kennis stel van die hoeveelheid en tydperk van storting – die owerheid kan dan bepaalde riglyne neerlê – § 6.
119 § 4 Abs 5.
120 § 10.
121 1986-08-27 soos gewysig 1994-04-22 BGBl I 446. Vgl ook Winter (1994) 10–11.
122 § 2.

gebiede[123] gestort word en die hersiklering en behandeling daarvan word toegelaat op die perseel indien die lisensie daarvoor voorsiening maak.[124] 'n Lisensie kan slegs uitgereik word as openbare kennisgewing kragtens die BImSchG gegee is.[125]

Die bevoegde owerheid is verplig om op navraag inligting oor afvalplekke aan die persone verantwoordelik daarvoor te verskaf.[126] Net soos in die geval van die waterwetgewing word die *Länder* die verpligting opgelê om behoorlike afvalbestuurplanne op te trek.[127] Die sluiting van 'n afvalterrein moet aangemeld word en daar kan van die betrokke instansie verwag word om die gebied te rehabiliteer.[128]

Bestuurders van afvalterreine word verplig om registers van die hoeveelheid en bestuur van afval te hou. Hierdie registers moet op aanvraag aan die bevoegde owerheid openbaar word. Daar kan voorgeskryf word hoe lank hierdie registers in stand gehou moet word.[129] Die bestuurders van afvalterreine moet een of meer afvalbestuurders aanstel wat onder meer moet toesien dat alle wetgewing nagekom en dat die werknemers voldoende ingelig word oor die nadelige uitwerking van die afval asook wyses om verdere besoedeling te voorkom.[130]

4 1 3 Voorkoming van ongelukke

Voor die Seveso-Riglyn[131] uitgevaardig is, is daar reeds soortgelyke wetgewing in Duitsland op die wetboek geplaas, naamlik die *Störfallverordnung*[132] van 1980. Die wet het betrekking op aanlegte waarop die BImSchG van toepassing is. 'n Projekbestuurder moet 'n veiligheidsplan optrek waarin alle persone verantwoordelik vir die voorkoming van ongelukke en die minimalisering van risiko's indien 'n ongeluk sou plaasvind, gespesifiseer word.[133] Die projekbestuurder moet verder planne vir optrede in die geval van ongelukke optrek. Die planne moet voortdurend in oorleg met alle betrokkenes op datum gebring word.[134] Sodra 'n ongeluk plaasvind, moet die relevante owerhede in kennis gestel word en alle stappe om die risiko's te minimaliseer, gedoen word.[135] Die publiek moet ingelig word oor die moontlike gevare van 'n ongeluk en wat hulle moet doen indien dit plaasvind.[136] 'n "Gevaarlike voorval-beampte" kan aangestel word volgens § 58b van die BImSchG. Hy of sy kan onder meer verbeterings eis,

123 § 7. Besware teen die lisensiëring van sodanige afvalbestuurterrein kan skriftelik geopper word – § 8b.
124 § 4.
125 § 8b. Soortgelyke bepalings bestaan tav die versameling en vervoer van afval (§ 12) en die vervoer daarvan oor grense heen (§ 13) asook in die geval van landbouafval (openbaarmaking by wyse van regulasie – § 15).
126 § 4a.
127 § 6.
128 § 10.
129 § 11.
130 § 11b.
131 82/501/EEC OJL 230 5.8.8.2 p 1 en 88/610/EEC OJL 336 7.12.88 p 14; uitgevaardig na 'n ongeluk in Bhopal (Indië).
132 Jongste weergawe is dié van 1991-09-20 BGBl I 1891.
133 §§ 3 en 7.
134 § 5 Abs 1 Satz 3.
135 § 11.
136 § 11a.

insidente aanmeld, die nakoming van regsvoorskrifte monitor en tekortkominge in enige van die planne rapporteer.[137] Die amptenaar moet die projekbestuurder jaarliks van 'n verslag voorsien. Alle notas en opmerkings moet aangeteken en vir vyf jaar bewaar word.[138]

Twee komitees is aangestel, naamlik die *Technischer Ausschuss für Anlagensicherung*[139] en die *Störfallkommission*.[140] Eersgenoemde kommissie moet die verantwoordelike minister adviseer oor tegniese aspekte (bv die bes beskikbare veiligheidstegnologie) rakende die voorkoming van ongelukke en die minimalisering van die gevolge daarvan sou dit plaasvind. Die komitee word uit verskillende belangegroepe saamgestel.[141] Laasgenoemde kommissie is ingestel om die federale regering oor spesifieke aangeleenthede aangaande die veiligheid van aanlegte te adviseer. Die kommissie is saamgestel uit verteenwoordigers van die regering, wetenskapgemeenskap, omgewingsgroepe, vakbonde en verteenwoordigers van die aanlegte self.[142] Die kommissie moet verteenwoordigend van verskillende belangegroepe wees.[143]

4 1 4 Omgewingsinvloedstudies

Die *Gesetz über die Umweltverträglichkeitsprüfung*[144] het te make met die opstel van omgewingsinvloedstudies.[145] Daar word spesifiek vermeld dat 'n omgewingsinvloedstudie opgestel moet word met die deelname van die publiek.[146]

'n Aansoeker moet die betrokke owerhede nader voordat formeel om 'n lisensie aansoek gedoen word.[147] Die owerhede bespreek met die aansoeker, ander betrokke departemente, deskundiges en derdes (bv omgewingsgroepe)[148] die soort, omvang en metodes wat vir die omgewingsinvloedstudie verlang word

137 Daar moet iemand in die aanleg geïdentifiseer word om inligting in dié verband te ontvang – § 51b.

138 Vgl ook Winter (1994) 8–10.

139 Tegniese komitee vir die veiligheid van die aanleg – § 31a BImSchG.

140 Ongelukkekommissie – § 51a.

141 Vanweë 'n tegniese interpretasie van die verdeling van bevoegdhede tussen die Bond en die *Länder* mag hierdie komitee slegs regsaspekte aanspreek – die toepassing en uitvoering daarvan moet in die *Länder* gedoen word – vgl Winter (1994) 9.

142 § 51a.

143 Winter (1994) 9–10.

144 (UVPG) van 1990-02-12 BGBl I 205. Die administratiewe regulasies/riglyne uitgereik kragtens § 20 word na verwys as UVPVwV (*Allgemeine Verwaltungsvorschrift zur Ausführung des Gesetzes über die Umweltverträglichkeitsprüfung* – Riglyn vir implementering van UVPG).

145 'n Omgewingsinvloedstudie is die identifisering, beskrywing en bepaling van 'n projek se uitwerking op mense, diere en plante, grond, water, lug, klimaat en landskap, insluitend enige interaksies, kulturele goedere en ander materiële bates – § 2 Abs 1 UVPG.

146 § 2 Abs 1.

147 Waar daar meer as een owerheid of instansie betrokke is, moet vooraf uitgeklaar word watter departement of instansie die verantwoordelikheid vir die omgewingsinvloed prosedure gaan neem – die departement het koördineringsbevoegdhede maar die besluitneming hang van al die instansies gesamentlik af. Die "scoping"-proses en die maak van die opsomming kan deur die koördinerende instansie afgehandel word. Vgl §§ 2, 14, 5 en 11. In die bylae tot § 3 word die gevalle uiteengesit waarvoor 'n omgewingsinvloedstudie vereis word.

148 Openbare deelname word in § 9 gereël. Die publiek moet vooraf kennis kry van die prosedures en ook waar die inligting ter insae lê. Hulle moet geleentheid gegun word om kommentaar te lewer en moet ook van die finale besluit in kennis gestel word.

("scoping"). Die betrokke owerheid moet die aansoeker skriftelik in kennis stel van die voorgestelde raamwerk en omvang van die omgewingsinvloedstudie.[149]

Sodra die lisensie-aansoek voltooi is, word dit tesame met die omgewingsinvloeddokumente[150] aan die publiek ter insae blootgelê. Aanvanklik het die howe die blootlegging van die omgewingsinvloedstudie en openbare deelname beskou as 'n openbare/algemene eerder as individuele deelname. In die *Mülheim-Karlich* gewysde[151] het die hof beslis dat die reg op deelname ook individuele belange insluit – die hof het die reg op deelname afgelei van die individu se basiese regte op gesondheid en privaat eiendom, die reg om aangehoor te word en die reg op 'n billike verhoor. Daar word egter deur § 10 bepaal dat die reëls van geheimhouding en databeskerming nie deur die wet geraak word nie.

'n Administratiewe verhoor kan belê en die beswaardes en ander partye aangehoor word.[152] Na aanhoor van die getuienis moet die verantwoordelike departement 'n objektiewe opsomming maak van die verskillende omgewingsinvloede (soos blyk uit die omgewingsinvloedverslag, die kommentaar van die publiek en ander departemente).[153] Die opsomming dien onder meer as basis vir die evaluasie van die verslag.[154]

Die evaluasie van die omgewingsinvloede word gedefinieer as die interpretasie en toepassing van omgewingsverwante kriteria wat in wetgewing voorgeskryf word.[155] Waar die kriteria in standaarde vertaal is (bv uitlaatstandaarde), kan dit ook aangewend word. Die resultaat van die evaluasie word aangewend om te bepaal of 'n lisensie ooreenkomstig die verskillende wetgewing wat daarop van toepassing is, uitgereik kan word. Waar die wetgewing 'n afweging van belange voorsien (bv ekonomies in die geval van die oorweging van planne) kan dit daartoe lei dat 'n negatiewe invloed oor die hoof gesien word. Waar daar nie vir sodanige afweging voorsiening gemaak word nie, sal die bestaan van negatiewe invloede waarskynlik tot die weiering van die lisensie lei. Die uitslag van die oorwegingsproses met redes moet aan die betrokke projekbestuur en ondersteuners, die geaffekteerde publiek en alle ander beswaarmakers geopenbaar word.[156]

4 1 5 Beskerming van die natuurlike omgewing

Die *Bundesnaturgesetze*[157] en die *Landesnaturgesetze* reël die beskerming van die natuurlike plant- en dierelewe asook die variëteit, individualiteit en die skoonheid van die natuur en landskap.[158] Verskillende middele word aangewend om dié doel te bereik, naamlik landskapbeplanning, die aanwys van "aangewese"

149 § 5 UVPG.
150 Soos voorgeskryf in § 6.
151 BVerfGE 53.
152 § 9 UVPG en § 73 VwVfG.
153 § 11 UVPG.
154 § 12. Die data moet dus die stand van die omgewing voor die projek 'n aanvang neem, die veranderinge in die omgewing nav die normale voortgang van die projek asook alle moontlike alternatiewe wat oorweeg is en die uitwerking daarvan insluit – vgl Winter (1994) 15.
155 § 12 UPVG.
156 Vgl Winter (1994) 15–16.
157 BNatSchG van 1987-03-12 BGBl I 889 soos gewysig.
158 § 1 BNatSchG; § 2 gee algemene (beleids)beginsels weer wat in die bewaring van die natuur en omgewing gevolg moet word.

gebiede, die beskerming van spesies en waardevolle biotopes. Daar word ook vir skadevergoedingsreëlings voorsiening gemaak waar daar inbreuk op die natuur en die landskap gemaak word.[159]

Landskapbeplanning word verdeel in landskapprogramme, landskapraamwerkplanne (vir 'n hele *Land* of gedeeltes daarvan)[160] en landskapplanne.[161]

Die BNatSchG maak in § 23 voorsiening vir 'n reg op inligting en 'n reg op toegang tot inligting in die geval van die staatsowerhede. Die bevoegde owerheidsinstansies[162] kan individue, regspersone en ander instansies nader om inligting vir die afdwing van EG-regulasies en enige bepalings van hierdie wet te bekom. Aangewese beamptes verkry gedurende kantoorure 'n reg op toegang tot persele, geboue en voertuie om inligting in te samel of inspeksies uit te voer. Persone wat verplig is om inligting te verskaf, moet die teenwoordigheid van hierdie beamptes duld. Persone wat die inligting moet verskaf, kan weier om inkriminerende vrae te beantwoord. Deelname van erkende groepe of instansies[163] waarvoor daar nie in ander wetgewing of in gelyke mate voorsiening gemaak word nie word in § 29 gereël. Die groepe kan hulle standpunt oor voorgestelde projekte lug en insae verkry in deskundige verslae gedurende die voorbereiding van regulasies, wetgewing en ander maatreëls, asook gedurende die voorbereiding van landskapsprogramme en planne. Insae kan ook verkry word voordat enige verbiedinge opgehef of daar van voorwaardes in natuurreserwes en parke afgesien word asook tydens die goedkeuringsproses van planne wat die natuur en omgewing kan skaad.

4 1 6 Beplanningprosedures en konstruksie van paaie

Planne moet ingedien word alvorens paaie gebou kan word en magtiging moet daarvoor verleen word in die vorm van 'n *Planfeststellung*.[164] Algemene beplanningsprosedures moet nagekom word.[165] Die plan moet vir een maand ter insae lê.[166] By die bepaling of sodanige magtiging verleen kan word, moet alle belange oorweeg word. 'n Administratiewe verhoor word gehou waar die partye

159 Winter (1994) 17. Cosack en Tomerius 1993 *Neue Zeitschrift für Verwaltungsrecht* 841–846 bepleit dat daar ook groter openheid ten aansien van grondbesoedeling ingevoer word.

160 Dit bevat die fisiese beplanning van die vereistes en maatreëls vir natuurbeskerming terwyl landskapplanne die plaaslike toepassing daarvan is. Spesieke gebiede kan soos in Suid-Afrika vir natuurbewaring (natuurbeskermingsgebiede, nasionale parke, landskapbeskermde gebiede) aangewys word – vgl Winter (1994) 18.

161 §§ 5 en 6.

162 § 21c.

163 Erken kragtens § 29 Abs 2. Die hoofdoel van die groep moet natuurbewaring wees, dit moet nie-winsgewend wees en moet nie 'n beperkte lewensduur hê nie. Die groep se aktiwiteit moet ten minste die grondgebied van een van die *Länder* beslaan en daar moet voldoende bewys wees dat die groep in staat is om hulle doelwitte na te streef, gebaseer op die voorafgaande geskiedenis en omvang van die groep se aktiwiteite. Die erkenning word deur 'n bevoegde owerheid in 'n *Land* verleen. Die erkenning kan te eniger tyd teruggetrek word as daar nie meer aan een van dic vereistes voldoen word nie.

164 § 17 Abs 1 Satz 1 *Bundesfernstrassengesetz* (FStrG) van 1990-08-08 BGBl I 1714. Vgl ook die *Raumordnungsgesetz* van 1993-04-28 BGBl I 630.

165 Winter (1994) 20–22.

166 § 73 Abs 3 Satz 1 VwVfg.

ten gunste of teen die voorgestelde projek aangehoor word.[167] 'n Omgewingsinvloedstudie word vereis.[168]

4 1 7 Inligting vir skadevergoedingseise by omgewingskade

Die *Gesetz über die Umwelthaftung*[169] maak daarvoor voorsiening dat waar 'n persoon gedood of beseer word of sy of haar eiendom beskadig word deur die negatiewe invloed van 'n installasie[170] op die omgewing, sodanige persoon op skadevergoeding geregtig is.[171] Die benadeelde persoon kan inligting bekom van die eienaar van die installasie. Die inligting is beperk tot daardie inligting wat nodig is om die omvang van die eis vas te stel en moet betrekking hê op die aanleg, die toerusting wat gebruik is sowel as die konsentrasie materiale wat deur die aanleg gebruik of uitgelaat word. Inligting oor spesifieke optredes[172] kan verkry word van die bevoegde owerhede wat verantwoordelik is om na die omgewing om te sien. Die inligting hoef nie voorsien te word indien dit die amptenare in die uitoefening van hulle pligte sal hinder of as die openbaring van die inligting teen die openbare belang sal wees of die belange van derdes daardeur geskaad sal word nie.[173]

4 1 8 Aanmelding en toelaatbaarheid van produkte

Alle gevaarlike stowwe met verwysing na die inhoud, die kentekens en verpakking daarvan[174] wat vir die eerste keer in die handelsverkeer vrygestel word, moet kragtens die *Chemiekaliengesetz* aangemeld word (dit sluit nie stowwe in wat reeds in die handel beskikbaar is nie).[175] Die aanmelding word nie geopenbaar nie en daar is geen voorskrifte dat derdes aangehoor kan word nie. Insae in dié dokumentasie sal waarskynlik nie kragtens § 29 VwVfg moontlik wees nie,[176] maar wel volgens die *Umweltinformationsgesetz*. Dieselfde problematiek bestaan in die geval van die aangee van die inhoud van middels wat plantplae beheer (*Pflanzenschutzgesetz*).[177]

4 2 Passiewe inligtingsplig

Daar bestaan buiten die *Umweltinformationsgesetz* verskeie gevalle waar die amptenare wel 'n passiewe inligtingsplig opgelê word.

4 2 1 Dokumentinsae

§ 29 *Verwaltungsverfahrensgesetz*[178] bevat 'n reg op toegang tot dokumente in besit van die staat. Dit is egter nie 'n algemene toegangsreg nie. Die individu wat

167 § 72–78 VwVfg. Die vergunning vervang alle permitte en lisensies wat kragtens ander wetgewing vereis word – vgl Winter (1994) 22; Burmeister en Winter 99.
168 Vgl § 2 UVPG en 41.4; Winter (1994) 24–25.
169 Van 1990-12-10 BGBl I 2634.
170 Vgl Aanhangsel van die wet; sluit nie-operasionele of onvoltooide installasies in.
171 § 1.
172 § 8.
173 § 9. 'n Soortgelyke reg kom aan die eienaar van die aanleg teenoor die owerhede en die benadeelde toe – § 10.
174 §§ 6 en 7.
175 §§ 4 en 16c.
176 Burmeister en Winter 97–98.
177 Vgl *idem* 98.
178 BGBl I S 1253.

in 'n administratiewe geding betrokke is, kan insae in die dokument verkry om pleitstukke op te stel of hom of haar vir die verdediging voor te berei as dit "von rechtlichen Interessen erforderlich ist".[179] Die staat is nie verplig om enige kopieë te verskaf nie.[180]

Die belang van die individu by die openbaarmaking van die inligting moet afgeweeg word teenoor die geheimhoudingsaanspraak van die staat.[181] Dokumentasie wat deel van die besluitnemingsproses uitmaak, hoef nie beskikbaar gestel te word nie. Aanbevelings en opinies (*Gutachten*) behoort egter deurgegee word. Die geheimhouding of openbaarmaking berus op die diskresie van die amptenare.[182] Kwelsugtige of duidelik belastende navrae hoef nie beantwoord te word nie. Hierdie uitsondering moet eng uitgelê word.[183] Indien daar in ander wetgewing vir geheimhouding ter beskerming van die belange van derdes voorsiening gemaak word, het die amptenare geen diskresie nie en mag die inligting nie vrygestel word nie.[184]

4 2 2 Registrasieplig

Soos reeds vermeld, bestaan daar bepaalde gevalle waar die projekbestuurders of staatsamptenare verplig is om registers te hou byvoorbeeld in die geval van[185] waterwetgewing,[186] uitlaatgasse en lugreinigingsplanne, handelsregisters en ondernemingsopenbaarheid, asook insae in die *Grundbuch* (aktesregister) indien 'n persoon 'n geregverdigde belang daarin toon.[187] Die vakbondregister en *Güterrechtsregister* is vir enigeen beskikbaar terwyl die *Personenbestandregister* slegs beskikbaar is vir diegene wat 'n geregverdige belang daarin toon.[188]

5 OMGEWINGSOUDITREËLINGS

Deur middel van selfregulering lê ondernemings hulself die plig op om inligting te versamel en deur te gee. Die idee van selfregulering berus in die Duitse reg op die omgewingsregtelike samewerkingsbeginsel en die omgewingspraktyk as sodanig.[189] Sedert die tagtigerjare het dit praktyk geword in besighede om inligting oor hulle omgewingservaring en praktyk mee te deel. As gevolg van

---

179 Wollenteit *Informationsrechte des Forschers im Spannungsfeld von Transparenzforderungen und Datenschutz* (1993) 26–31; Taeger 1993 *Jur-PC* 1901–1903.

180 Burmeister en Winter 107.

181 § 30 VwVfg; vgl ook Burmeister en Winter 100–107.

182 Vgl ook §§ 10 en 7 BImSchG; 4.1.1. Von Schwanenflügel "Das Öffentlichkeitsprinzip des EG-Umweltrechts" 1991 *Deutsches Verwaltungsblatt* 101 is van mening dat die beamptes § 99 VwVGO kan misbruik ten einde goeie redes te vind waarom die inligting nie geopenbaar kan word nie en dat sodanige interpretasie so ver moontlik vermy moet word wanneer daar met omgewingsinligting gewerk word.

183 § 29 Abs 2 Satz 1 VwVfG; vgl ook Burmeister en Winter 109.

184 § 29 Abs 2 Satz 3 VwVfG. Voorbeelde van sodanige wetgewing is § 10 GG (posgeheime), § 300 StGB (swygplig van staatsdokters); § 20 BStatG (statistiekgeheime); § 2 Abs 1 BDSG (persoonlike inligting), beroeps- en handelsgeheime (a 14 GG en verskeie ander wette); vgl Burmeister en Winter 109–120.

185 Vgl Burmeister en Winter 122–124.

186 Vgl 4.12 – register tav alle regte, waterbeskermingsgebiede ens.

187 § 12 *Grundbuchordnung* (BGO).

188 §§ 79 en 1563 BGB; §61 *Personenstandsgesetz*.

189 Vgl Kloepfer "Umweltinformationen durch Unternehmen" 1993 *Natur und Recht* 15(7):353–358.

druk van buite (vanaf oa staatsweë, die EG, omgewingsgroepe, versekeraars en finansiers) is daar besef dat bestuurstrategieë aangepas moet word ten einde mededinging te verbeter.[190] Die nuwe omstandighede het industrieë genoop om lewensiklusoudits en bestuursomgewingsoudits te doen ten einde 'n balans te vind tussen ekobalansering van koste en die voordeel van omgewingsbewaring. In die proses word heelwat inligting versamel en geberg.

Aan die ander kant word ondernemings soos hierbo uiteengesit,[191] verplig om inligting aan verskillende staatsinstansies te verskaf. Die vrywillige omgewingsouditreëling van die EG kan die proses aanhelp maar het volgens Kloepfer[192] beperkte moontlikhede omdat daar nie van staatsweë hulp in die verband aan kleiner en middelgrootte ondernemings verskaf word nie.

In 1995 het die *Umweltauditsgesetz*[193] wat na aanleiding van die EG-riglyn[194] opgestel is, in werking getree.[195] 'n Ouditeur moet erkenning geniet, onafhanklik en objektief wees en oor die nodige vakkundige kennis beskik.[196] Die keuse van 'n ouditeur word aan die onderneming oorgelaat.

Registrasiekantore is kragtens § 32 ingestel. Dié kantore van die *Umweltauditgesetz* moet onafhanklik en neutraal wees en moet ook die inligting aan die EG deurgee.[197] Lubbe-Wolff[198] is van mening dat enige reëlings wat voorsiening maak dat misbruik of nie-nakoming van reëls aan die betrokke owerhede deurgegee moet word, geen sin het nie. Wanneer 'n maatskappy nie 'n omgewingsoudit slaag nie, gaan dit nie die moeite en koste aangaan om te registreer nie; deelname is immers vrywillig.

Die mate van insae word deur die betrokke wetgewing self gereël alhoewel die *Umweltinformationsgesetz*[199] moontlik in die toekoms 'n beduidende verskil kan maak aan die openbaarmaking van omgewingsinligting.

6 SLOT

Verskeie wette in Duitsland vereis dat omgewingsinligting aan die staat beskikbaar gestel moet word. Voor inwerkingtreding van die *Umweltinformationsgesetz* kon hierdie inligting nie deur privaat persone of omgewingsgroepe bekom word tensy dit vir litigasiedoeleindes was nie. Sommige wette plaas 'n aktiewe plig op die staat om inligting vry te stel.

Sedert die inwerkingtreding van die *Umweltinformationsgesetz* moet die staat die inligting vrystel tensy dit onder een van die uitsonderingsgevalle waarna in die wet verwys word, val. Die verpligting word nie privaatinstansies opgelê nie.

---

190 Kloepfer 1993 *Natur und Recht* 15(7):354.
191 Vgl 4.11 en 4.12; Kloepfer 1993 *Natur und Recht* 15(7):355.
192 1993 *Natur und Recht* 15(7):355–357.
193 (UAG) van 1995-12-15 BGBl I S 1591 en die *UAG-Gebührenverordnung* (UAGGebV) van 1995-12-18 BGBl I S 2013.
194 Reg 1836/93 OJL 168 10.07.93 p1.
195 Vgl Lübbe-Wolff "Das Umweltauditgesetz" 1996 *Natur und Recht* 217–227.
196 §§ 4 en 5. Vgl Lübbe-Wolff 1996 *Natur und Recht* 221–222. 'n Ouditeur se vakkundige kennis en toelating moet elke drie jaar nagegaan word om te bepaal of die persoon nog ouditering kan doen; die kwaliteit van reeds afgehandelde ouditerings moet ook nagegaan word – § 15.
197 § 18.
198 225.
199 Vgl 3.

Die vernaamste kritiek teen die wet is dat staatsinstansies nie behoorlik gedefinieer is nie en dat die uitsonderingsgronde verwarrend geformuleer is.

Die toepassing van die uitsondering van handelsgeheime kan daartoe lei dat geen inligting beskikbaar gestel word nie. Dit wil voorkom asof hierdie uitsondering in die geval van veral die chemiese industrieë misbruik word. By omgewingsinvloedstudies moet die dokument ter insae lê. Indien 'n beroep op handelsgeheime aanvaar is, moet daar steeds voldoende inligting vrygestel word, sodat die graad van die omgewingsinvloed bepaal kan word.

Die uitsondering dat dokumente nog in voorbereidingsfase is, is 'n ander verskoning wat gebruik word om insae te weier. Die koste wat gehef word vir soektogte vir omgewingsinligting is buitensporig hoog en Duitsland is al deur die EG daaroor aangespreek.

Suid-Afrika is 'n land wat tot onlangs 'n uiters geslote staatsadministrasie gehad het. Die skep van 'n reg op inligting in die 1993- en 1996-Grondwet was 'n vreemde idee vir staatsamptenare. Alhoewel bepaalde wette vereis het dat inligting aan die staat beskikbaar gestel kan word, is hierdie inligting nooit algemeen bekend gemaak nie. Daar was geen aktiewe openbaarmakingplig op die staat nie. Klousule 9 van die *Open Democracy Bill* is al 'n stap in die regte rigting. Die algemene reg op inligting wat in die wetsontwerp vervat is, sal gebruik kan word om omgewingsinligting te bekom.

Ander lande in Europa het vryheid van inligtingswetgewing gehad, maar daar was tog 'n behoefte in die negentigerjare om ook vir 'n wet op omgewingsinligting voorsiening te maak. In die lig van die bespreking van die Duitse wetgewing word voorgestel dat die Suid-Afrikaanse wetgewer nie net op die *Open Democracy Bill* staatmaak nie, maar dat daar 'n wet op omgewingsinligting opgestel word. Die reg op inligting behoort nie net teen die staat nie, maar ook teen privaatinstansies afdwingbaar te wees. Die uitsonderingsgronde wat in sodanige wetgewing vervat word, moet duidelik geformuleer word. Maatskappye of die staat moet nie in staat wees om agter die uitsonderingsgronde te skuil nie. Die koste vir die verkryging van sodanige inligting behoort tot kopieerkoste beperk te word. Lokale moet beskikbaar gestel word waar die inligting rustig nagegaan kan word.

Vir baie jare is duisende mense in Suid-Afrika deur omgewingsbesoedeling benadeel. Diegene wat die ergste benadeel word, is gewoonlik die armste gedeeltes van die bevolking. Aangesien inligting in die verlede geheim gehou is, kon hierdie groeperinge of omgewingsaktiviste nie optree nie. 'n Reg op omgewingsinligting en die verpligting tot deursigtigheid van omgewingspraktyke kan meebring dat die omgewing (insluitend die mense daarin) in Suid-Afrika beter beskerming verkry. Sodoende kan daar tegelykertyd aan artikel 24 van die 1996-Grondwet voldoen word.

Meaning and statutory interpretation

J de Ville
BCom LLD
Professor of Public and Adjective Law, University of the Western Cape

OPSOMMING

Betekenis en wetsuitleg

Die teorie van Botha en Du Plessis rakende betekenis en die norme van wetsuitleg word in hierdie artikel van nader beskou, veral wat betref hul opvattings oor die rol van taal in die interpretasieproses. Beide outeurs poog om betekenis te "stabiliseer": Botha met behulp van die doel van die wet en Du Plessis met behulp van die norme van wetsuitleg. Daar word aangetoon dat beide benaderings te kort skiet in hierdie opsig aangesien dit wat veronderstel is om stabiliteit te verskaf, self 'n teks is wat aan interpretasie onderworpe is. Daar word betoog dat die betekenis van tekste in beginsel onbegrens is en dat 'n benadering tot wetsuitleg wat erns maak hiermee, (positiewe) transformerende gevolge kan hê.

1 INTRODUCTION

I have chosen two textbooks as subjects for discussion in this article. The first is Botha's *Statutory interpretation: an introduction for students* 3 ed (1998). The aim of Botha's textbook is modest, namely to provide students with "a basic and 'student-friendly' introduction to the fundamental principles of statutory interpretation".[1] This, however, makes the book potentially very important. If it is to be read (and studied) by a thousand or more (Unisa and other) students, its contents must be able to stand up to intellectual scrutiny. My contention is that it fails to do so, in a number of respects. The second textbook is Du Plessis's *The interpretation of statutes* (1986).[2] This was the first attempt to challenge, in book form, the *locus classicus* in the field of statutory interpretation, Steyn's *Die uitleg van wette*.[3] In his book Du Plessis challenged the courts' so-called "literalist-cum-intentionalist" approach to interpretation and substituted for it his approach of "normative transposition". Many a student has been taught interpretation of statutes under the influence of Du Plessis's critical exposition of this field of law. A second edition of this book is at present in preparation. The aim of this article is to facilitate this process by providing a number of critical comments on certain aspects of Du Plessis's theory of interpretation.[4] I will focus

1 Preface, v.
2 All further references to Du Plessis in this article relate to this textbook, unless otherwise indicated.
3 The most recent (5th) edition of Steyn's book was published in 1981.
4 This article is partly a result of discussions by the author with Du Plessis and with the other members of the Research Unit for Legal and Constitutional Interpretation (RULCI).

primarily on the discussion in these textbooks of the generation of meaning and the way in which this affects the authors' methodology of interpretation.[5]

2 INTERPRETATION AND THE GENERATION OF MEANING

Botha

Language and Meaning

Botha[6] explains the function of the discipline of statutory interpretation as follows:

> "Interpretation of statutes, or perhaps more precisely, the juridical understanding of legal texts (legislation, in other words), deals with the body of rules and principles which are used to construct the correct meaning of legislative provisions to be applied in practical situations."

The use of "rules and principles" is said to be necessary for the following reason:

> "The written and spoken word are imperfect renderings of human thought, and in the case of legislation, contracts and wills the courts are obliged to use specific rules of interpretation to construe the meaning of the documents."[7]

Later, Botha writes, in similar vein:

> "It should be borne in mind that the text serves only as the *medium* through which meaning is communicated. Often inappropriate or incorrect words are used, indicating that words as 'units of meaning' will not always reflect the true intention."[8]

The author in these paragraphs expresses the view that human thought is something pure and perfect which precedes language. It is then, because of the deficiencies inherent in language, imperfectly expressed in written and spoken words. The aim of interpretation is to discover the correct meaning of the words used. There thus exists, for Botha, an original meaning which is lost in the linguistic act and which has to be recaptured through the aid of the rules of interpretation.

---

5 This is one of the reasons why Cockram *The interpretation of statutes* (1987), Devenish *Interpretation of statutes* (1992) ("Devenish"), Kellaway *Principles of legal interpretation of statutes, contracts and wills* (1995) and Van Heerden and Crosby *Interpretation of statutes* (1996) were not chosen. Their methodologies are not based on any (explicitly expounded) theory of meaning.

6 2.

7 The correspondence between this paragraph and Steyn's views (*Die uitleg van wette* (1981) 1) is obvious: "Die eerste vraag wat ontstaan, is: wat is wetsuitleg? of, met ander woorde: wat is die taak van die wetsuitlegger? Die antwoord hierop is nie ver te soek nie. Dit is om die wils- of gedagte-inhoud van die wetgewer vas te stel. Om dit te doen, is die uitlegger natuurlik in die eerste plek aangewese op die woorde wat die wetgewer gebruik het om daardie wils- of gedagte-inhoud te openbaar. Maar nou is woorde alte dikwels 'n onvolmaakte middel om aan die werklike wil of gedagte so 'n duidelike gestalte te gee dat dit in alle omstandighede waarop daardie wil of gedagte betrekking kan hê, alleen vir 'n enkele uitleg vatbaar sal wees."

8 30. See also Devenish 3 ("It is difficult to express ideas in words with complete accuracy; and the more complex the idea the greater the difficulty") and 4 ("Language is therefore inevitably an imperfect medium for expressing and conveying thought and intention, and it follows that it is frequently problematic to ascertain the meaning of the written word, and to decide on its application in various circumstances"). Devenish does not explain how his preferred methodology for interpretation (the teleological approach) relates to his theory of meaning. It is therefore not discussed in greater detail here. It does, however, show some correspondence to that of Botha, and the criticism of Botha's thesis could thus be said to apply to Devenish's as well.

Thought, however, does not precede language or take place in a language-free sphere, contrary to what Botha suggests. Language precedes thought and when we think, we think in and through language. We are born into a "language-world", constituted by language, and all our thoughts take place within the confines of this "world".[9] Eagleton[10] explains the implications this has for meaning as follows:

> "[M]eaning is not simply something 'expressed' or 'reflected' in language: it is actually *produced* by it. It is not as though we have meanings, or experiences, which we then proceed to cloak with words, we can only have the meanings and experiences in the first place because we have language to have them in."
>
> "It is not that I can have a pure, unblemished meaning, intention or experience which then gets distorted and refracted by the flawed medium of language: because language is the very air I breathe, I can never have a pure, unblemished meaning or experience at all."

As one's thoughts are already "blemished", they cannot have the precedence which is ascribed to them by Botha, that of something pure and perfect which must be rediscovered with the assistance of the rules and presumptions of interpretation. The correct, true, pure, proper meaning cannot, therefore, be tied to something permanent and original – the thoughts of the author as transcendental signified. Rather, the signifiers (the spoken or written words) are the origins of meaning, producing meaning through their interaction with other signifiers.[11] In other words, meaning is a function of language itself, not of some or other mental process of the author of the text.[12] As the signifiers are different in each new context in which they (for example the provisions of a statute) are used (applied, in the case of statutory provisions), their meaning is never something fixed or stable, but changes with the new context. The meaning of a statutory provision thus exists independently of what its author intended the words used "to do" or "to say".[13] This does not mean that what an author says he or she intended[14] or the drafting history of a statutory provision can have no bearing on

---

9 Some people may be born into, or grow up in, more than one language-world.

10 *Literary theory: an introduction* (1983) ("Eagleton") 60, 130.

11 As pointed out by Saussure (see Culler *Saussure* (1976) 23), meaning is a function of the linguistic system. The individual units of the system have an inherent meaning or a meaning, not by virtue of a speaker uttering a sentence, but by virtue of their relationship with one another. See De Ville "Eduard Fagan in context" 1997 *SAPL* 493 502–506.

12 Eaglcton 113.

13 See Dworkin *Life's dominion: an argument about abortion and euthanasia* (1993) 133–134 for this distinction; he chooses the latter conception of intention. Two examples from my own recent experience will illustrate the principle that words have meaning independent of the author's intention. On Friday 4 December 1998 I called a colleague of mine at the office to hear if he could have lunch with me. He often works from home and I wasn't very optimistic that he would be there on a Friday afternoon. Having reached his secretary, I asked her the following: "Is Nico at home?" Her response was: "Yes, just hold on, I'll put you through." At the risk of oversimplification, she (quite legitimately) construed the word "home" as meaning at the office, regardless of my intention. A second example comes from the home environment where my two-year-old daughter is learning language (and manners). Her words "I want water" were followed by (the expected command) "Say nicely". Her (quite legitimate) interpretation and response was to say "nicely".

14 Culler *On deconstruction: theory and criticism after structuralism* (1982) 128 explains intention as follows: "My intention is the sum of further explanations I might give when questioned on any point and is thus less an origin tha[n] a product, less a delimited content than an open set of discursive possibilities linked to the consequences of iterable acts

continued on next page

the meaning of the words used. These "intentions" (which remain interpretations) form part of the context of the utterance and are therefore in principle relevant to, but not determinative of, meaning.[15]

Context should, furthermore, not be seen as a new source of stability, since the context itself is boundless. It can, for example, never be determined fully in advance within which contexts a statutory provision will in future be applied, or which parts of the context (for example history, present circumstances, other parts of the statutory text, the Constitution), if brought to bear on the provision concerned, can destabilise the (expected) stable meaning in a given situation. Thus interpretation is not, and cannot be, concerned with recovering an original meaning, since there is and was no original meaning.[16] Meaning, instead, comes into being through an interaction between the text and the interpreter. Rosenau[17] puts the interaction that exists between reader and text appositely as follows: "The reader may construct the text, but the text in turn controls the encounter."

The purposive approach

Botha's account of how meaning is generated is central to his understanding and advocating of the purposive approach. He explains:[18]

> "Because the legislative function is a *purposive activity*, 'intention' must become part of the functional framework of the purpose of the legislation. This means that 'intention' must be determined objectively; the subjective criteria related to 'intention' of the legislature (the composite body) must be replaced by 'intention' (legislative purpose) in the objective sense, ie the purpose or object of legislation (in other words, what did the legislature 'intend' to achieve with the legislation?). In terms of the purpose-oriented approach, the purpose of the legislation is the prevailing factor in interpretation. The context of the legislation, as well as social and political policy decisions, are taken into account to establish the purpose of the

---

and to contexts that pose particular questions about those acts." Eagleton 114 similarly explains that when one asks a speaker/writer about her intentions ("What do you mean?"), it is actually an attempt to ask what effects she is trying to bring about by her language. It is, he says, "a way of understanding the situation itself, not an attempt to tune into ghostly impulses within my skull. Understanding my intention is grasping my speech and behaviour in relation to a significant context".

15 See De Ville "Legislative history and constitutional interpretation" 1999 *TSAR* 211.

16 Derrida *Writing and difference* (1978) 292 points out that "[t]here are two interpretations of interpretation, of structure, of sign, of play. The one seeks to decipher, dreams of deciphering, a truth or an origin which escapes play and the order of the sign, and which lives the necessity of interpretation as an exile. The other, which is no longer turned towards the origin, affirms play and tries to pass beyond man and humanism, the name of man being the name of that being who, throughout the history of metaphysics or of ontotheology – in other words, through his entire history – has dreamed of full presence, the reassuring foundation, the origin and the end of play". It is therefore the rabbi versus the poet (Caputo *Radical hermeneutics: repetition, deconstruction and the hermeneutic project* (1987) 116). We are not faced with a disjunctive choice between these two interpretations of interpretation. Interpretation is both serious and playful, attentive and creative. This seems to suggest a third interpretation of interpretation, namely as a struggle to overwhelm and to dislodge an already existing, dominant interpretation (Schrift *Nietzsche and the question of interpretation: between hermeneutics and deconstruction* (1990) ("Schrift") 171).

17 Rosenau *Post-modernism and the social sciences: insights, inroads, and intrusions* (1992) 25.

18 31–32.

> legislation. The court may modify or adapt the initial meaning of the text to harmonise it with the purpose of the legislation. The role of the courts is therefore far more flexible, and is not limited to mere textual analysis and mechanical application of the legislation. The contextualists hold the view that the judiciary has an *inherent lawmaking discretion* during statutory interpretation. However, this discretion is qualified by the logical prerequisite that modification of the meaning of the text is possible (and admissible) only if and when the scope and purpose of the legislation is absolutely clear, and also supports such a modification. Such a lawmaking function of the judiciary is not an infringement of the legislature's legislative function, but merely a logical extension of the powers of the court during the interpretation and application of the relevant legislation in each practical instance. Consequently, the application and utilisation of the presumptions and the various aids to interpretation are very important tools for the contextualists in the quest for the scope and purpose of the legislation concerned."

This move by Botha (replacing legislative intent with legislative purpose) follows from his analysis and criticism of the South African courts' approach to interpretation. The following critical points he makes in his analysis can be noted:

1 The context within which a provision appears (such as common-law presumptions, and internal and external aids) is ignored except if the wording is regarded as ambiguous. Botha regards this as an "absurd situation", for how can "the ignored context and presumptions suddenly regain importance and become 'necessary' as soon as the text seems ambiguous"? This concern with context is directly related to his theory of meaning-generation. As language is an imperfect vehicle for meaning, the presumptions and aids are needed in order to establish the correct meaning of the provision in question (which must correspond to the purpose of the provision).[19] If they are not used, the meaning established by the court cannot be correct.

2 The literal approach is inherently subjective. This is because "the court will deviate from the so-called 'plain meaning' of the text only if it is unclear or ambiguous, and the eventual application of the intra- and extra-textual aids to interpretation depends on how clear the text may seem to the particular interpreter. As a result, the 'intention of the legislature' is ultimately dependent on the court's decision on the clarity of the particular legislative text!"[20]

3 Interpretation is not a mechanical activity, as suggested by the courts' interpretive approach. Rather, according to Botha, the courts have a lawmaking function (within the confines of the purpose of the legislation).

Botha's main concerns in interpretation can thus be summarised as follows:

- establishing the correct meaning through the purposive approach;
- avoiding subjectivism; and
- giving recognition to the courts' lawmaking function.

The reason for elevating purpose to a privileged position seems to lie in Botha's apparent belief that, like the thoughts of an author, purpose is something external to language which exists in pure and perfect form. This pre-existing purpose is

---

19 30: "Unless the textual meaning is ambiguous or unclear, the interpreter will not have recourse to the wide range of aids to interpretation at his disposal. The data necessary to reach a just and meaningful conclusion, are excluded from the process, increasing the risk of incorrect concretisation."

20 30.

then achieved through the imperfect medium of language, in the form of a statutory provision. Such a statutory provision will often not give an exact reflection of the legislature's purpose (owing to the tainted nature of language). The task of the interpreter is then to find the single correct meaning of the text through discovering the purpose. But can purpose be accorded this privileged status? In order for "purpose" to exist, it has to be constructed in and through language and (according to Botha) by making use of the aids and presumptions of interpretation (which are themselves expressed in language and therefore also "imperfect" media).[21] Just as meaning does not pre-exist language, but is produced afterwards, purpose is derivative, not original or primary.[22]

Meaning therefore cannot be stabilised with reference either to "intention" or to "purpose". Both of these concepts are interpretive constructs, purpose no less so than intention. Purpose has to be constructed[23] from that which a court decides is relevant.[24] Although purpose can therefore play a role in determining the meaning of a statutory provision (but only after the purpose has itself been ascertained), it cannot serve as a fixed determinant of meaning, leading to a correct interpretation.[25] There is simply no single, correct meaning to any statutory provision.

Botha, furthermore, does not explain how or why specifically the Interpretation Act 1957,[26] presumptions and intra- and extra-textual aids[27] (and social and political policy directions[28]) manage (perfectly) to convey legislative purpose. If language is an imperfect form of expression, and the legislative text therefore cannot be taken as the final word on legislative purpose, then surely the abovementioned factors (which are also expressed in language) will be as flawed a "medium". This is not to say that "aids" such as the preamble and long title, and even the presumptions, cannot be of any assistance in constructing a legislative purpose. Indeed, they can. The importance of these factors in influencing meaning cannot, however, be ascribed to any natural ability they have to convey legislative purpose. They are relevant to constructing legislative meaning (and, at times, purpose) only because of the peculiar development of our legal tradition.[29]

---

21 According to Botha (18 and 77), all the intra-textual and extra-textual aids as well as the presumptions must assist in determining the purpose of the legislation.

22 Botha's theory also does not explain why the presumptions and aids of interpretation in particular are of assistance in ascertaining purpose. Does the legislature also intend this to happen?

23 Botha acknowledges this at 77. This is also the case where (as in s 1 of the Labour Relations Act 66 of 1995) purpose is expressly set out. The words used to express the purpose each require interpretation. Furthermore, the purpose of each provision would still have to be ascertained from the factors considered relevant.

24 See eg *S v Makwanyane* 1995 3 SA 391 (CC) para 9.

25 The purpose of the legislation appears, for Botha, to be nothing but a metaphor for the thoughts of the author.

26 Act 33 of 1957.

27 18.

28 31.

29 There may also be rational reasons for the existence of (at least some of) these rules (see Du Plessis 60), although this cannot mean that they are cast in stone. (Even if they were, they would still have to be interpreted.)

The criticism of subjectivism in, specifically, the literalist approach is unfounded. Botha's purposive approach is no more objective (or less subjective) than the literalist approach. Schrift[30] explains:

> "When Nietzsche writes, for example, that 'one may not ask: "who then interprets?"' . . ., it is because such a question already mislocates the interpretive process. Likewise, one may not ask 'what then is interpreted?' Interpretation is not grounded in either the subject or object; it exists in the *between*, in the space which separates them. And the attempt to focus the interpretive process in the direction of either the subject or the object will only serve to obscure the dynamics of this process."[31]

Furthermore, judges are part of a historical context and therefore perform their functions within the constraints of the legal tradition to which they belong. Understanding is, in other words, historically conditioned or prejudiced. According to Gadamer, one always comes to a text with certain preconceptions, and a fusion of horizons takes place between the horizon of the interpreter and that of the text.[32] This, however, does not mean that judges are simply products of the legal tradition to which they belong, and that they do not have the ability radically to transform the system of which they are a part.[33]

Botha's rejection of the idea of interpretation as a mechanical process remains incomplete. He leaves scope for a lawmaking function to the courts, but only within the constraints of the purpose of the legislation. In terms of his model, the interpreter is and should be bound by the purpose of the legislation. This is not substantially different from a positivistic approach which says that a judge has no choice but to apply the provisions of the statute as he or she finds it. Purpose cannot constrain a judge any more than the "language" of a statute can. Both the meaning of the statute and its purpose have to be constructed. As I have already indicated, this process is neither fully subjective nor fully objective.

Du Plessis

Du Plessis[34] attempts to depart from the courts' view regarding the generation of meaning in the following way:

> "The act or process of interpretation involves the transposition of external data into one's own subjective world of experience, where it interacts with one's own accumulated knowledge and experience, to produce the state or condition of understanding."

---

30 191.

31 See also Rosenau above.

32 Gadamer *Truth and method* (1997) 300ff. Understanding, for Gadamer, is historically conditioned or prejudiced. Every understanding is preceded by a preunderstanding. Understanding, in other words, takes place within and from the point of view of a meaning-horizon (in other words, the tradition within which an interpreter finds himself or herself). Every new understanding exceeds the preunderstanding and simultaneously adjusts it, so as to form a new preunderstanding. Understanding is therefore always different with each new interpretation. The concept of the hermeneutic circle has been criticised for being inhibiting, as it restricts in a seemingly "neutral" way the possibilities of meaning, whilst conveniently forgetting that this horizon of meaning is always exclusionary. The concept of a fusion of horizons, furthermore, does not adequately account for the fact that understanding also entails misunderstanding.

33 See further Cornell *Transformations: recollective imagination and sexual difference* (1993) 12–22.

34 48.

And:

> "The *meaning* of X . . . refers to X's capability of being transposed from the 'external world' into the interpreter's own 'internal world' (or consciousness) – ie X's transposability (Afrikaans: 'transponeerbaarheid'). This meaning is always subject to certain norms, ie it is consciously or unconsciously 'agreed' among the recipients of this external data that certain 'rules' will obtain and will in fact be obeyed in the process of transposition. Certain sets of symbols in a language or culture lead the process of transposition to a certain limited number of end results."

An important element that is missing from the above account of meaning-generation is an account of the central role which language plays. This aspect will be considered first in what follows, after which Du Plessis's account of interpretation will be discussed.

Language

The notion of transposition as described by Du Plessis excludes the need for language in the process of understanding as it implies that (nonlinguistic) things (like the sky, the moon, the sun, etc) can have meaning to human beings without having been expressed in language. However, as already explained above, no meaning is possible without language.[35] Furthermore, one's "accumulated knowledge and experience",[36] in order to be meaningful, have to be expressed in language. It would be impossible to have this knowledge and experience without language.[37] Understanding can therefore take place only through language, or rather a fusion of languages.[38] Understanding, one can say, is linguistic.[39]

Turning to statutory interpretation, Du Plessis describes language as one of the contextual or extra-textual factors which always helps to determine the meaning of a statute:[40]

> "An enactment is written in a certain *language*. This statement requires elaboration, as it may seem rather odd at first glance to refer to language as an *extra-textual* constituent of the meaning of a statute. The point, however, is that while an enactment is written in a certain language, the language can do no more than "surround" it. As a matter of fact, written language need not necessarily serve as the only method for conveying the meaning of an enactment, although in the case and for the purpose of statute law as we know it, language is a primarily important

35 This does not mean that only words have meaning. Road signs, sonic signs (such as an ambulance siren), hand gestures or directions (of a traffic officer) and light signs (for example traffic lights or a blue police light) also have meaning (see Van den Bergh "Wetsuitlegteorie. Kan daar tussen Scylla en Charybdis deurgevaar word?" 1983 *TRW* 59 76), but then only through language.

36 Du Plessis 48.

37 As Eagleton 60 says: "To claim that I am having a wholly private experience is meaningless: I would not be able to have an experience in the first place unless it took place in the terms of some language within which I could identify it." See also Palmer *Hermeneutics: interpretation theory in Schleiermacher, Dilthey, Heidegger, and Gadamer* (1969) 203: "The nature of experience is not a nonlinguistic datum for which one subsequently, through a reflective act, finds words; experience, thinking, and understanding are linguistic through and through, and in formulating an assertion one only uses the words already belonging to the situation. The devising of words to describe experience is no random act but a conforming to the demands of the experience."

38 See Palmer 208: "Because of our belongingness to language and because of the belongingness of the text to language, a common horizon becomes possible."

39 Palmer 228.

40 49.

> extra-textual constituent of the meaning of an enactment simply because it is *the medium or means through which the meaning contents of the enactment is communicated.* Language allows the interpreter 'to enter' the meaning structure of an enactment, and in addition it fulfils a guiding function throughout the process of interpretation. *But* language is the medium through which meaning is transmitted: not the meaning itself. The meaning of an enactment can never be identified solely with its language as such."[41]

Du Plessis undervalues the importance of language in that, in terms of his theory, it is seemingly only the enactment that is written in language. He does not acknowledge (explicitly) a role for language in his exposition of the role of the presumptions, aids or maxims of interpretation.[42] Furthermore, as appears from the above quotation, for Du Plessis (as for Botha) meaning is to be found outside of language.[43] Instead, as (post)structuralism has taught us, both signifier and signified (which is itself a signifier) are elements (or signs) in the language system. Meaning lies in the relationship between (all) the different signs in the same language system, not in reality.[44] There is thus no meaning outside of language. The meaning of a statutory provision will consequently be determined by the way in which other signs in the system are allowed to interplay with the signs to be found in the statutory provision itself.[45] Meaning is simply a function of the manipulation of context.[46] And context includes everything.

Du Plessis's inability to grasp the importance of language in understanding makes it extremely difficult for him to explain why context has to be taken into account when interpreting a statutory provision. The closest he comes to an explanation is to say:[47]

---

41 50. Du Plessis's views on language are more fully elaborated in a later text (Du Plessis and Corder *Understanding South Africa's transitional bill of rights* (1994) 66): "To use a metaphor: a text is 'made of' language just as a jersey is made of wool. The jersey is much more than just wool – and its 'distinctive structure' goes beyond just 'being wool' – but to be able to knit a jersey, wool is indispensable. Because a legislative text is made of language there are criteria or rules of interpretation which direct one's attention to that fact. However, to elevate these criteria above other criteria (or rules and presumptions) accounting for other intra- and extra-textual dimensions of the text is to imply that the text is *language* instead of recognizing, more realistically, that it is *made of language*."

42 Thus he uncritically accepts Cowen's depiction of the purpose of the law, its subject matter and the historical background as "non-linguistic factors" ("Die stilte oor wetsuitlegteorie word verbreek" (unpublished paper) 6).

43 This also appears from his criticism of the traditional approach of the South African courts to interpretation. "The root error of literalism", Du Plessis writes, "lies in its denial of the distinction between meaning and language, and its consequential confusion of the medium as means, with the message as goal or end" (50). I disagree. Literalism, as expounded by the courts in South Africa, does not deny the distinction between language and meaning. It holds the view that the language of a legal provision is the primary or exclusive source of law because the text alone is seen as the best guide to determining the author's intentions. Written language for literalists, then, is not constitutive of meaning (as we have seen language is), but referential – the medium through which the author's meaning and intent is presented. (The similarity with Du Plessis's own views on language is clear.)

44 See De Ville 1997 *SAPL* 502–503.

45 Du Plessis's metaphor should in fact be understood as follows: The jersey should be seen as a metaphor, not for the legislative provision, but for meaning. Language (wool) is indispensable for meaning (a jersey). In South Africa the rules, presumptions, aids and maxims (the wool) interrelate in different ways (depending on the context of the specific case and the interpreter) so as to produce a new meaning (jersey) in each instance.

46 This manipulation has to be justified, though; see below.

47 49.

> "A statute as a structurally distinctive entity coheres and interacts with its environment: text and context can in other words never be divorced."

The fact that text and context cohere and interact (a statement which is not supported by any argument) cannot, however, explain how or why context manages to affect the meaning of the text.

Interpretation

Because of its "subjective" consequences, Du Plessis also rejects Heidegger's conception of interpretation as always historically situated.[48] Du Plessis summarises (his understanding of) Heidegger in this regard as follows:[49]

> "Martin Heidegger . . . voer egter die *Geschichtlichkeit* van interpretasie tot sy uiterste konsekwensies: interpretasie is, volgens hom, betekenis*gewing* (nie 'n 'uithaal' van betekenis nie) volgens die interpreteerder se eie, konkreet-situatiewe, singewende bedoeling en is daarom na sy aard geweldadig – as 'n mens 'n teks interpreteer, verskuif jy die (betekenis-)grense daarvan."

This "hyperhistorical" view of interpretation is totally unacceptable to Du Plessis, as it would, according to him, mean that objective meaning is not possible.[50] The reason is that no two people would, on this view, be able to understand a text in the same manner: they would not (even) be interpreting the same text.[51] It all depends on what one means by "text". Text is thus already an interpretation and cannot be said to exist in and of itself, in other words apart from the activity of interpretation. Just as there can be no tradition, history, religion or natural science without interpretation, so there can be no text without interpretation. Nothing escapes the scope of interpretive activity.[52]

Du Plessis's objection appears to be based on a fear of relativism and the (positivistic) belief that a text can have a meaning of its own which has to be "found" by interpreters,[53] thereby enabling a distinction between correct and incorrect interpretations.[54] Only if one believes in the above will it serve any purpose to establish a text distinct from its interpretations. There is, however, no

---

48 "Die teoretiese grondslae van wetsuitleg" in Joubert (ed) *Petere fontes: LC Steyn-gedenkbundel* (1980) 24 29. Although the reference to Heidegger does not appear in *The interpretation of statutes*, Du Plessis refers favourably to his *Petere fontes* chapter (47 fn 98) as containing a more detailed analysis of his theory. Yet Du Plessis (48) acknowledges the historical nature of the norms of interpretation.

49 "Die teoretiese grondslae van wetsuitleg" 24 29.

50 29.

51 From Du Plessis and Corder *Understanding South Africa's transitional bill of rights* (1994) 61 it appears that the author has since changed his views in this respect. In apparent agreement with these views, he explains that "[m]odern-day conceptions of hermeneutics in the humanities and the social sciences assume that interpretation is a *holistic* activity involving the exposition and elucidation of what 'someone else' has said or written (the 'text') (i) in the particular *context in which* it occurs and (ii) from the *hermeneut's* own perspective determined by his or her *own context* or situation". Du Plessis still subscribes, however, to his theory of normative transposition (65). Furthermore, he continues to undervalue the importance of language in understanding. Language is again described as only a "*vehicle* conveying meaning" (66).

52 Schrift 182.

53 See also Du Plessis 39: "A text has a meaning of its own . . ." See 48 with regard to the norms of interpretation: "certain 'rules' will obtain and will in fact be obeyed in the process of transposition".

54 See eg 38.

escaping the personal role of the interpreter (within a certain historical tradition) in the process of understanding.

Du Plessis refutes (at least partly[55]) his own views when he clearly shows the constructed nature of the norms of interpretation in his detailed account of them. Thus, for example, in his exposition of the presumptions of interpretation, he takes issue with other authors and the courts with regard to the "true nature" of the presumptions,[56] the way in which they ought to be invoked[57] and the meaning of some of them.[58] He himself therefore shows that these norms are not fixed and stable, but (linguistically) constructed and therefore also subject to deconstruction.

This does not, of course, make of interpretation a completely subjective/-arbitrary process.[59] Meaning is conditioned by the interpreter's situation in space and time. The text can be seen and read only from a position in the present. The present is, however, irrevocably influenced by preconceptions bequeathed from the past.[60] Our "knowledge and experience"[61] thus depend upon the culture, language and time period in which we find ourselves.[62] The importance of realising this should be obvious. If one is aware of the fact that one's views on matters are not based on some transcendental concept of truth, but are conditioned by history, it is possible to reflect critically on those views and change them if necessary.

3 IMPLICATIONS FOR THE NORMS OF STATUTORY INTERPRETATION

The role of the methods or norms of interpretation in coming to understanding is overemphasised in Du Plessis's theory. A distinction has to be made between coming to a decision (or "understanding") and the justification for that decision. It may be true that these norms of interpretation at times influence a judge's (initial) arrival at a decision (because of an internalisation of the shared legal

---

55 The view that a statutory provision has a meaning of its own can be said to be refuted in Du Plessis's account of "ordinary meaning" (103–107).

56 Du Plessis himself proposes a specific interpretation of the presumptions, namely that they function as material groundnorms to interpretation (54).

57 According to him, their function is to serve as the ABCs and XYZs of interpretation (52–53).

58 See eg his discussion of the meaning of the presumption that an enactment promotes the public interest (65–66) and that absurdities must be avoided (96).

59 Palmer 229: "The subject understands through the shared world of understanding already given in and through his language and the historical positionality in which his understanding stands. To call this subjective or to trace it back to the individual consciousness is untenable, since the individual did not create the shared understanding and language but only participates in them." This statement can again be criticised for not accounting adequately for the active role that an individual can play in the continuous evolution of language and tradition.

60 Palmer 176.

61 Du Plessis 48.

62 It depends upon the time period in which one lives whether, eg the sun is (generally) perceived to orbit the earth, or the earth the sun. See also Palmer 231–232: "Experience is not some subschema within the framework of the subject-object dichotomy; it is not some nonhistorical, nontemporal, abstract knowing outside time and space where an empty, placeless consciousness receives a configuration of sensations or perceptions. Experience is something that happens in living, historical human beings."

culture), though this cannot be said always to be the case where a statute is involved. Nor are these the only factors that play a role in coming to a decision. A decision is often arrived at intuitively and thereafter justified with reference to, *inter alia*, the norms of interpretation.[63] Such intuition may be inspired by a judge's moral and political beliefs, by unconscious, irrational factors, and/or by legal knowledge (including the norms of interpretation). If, however, one accepts this fact and acknowledges its importance in reaching a decision, it cannot by itself undermine the norms of interpretation. The norms as reasons have themselves to be judged as to whether or not they provide good reasons for the decision.[64] The future of the norms of interpretation cannot, in other words, be judged with reference to the question whether they always play a role in judicial decision-making, or whether they play a dominant role. Rather, the question is whether they provide a convincing (well-reasoned) justification[65] for a decision, or for attaching a particular meaning to a specific provision.[66]

The existence of the norms can be explained with reference to the (conscious or unconscious) realisation by the courts (and Parliament) that "meaning is context-bound, but context is boundless".[67] The primary function of the norms of interpretation is to attempt to (justify the) control (of) the context – in other words, to halt the dissemination of meaning.[68] In this way, for example, the first or *primary rule* of interpretation[69] attempts to restrict meaning to the "ordinary meaning" of the words or phrases used in a provision; the *golden rule*[70] authorises a departure from the ordinary meaning but only under strictly controlled circumstances; the *mischief rule*[71] restricts the meaning of a provision to that which corresponds with the *ratio* of the enactment; the presumptions of interpretation[72] exclude certain meanings and make others more acceptable; the rules

63 Mootz "The ontological basis of legal hermeneutics: a proposed model of inquiry based on the work of Gadamer, Habermas, and Ricoeur" 1988 *Boston Univ LR* 523 538 explains it as follows: "Meaning 'charms' us in a pre-rational way, whether it is the meaning of a text or a work of art. By the time that [the] reader brings rational analysis to bear on the text, the important work has already been playfully accomplished." Neither (intuitive) understanding nor justification can be said to be dominantly subjective or objective as they contain elements of both (compare Van den Bergh "Wetsuitleg: quo vadis?" 1982 *De Jure* 154 160).

64 After a judge has come to an initial decision in a case, he or she may find that the decision "won't write" – in other words, a defensible argument cannot be found for the decision, in which case he or she will have to decide the case differently (Golding *Legal reasoning* (1984) 2–4).

65 The importance of justification appears from Golding 6–10.

66 The role of personal factors (eg having a grudge against the plaintiff/defendant, or political and moral views) cannot be avoided, and it can hardly be expected of judges to reveal these in the furnishing of reasons. (They are simply, in our legal culture, regarded as irrelevant for purposes of justification.) A decision (in order to be a legal one) has to be justified by reference to the law, not by reference to personal factors. Although the justification for the decision has therefore to be rational (and this is also a disputed concept), the act of understanding need not be.

67 Culler *On deconstruction* 123.

68 There are, of course, other ways of looking at these norms – see, eg Du Plessis 54–60 where a detailed justification is given for the existence of these norms.

69 Du Plessis 35; Botha 27.

70 Du Plessis 108–110; Botha 27.

71 Du Plessis 33–34; Botha 94–95.

72 Du Plessis 61–102; Botha 55–76.

relating to the taking into account of "intra- and extra-textual aids"[73] generally restrict such resort to instances of "ambiguity"; and the rules of restrictive and extensive interpretation[74] either "restrict" or "extend" the "ordinary meaning" of a provision, depending on the "intention of the legislature".[75]

As judges always have to draw frames around the context in order to fix meaning, it seems inevitable that norms will forever be constructed to regulate the context of which account can be taken. Because of the boundlessness of context and the impossibility of taking everything into account, the meaning decided upon will never be the only meaning, but simply the meaning within the context as defined. Because of time constraints we can therefore never completely justify our decisions. One can never take into account all elements of the context. Furthermore, in the case of conflicting results, one has to choose between different parts of the context which are taken into account. In this lies the responsibility of the interpreter.[76]

It should not be inferred from the above that the norms of interpretation have determinate outcomes. These norms are texts which themselves require interpretation and application in the specific context.[77] It is therefore not possible to invoke norms (of interpretation)[78] to bring an objective side into interpretation. They are not transparent tools which can simply be "used" or "obeyed" in order to obtain correct results. The reason why the outcome in a court case can often be predicted lies not in the norms, but in the shared legal culture[79] (sc in the way of viewing (interpreting) those norms). The (same) norms can therefore lead to radically different outcomes with a change in the legal and political culture. Within the same culture there can, of course, also be opposing factions.

Apart from the fact that the application of these norms should be considered carefully in each case to harmonise with the (interpreted) values of the Constitution,[80] their existence and that of the theories underlying them should also be the subject of continuous and thorough theoretical scrutiny. Consider, for example, the preamble to an Act as an "aid" to interpretation. The *locus classicus* in this regard is *Law Union and Rock Insurance Co Ltd v Carmichael's Executor*,[81] where the use of a preamble was justified as follows:

> "A preamble has been described by an old English Judge as 'a key to open the minds of the makers of the Act and the mischiefs which they intended to redress'. But the key cannot be used if the meaning of the enacting clauses is clear and plain. In cases however where the wording is ambiguous, and in cases where the Court is satisfied that the Legislature must have intended to limit in some way the wide language used, then it is proper to have recourse to the preamble."

73 Du Plessis 103–137; Botha 79–100.
74 Du Plessis 152–157; Botha 121–131.
75 See Steyn 25.
76 Ijsseling "Jacques Derrida: een strategie van de vertraging" in Widdershoven and De Boer (eds) *Hermeneutiek in discussie* 9 14.
77 The norms of interpretation are in each instance grafted on to another text (the statutory provision to be applied within a specific context) which affects the meaning of the norm of interpretation.
78 As Du Plessis attempts to do at 48.
79 See Singer "The player and the cards: nihilism and legal theory" 1984 *Yale LJ* 1 21.
80 Constitution of the Republic of South Africa 108 of 1996.
81 1917 AD 593 597.

Ambiguity has been regarded by the courts as the threshold for inviting contextual factors such as the preamble, long title, headings, purpose, the presumptions, etc. "Ambiguity" is defined in the *Collins English Dictionary* as "the possibility of interpreting an expression in two or more distinct ways" or "vagueness or uncertainty of meaning". "Ambiguous" is defined as "having more than one possible interpretation or meaning" or "difficult to understand or classify; obscure". The word is said to derive from the Latin *ambiguus* which means "going here and there, uncertain, from ambigere to go around". Once one accepts that words do not have an intrinsic meaning, that they do not derive their meaning from the intention of the legislature but from the context within which they are used, that the context can always be defined differently, and that statutory provisions can thus always be interpreted in two or more ways, it appears that all statutory provisions are in fact ambiguous.[82] By saying that the meaning of a provision is clear, a judge is actually saying that in spite of the ambiguity, he or she has a clear sense of what the meaning should be.

Nevertheless, if we accept for the moment that there is a difference between clear and ambiguous provisions, no norms exist to prescribe whether a provision is to be regarded as ambiguous or not, or exactly which factors should play a role in determining the intention of the legislature to restrict the meaning of the general words of a provision. It is therefore a matter of interpretation. Once it has been decided to take account of the preamble, the (meaning of the) preamble itself can also, of course, be interpreted in different ways[83] and be allowed to interact in different ways with the provision(s) to be interpreted.

An example from our case law will indicate how preambles have been invoked in the past. In *S v Kola*[84], Kola was convicted by a magistrate of contravening section 1 of Law 2 of 1891 (T) because he was wearing female clothing in a public road in Johannesburg. He had make-up on his face and wore his hair long. He was given the maximum sentence: R10 or 14 days' imprisonment. Section 1 provided:

> "The wearing or use of masks, false beards, or other means whereby disguises are effected, in public roads or other places is forbidden."

The court *a quo* on appeal held that as the meaning of section 1 was not clear, the preamble could be invoked, which showed that a person could be convicted of such an offence only if he disguised himself with the intention to defraud the public or to escape prosecution. The preamble provided the following:

> "Whereas it has appeared that by the use of masks, false beards, or other disguises, fraud has more than once been committed by leading the public to believe that it has to deal with another person than is actually the case, and
>
> Whereas disguises are also made use of by fugitives, who thereby endeavour to escape prosecution:
>
> Be it hereby enacted and provided as follows:".

As the state had not proved that the accused had worn female clothing for these purposes, he was acquitted. The Appellate Division, however, was of the opinion that the statutory provision was clear and unambiguous. The court also held that

---

82 In principle, therefore, ambiguity does not differ from polysemy ("the existence of several meanings in a single word"). All words are polysemous, as their meaning always depends on the context within which they are used.

83 This is acknowledged in the *Law Union* case (598).

84 1966 4 SA 322 (A).

section 2 of the Law[85] indicated that the ambit of section 1 was not to be limited, and that recourse could therefore not be had to the preamble. It was accordingly not necessary for the state to prove that the accused disguised himself in order to defraud the public or to facilitate escaping prosecution. The state had only to prove that the accused's intention was to conceal his identity. This, the court held, could be inferred from his clothing.

A clearer instance of injustice would be difficult to find. This is, however, the law's way of dealing with the possibility of disunity in meaning. The law is to be construed as being logically coherent. Therefore, anything which does not cohere with such a finding is to be (violently) excluded by calling it names (for example an "aid" to construction) without having to acknowledge the choice that is involved. Even though both the preamble and the statutory provision form integral parts of the Act, the one was arbitrarily chosen above the other, regardless of the consequences.

The norm regarding the consideration of a preamble as an aid to interpretation is theoretically highly suspect. It is based on the (false) notion that words are (normally) a perfect medium of communication for (intended) meaning. When, however, words prove unsuccessful in conveying a perfectly clear message, the meaning is to be found with reference to other aids of construction, *inter alia* the preamble. Still, the object remains to ascertain the intention of the legislature. How the intention of the legislature (and thereby the meaning) can at times (when the wording is clear) be found in the ordinary meaning of the provision, and at other times (for example when the wording is ambiguous) in the interrelationship between the provision and other texts (for example a preamble), the theory does not and cannot possibly explain. Meaning cannot lie both in the mind of the author(s) and in the productive effects of language. As we have seen, the meaning of words depends on the contexts within which they are used, not on (an author's) intention.

4 CONCLUSION

The insight that language and the interpreter's situation within a historical context are central to meaning has to be duly accounted for in any theory of meaning and in the exposition of the norms of interpretation. The norms of interpretation are historically influenced ways of controlling meaning, of limiting the dissemination of meaning. These norms are themselves texts, requiring interpretation. The recognition of the open nature of the norms of interpretation is essential for actualising their transformative potential. Botha's and Du Plessis's explanations of meaning and the norms of interpretation do not adequately account for these factors in the interpretation process. The norms of interpretation are (at times) seen as transparent and objective tools which can simply be used so as to ascertain the correct meaning of a statutory provision, without the norms of interpretation themselves requiring interpretation. For Du Plessis and Botha, these norms are what bring objectivity and fixedness/certainty into meaning.[86] These authors make of interpretation a step-by-step (calculable)

85 S 2 related to disguises at theatrical performances or other diversions, and provided that disguises in such instances would not fall under the law.

86 For the courts, this stability was attained in the past through the concept of the intention of the legislature. The intention of the legislature which was always desired to ground/provide

continued on next page

process which can be objectively measured. By positing the methods as objective filters to meaning, Botha and Du Plessis place responsibility for meaning in the methods and tradition, rather than in the judiciary.

The interpretation and application of the norms of interpretation are always in contention and therefore a site of struggle. There is no "agreement"[87] in this regard, as these norms continually require reinterpretation. Furthermore, they form part of our (violent and oppressive) legal tradition. For it was in their name that the courts enforced oppressive apartheid legislation.[88] The courts, by following a literal/intentionalist approach, attempted to place responsibility for meaning (exclusively) on the legal text/Parliament itself without themselves taking any responsibility for the interpretation. Even a literal interpretation, however, takes account of (a certain part of) the context (even if "forgotten").[89] There simply is no meaning out of context, not even a literal meaning. It is thus not true to allege, as Corbett does,[90] that the courts had no option during the apartheid years but to have applied the law "as they found it, however unjust it might [have] appear[ed] to be". The law (which includes the norms of interpretation) does not, as positivists believe, exist prior to the act of interpretation.[91] There is no excuse; judges bear the ultimate responsibility for their acceptance, interpretation and application of the norms of interpretation.

The complicity of the norms of interpretation in apartheid does not necessarily call for their abolition. Within common-law systems, and at times even under apartheid, these norms often succeeded in securing a degree of justice. The norms of interpretation and the theories underlying them should, however, be continually scrutinised, on both theoretical and ethical grounds. Although the origins of most of them (for example the presumptions of legislative intent) can be traced to a fatally defective account of meaning-generation, it does not mean that they can serve no further purpose in construing the meaning of statutory provisions. Most of them can be rephrased (as, for example, suggested by

---

a foundation for any interpretation has been shown to be something capable of construction only afterwards. It is always a construction, and cannot provide a firm foundation for any interpretation.

87 See Du Plessis 48.

88 Du Plessis and Botha do not, in my view, adequately expose the violent and oppresive consequences of the norms of interpretation. Du Plessis, by attempting to show their inherent rationality, emphasises their positive nature without acknowledging their failures.

89 Both the text and the interpreter find themselves in a historical context which inevitably influences understanding.

90 "Presentation to the Truth and Reconciliation Commission" 1998 *SALJ* 17 18: "Prior to the coming into effect of the interim Constitution on 27 April 1994, Parliament was supreme. For practical purposes it could pass any law it liked; and it did so. The courts had no power to question the validity of the laws Parliament made. Still less could they declare them invalid. The courts had no option but to apply the law as they found it, however unjust it might appear to be. Of course, often the statute passed by Parliament was unclear and in such cases, when required to interpret it, the court was presented with a choice between an interpretation which produced inequity and one which did not. In such cases the courts were in a position to make the latter choice in the process of construing the will of Parliament; and they often did so. In this they were legitimately applying the principles of Roman-Dutch law relating to statutory interpretation . . ."

91 Cornell "Institutionalization of meaning, recollective imagination and the potential for tranformative legal interpretation" 1988 *Univ Penn LR* 1135 1216.

Du Plessis with regard to the presumptions, or above, with regard to the preamble) to fit into a contextual account of meaning-generation.

Interpretation should not be aimed at reproducing the text, for the text has no meaning of its own. There are no firm foundations in interpretation. The intention of the legislature, the clarity of the text and the purpose of the enactment cannot provide such a foundation. Without leaving the text,[92] the courts should show a willingness to use the norms of interpretation to transform society in accordance with the ideals of the Constitution (as interpreted).

When you discover you are riding a dead horse, the best strategy is to dismount. In law firms, we often try other strategies with dead horses, including the following: buying a stronger whip; changing riders; saying things like "this is the way we have always ridden this horse"; appointing a committee to study the horse; arranging to visit other firms to see how they ride dead horses; increasing the standards to ride dead horses; declaring that the horse is better, faster and cheaper dead; and, finally, harnessing several dead horses together for increased speed.

Comment by Judge Thomas Penfield Jackson after listening to members of a legal team battering away at an apparently lost cause during the hearing in the Microsoft Antitrust *hearing.*

Reported in the Financial Mail *1999-06-10.*

92 As there is no "absolute text" that can be used to judge the correctness of interpretations, Nietzsche prescribes for interpreters the art of "reading well" (not "reading correctly"). This entails reading slowly, cautiously, reflecting on what is read, and being honest and just towards the text (see Schrift 163–166, 189). Such a reading has to be responsible, and the meaning imposed has to remain connected to the text in the sense of responding to and fitting with the text.

Locus standi and access to judicial review: statutory interpretation and judicial practice in Botswana

Bugalo Maripe
LLB LLM
Lecturer in law, University of Botswana

> "The court would not listen, of course to a mere busybody who was interfering in things which did not concern him. But it will listen to anyone whose interests are affected by what has been done."[1]

OPSOMMING

***Locus standi* en toegang tot geregtelike hersiening: wetsuitleg en judisiële praktyk in Botswana**

Daar word algemeen erken dat, hoewel toegang tot die regsproses noodsaaklik is, misbruik van die proses 'n verskynsel is waarteen alle regstelsels waak. Derhalwe bestaan *locus standi*-reëls om toegang tot die howe te reguleer. Hierdie reëls manifesteer sig hoofsaaklik in twee vrae: (a) of die litigant die nodige regsbevoegdheid het om in die hof op te tree; en (b) of die litigant 'n geregtelik erkende belang het. Hierdie bydrae gaan oor laasgenoemde.

Die ondersoek word gerig op *locus standi* in die konteks van Botswana, maar daar word ook op die posisie in ander jurisdiksies gelet – veral dié wat aan Engelse en Romeins-Hollandse invloed blootgestel is. Daar word betoog dat waar individue op grondwetlike gronde die hof wil nader, dit wenslik is om die streng vereistes aangaande die bestaan van 'n besondere belang te verslap en sodoende 'n wyer toegangsreg in sulke gevalle te erken.

INTRODUCTION

It is perhaps axiomatic to state that, whereas all the major legal systems of the world have developed mechanisms enabling citizens to participate actively in the administration of justice, the competence to invoke the jurisdiction of the court is circumscribed and regulated in a number of ways. While there is a need for access to judicial review, abuse of process is a phenomenon every legal system guards against, hence the desirability to discourage "meddlesome interlopers" from invoking the jurisdiction of the courts in matters not concerning them.[2] The rules of *locus standi* exist primarily to regulate access to the courts.[3] The application

1 *Reg v Paddington Valuation Officer Exparte Peachy Property Corporation Ltd* 1966 1 QB 380 401 per Lord Denning MR.
2 *Ibid.*
3 See Sir Konrad Schiemann "*Locus standi*" 1990 *PL* 342.

of the *locus standi* rules manifests itself in two ways: (a) whether the particular litigant has the necessary legal capacity to bring proceedings (for example, minors, lunatics, unrehabilitated insolvents may not have legal capacity in some cases); and (b) whether the litigant has a legally recognised interest to assert or protect.

Our concern here is with the latter. The courts have taken the position that the person bringing proceedings must be affected in some way by the cause complained of, or that he must be an "aggrieved" person, having suffered some special interest or damage. This position obtains in different legal systems, for example: England,[4] America,[5] South Africa,[6] Zimbabwe,[7] Canada,[8] Botswana,[9] and European Human Rights law.[10]

The purpose of this article is to examine the question of *locus standi* in the context of the law in Botswana. In this exercise, the legal position as it exists elsewhere will not be ignored. It appears to this writer that in fact the position taken up by the courts in Botswana is informed by decisions from both English common law and Roman-Dutch legal tradition. The reason for this is that though Botswana is a Roman-Dutch common law jurisdiction, it has not escaped English common-law influences. The view has been expressed, and correctly so, that the legal system of Botswana is a mixture of Roman-Dutch and English legal principles.[11] The other reason is that, as a developing legal system, like any other system, it is not "self-contained" and borrows a great deal from developed legal systems. Decisions from other jurisdictions have highly persuasive value.[12] This is also true of other jurisdictions where reliance on foreign authorities is a common place.

STATUTORY PROVISIONS

The Constitution, as well as a number of statutes, provides for a right of access to courts in limited circumstances. The Constitution of the Republic of Botswana provides for the protection of fundamental rights and freedoms of the individual, in Chapter II, especially sections 3 to 16. In particular, the Constitution provides for the legal enforcement of the protection of fundamental rights and freedoms in the following terms:

---

4 See fn 1 *supra*; *R v Inland Revenue Commissioners exp National Federation of Self-Employed and Small Businesses* 1982 AC 617.

5 *Corpus Juris Secundum* Vol 16 (1984) para 65; *Frothingham v Mellon, Secretary of the Treasury* 262 US 447 (1923).

6 *Jacobs v Waks* 1992 1 SA 521 (A).

7 *In re Wood* 1994 2 ZLR 155.

8 *Thorson v The Attorney-General of Canada (No 2)* (1974) 43 DLR (Ed) 1. See also Johnson "'Locus standi' in constitutional cases after Thorson" 1975 *PL* 137.

9 *The Attorney-General v Unity Dow* 1992 LRC 623.

10 *Eckle case*, Judgment of 1982-07-15, Pull ECHR Series A, Vol 51: See also Zwart *The admissibility of human rights petitions* (1994) Vol 36 50.

11 Otlhogile *A history of the higher courts of Botswana* (1912–1990) 1–6; Molokomme "The reception and development of Roman-Dutch law in Botswana" 1985 *Lesotho LJ* 121; Pain "The reception of English and Roman-Dutch law in Africa with reference to Botswana, Lesotho and Swaziland" 1978 *CILSA* 137.

12 This view was expressed in the Botswana High Court by Murray J in *State v Moreputla* 1985 BLR 380 400–401.

> "[I]f any person alleges that any of the provisions of Section 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then . . . that person may apply to the High Court for redress."[13]

State action which impinges upon the fundamental rights and freedoms can only be challenged in court by a person who is personally affected by such state activity, or is likely to suffer its consequences. An individual may only enforce a right available to himself personally or may sue in respect of injury sustained or apprehended by him.[14] This provision was subjected to judicial scrutiny in the case of *Attorney-General v Unity Dow* which will be examined in greater detail below. Section 24(1) of the Zimbabwean Constitution is similar to section 18(1) of the Botswana Constitution. In *United Parties v Minister of Justice, Legal and Parliamentary Affairs*, Gubbay CJ said of section 24(1):

> "Thus, s 24(1) affords the applicant *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. The applicant must be able to show a likelihood of *itself* being affected by the law impugned before it can invoke a constitutional right to invalidate the law."[15]

It is submitted this observation applies with equal force to section 18(1) of the Constitution of Botswana. The position in South Africa (whose common law position would have been reflected by the observation of Gubbay CJ above) has been revolutionised with the advent of the new Constitution in 1996. Chapter II of this Constitution provides for a Bill of Rights, and section 38 for enforcement of these rights. Section 38 provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the *public interest*;
>
> (e) an association acting in the interest of its members."

The *actio popularis* has therefore been legislated into South African law by a constitutional provision. It seems clear this was deliberately done to supersede the common law. Botswana's Constitution does not have a similar provision and the position regarding *locus standi* is still governed by the common law and statutory provisions conferring *locus standi* in general terms.

In addition to the Constitution, several statutes provide access to court to persons who may have been affected by action taken in terms of the statutory provisions. Several Parliamentary enactments authorise certain bodies to exercise certain powers depending on the scheme and purpose of the particular

---

13 S 18.

14 This reflects the common law position which entitles a person to bring proceedings in relation to harm suffered by himself personally to the exclusion of the Roman law *actio popularis*. See *Dalrymple v Colonial Treasurer* 1910 TS 372; *Gouriet v UPO* [1978] AC 435. The *actio popularis* does not form part of Roman-Dutch law, the law applied in Botswana, or of English law; see *Gouriet v UPO supra*.

15 Civil Application No 229/95; Judgment No 139/97 2, emphasis in the original.

legislation and either grant a right of appeal to the Minister or access to judicial review to a "person aggrieved", a position long decried by the courts but one which continues to exist.[16]

For instance, the Trade and Liquor Act, which relates to trading and liquor Licensing and other incidental matters provides:

> "Any *person aggrieved* by a decision of a licensing authority . . . may appeal to the Minister . . ."[17]

The import of such provisions and the construction attached to them by the courts will appear more fully below.

Two other statutes are worth mentioning at this stage. The Civil Procedure (Actions by or against Government or Public Officers Act)[18] provides that actions by or against the government must be instituted by or against the Attorney-General or other person authorised by the Attorney-General to act. It is implicit in the terms of this legislation that the Attorney-General alone has a discretion to institute proceedings on behalf of the government.

An individual cannot bring proceedings on behalf of government unless expressly authorised by law. This, however, applies only to civil wrongs. For public wrongs, particularly crimes, the position is different in that the acts generally have a harmful effect on the public and do more than interfere with merely private rights. It has been said that

> "[c]rime is crime because it consists in wrongdoing which directly and in serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured".[19]

In the matter of *locus standi*, every responsible citizen has an interest in the preservation of public order and security. A crime threatens these fundamental ideals in some sense. Can every individual prosecute a crime even where he or she is not a direct victim? Once a crime has been or is alleged to have been committed, the complaint is not only that of the victim but of the society at large. In almost all major legal systems, the prosecution for offences has been made a prerogative of the crown. The crown does so at the instance of the public, because it is a public wrong that results from a commission of an offence. Botswana has been no exception in this regard. The Criminal Procedure and Evidence Act[20] was enacted to make provision for procedure and evidence in criminal cases. It dates back to colonial days and owes its origins to Proclamation 52 of the Bechuanaland Protectorate (1938). It has, however, been amended several times to suit changing circumstances. The Act provides:

---

16 See Lord Parker CJ in *Ealing Corporation v Jones* [1959] 1 QB 384, 390: "I would like to voice a protest that Parliament continues to allow this expression to come into Act after Act of Parliament." As long ago as 1929, Lord Hewart CJ in *Sevenoaks Urban District Council v Twynam* (1929) 2 KB 440, referred to the fact that these words were so often used, and if one looked at the cases, one "would find some cases going one way and some the other. Notwithstanding that, the words continued to creep in after that date and continue to do so today. This is another case where Parliament has failed to make clear what was really intended by those words".

17 Cap 43:02; s 65. See also Financial Institutions Act Cap 46:04; s 17, Apprenticeship and Industrial Training Act Cap 47:04; s 35.

18 Cap 10:01.

19 Allen *Legal duties*, quoted in Smith and Hogan *Criminal law* (1988) 18.

20 Cap 08:02.

> "The Attorney-General is vested with the right and entrusted with the duty of prosecuting in the name and on behalf of the State in respect of any offence committed in Botswana."[21]

This re-echoes the Constitution which provides:

> "The Attorney-General shall have power in any case in which he considers it desirable so to do –
>
> (a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person;"[22]

The Constitution and the Act proceed to empower the Attorney-General to stop any prosecution commenced by him or by any other person authorised by him, at any time before conviction.[23] The Attorney-General is therefore the *dominus litis* in criminal matters. He has a discretion to decide whether to prosecute, or even to abandon the prosecution. It has been said that in the exercise of such discretion the Attorney-General is unfettered, his discretion is absolute and cannot be judicially reviewed.[24] The Attorney-General has in fact withdrawn proceedings on some occasions, and declined to prosecute, in the exercise of powers vested in him under legislation. These provisions notwithstanding, the Criminal Procedure and Evidence Act recognises this possibility and makes provision for private prosecutions, but only when the Attorney-General declines to prosecute for an alleged offence. It provides:

> "In all cases where the Attorney-General declines to prosecute for an alleged offence, *any private party who can show some substantial and peculiar interest* in the issue of the trial, *arising out of some injury which he individually has suffered* by the commission of the offence, may prosecute in any court competent to try the offence, the person alleged to have committed it."[25]

The Act proceeds:

> "The following persons also possess the right of prosecution under Section 14 as private parties –
>
> (a) a husband in respect of offences committed against his wife;
>
> (b) the legal guardians or curators of minors or lunatics in respect of offences committed against their wards;
>
> (c) the wife or children or, where there is no wife or child, any of the next of kin of any deceased person in respect of any offence by which the death of such person is alleged to have been caused."[26]

The right to private prosecution may be exercised only upon presentation to an appropriate court officer of a certificate issued by the Attorney-General that he has seen the statements or affidavits on which the charge is based and declines to prosecute.[27] There is an obligation on the Attorney-General to issue such a

---

21 S 7.

22 S 51(3)(a) of the Constitution.

23 The Attorney-General may appear personally, or may delegate the responsibility to any person. These are either attorneys working in his office or police officers called public prosecutors who appear as his representatives; s 8 and 10 of Act and s 51(4) of the Constitution.

24 *Gouriet v UPO supra* on the English law position which, it is submitted, obtains in Botswana.

25 S 14 (emphasis supplied).

26 S 15.

27 S 18.

certificate if he declines to prosecute once a request is made by a private party to prosecute.[28]

Section 15 is clearly inclusive rather than exhaustive. Why a wife is not expressly vested with the right of prosecution is not entirely clear from the terms of the statute. It would appear this was deliberately made to reflect the patrilineal nature of Tswana society according to which, upon marriage, a woman passes from the legal control of her parents to that of the husband, who then becomes to all intents and purposes her legal guardian.[29] This characteristic feature has been relaxed somewhat, to the extent that women now enjoy, in limited circumstances, the same rights which traditionally were the preserve of men.[30] It is submitted that in the absence of an express exclusion, a wife should be recognised as having the competence to prosecute privately in respect of offences committed against her husband. Another person who may fall within the scope of this legislation is a trustee in insolvency under the Insolvency Act,[31] in respect of offences against his ward.

The other condition for the exercise of the right to private prosecution is that the Attorney-General should have declined to prosecute for an alleged offence. This, and the issuance of a certificate signed by the Attorney-General, may be ascertained with relative ease. However, qualification for private prosecution under section 14 is dependent upon a further condition; the private party must show some *substantial and peculiar interest* in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence.[32] Three observations emerge from section 14. First, the private prosecutor must establish a *causal nexus* between the injury in respect of which he seeks to prosecute and the commission of the offence. Secondly, the injury must have been suffered by himself individually. He cannot prosecute in respect of injury suffered by the public; it is apparent this was meant to exclude the *actio popularis*. Thirdly, and most importantly, he should have some "substantial and peculiar interest" in the issue of the trial. The phrase "substantial and peculiar interest" is neither defined in the Act, nor has it been subjected to judicial scrutiny in Botswana. It has been interpreted in South Africa in *Solomon v Magistrate, Pretoria*[33] as follows:

> "[W]hen Section 14 speaks of a 'substantial and peculiar interest in the issue of the trial' it does not in my view refer to a material or pecuniary interest such as the recovery of money. The issue of trial is an acquittal or a conviction, and the

28 *Ibid*; s 18 provides that " . . . in every case in which the Attorney-General declines to prosecute he *shall* at the request of the party intending to prosecute grant the certificate aforesaid". See s 45 of the Interpretation Act Cap 01:04 which provides: "In an enactment 'shall' shall be construed as imperative and 'may' as permissive and empowering."

29 See Schapera *A handbook of Tswana law and custom* (1994) 150–151.

30 See *Attorney-General v Unity Dow* 1992 LRC 623, and also s 2 of the Deeds Registry (Amendment) Act, 1996, in terms of which a woman married in community of property may now transfer or receive immovable property in her own name without the assistance of her husband.

31 Cap 42:02.

32 S 14 of the Criminal Procedure and Evidence Act Cap 08:02.

33 1950 3 SA 603, where the provision in the issue was s 14 of the South African Criminal Procedure and Evidence Act 31 of 1917; this and our section are *in pari materia*. What the South African court said would be very persuasive to the courts in Botswana.

> interest of the prosecutor lies in securing the conviction and punishment of the man who had injured him by a criminal act."[34]

The commission of a crime clothes the victim with a substantial interest in the issue of the trial. This interest, however, is not limited to the victim of the crime *strictu sensu*, but may extend to persons who are closely connected with the victim in some way, either by reason of a special legal relationship as described in section 15 or some other relationship such as common membership of a political party or church.[35] Roper J went on to recognise that, though injury suffered by the commission of a crime would in the great majority of cases be of a patrimonial nature, it need not be so narrowly construed. It would consist in any position which adversely affects the relationship of the prosecutor and the victim.

There are numerous provisions in legislative enactments in Botswana which provide for certain matters to be done by designated authorities, depending on the purpose for which the law was enacted and matters it was set to regulate. These provide for access to the courts to an "aggrieved person" in respect of any decision taken in terms of particular legislation.[36] The phrase "aggrieved person" also continues to find its way into legislation despite judicial protests.[37]

The determination of who is an aggrieved person for purposes of any legislative enactment, has in all cases been a judicial exercise. It is submitted that exhaustive definitions are not always desirable. In situations where interference with rights and interests expresses itself in different forms, access to judicial review should be given to a wide set of individuals as long as the interest they assert is one recognised in law. Otherwise definitions may be too restrictive to the extent of excluding people who would otherwise be in the contemplation of the legislature at the time of the enactment. Despite judicial pleas to Parliament to make its intentions clear, this is one area where it could safely be said that Parliament has allowed the judiciary to make law. Who an "aggrieved person" is in any one case depends on the interpretation of the courts. In *Buxton v Minister of Housing and Local Government*,[38] it was held that the phrase meant a person who had suffered a legal grievance in the sense of having had his rights under statute infringed. This case will be explored further below.[39] In Botswana, a victim of a crime was held to be an aggrieved person, and consequently could properly appeal against the decision of a statutory tribunal acquitting the accused.[40] This was a stock theft case and the appellant was the person whose beast had allegedly been stolen. The relevant provision read:

---

34 609 per Roper J. It is interesting to note that Roper J had a long association with the courts of Botswana; having been a judge of appeal of the Botswana Court of Appeal, Attorney-General for the High Commission Territories, and finally President of the Botswana Court of Appeal. See Otlhogile *A history of the higher courts of Botswana 1912–1900* (1994) 97–98. It can reasonably be assumed that he would have interpreted our s 14 in like manner.

35 *Wood v Odangwa Tribal Authority* 1975 2 SA 294 (A).

36 See eg Trade and Liquor Act Cap 43:02 s 65, Fauna Conservation Act Cap 38:01, s 44, and Apprenticeship and Industrial Training Act Cap 47:04 s 35.

37 See the authority quoted in fn16 above.

38 [1961] 1 QB 278.

39 See fns 49 and 50.

40 *Mutshegwa Busang v The State* 1982 1 BLR 10.

> "Any person aggrieved by an order or decision of a lower customary court . . . may appeal therefrom to a higher customary court, or, if there be no higher customary court, to the Customary Court of Appeal."[41]

The issue was whether the appellant was a "person aggrieved" within the terms of the Act. The matter went all the way to the Court of Appeal, where Maisels P relied on the observation of Lord Denning in *Attorney-General of Gambia v Njie*, where the latter said:

> "The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."[42]

It was held in that case that where professional misconduct by a legal practitioner was in issue, the Attorney-General had sufficient interest to institute legal proceedings against the practitioner concerned, as he represented the crown as the guardian of the public interest. In *Mutshegwa Busang v The State* the basis of the decision was that the appellant was a person aggrieved, since he was the owner of the beast allegedly stolen, and that he was interested in the matter to the extent that a decision convicting the accused could be accompanied by an order to return the beast to its owner.[43] Two observations may be made about the case. First, the prosecution in the case was conducted at the public instance and not by a private prosecutor. The position that appears to be confirmed by the decision is that the complainant, that is, the victim of a criminal offence, has a sufficient interest in the conduct of proceedings against the accused person by the state, and may challenge the decision of the tribunal before which proceedings are conducted, by way of appeal or review. Secondly, and this also came up in *Solomon v Magistrate, Pretoria*[44] referred to above, the aggrieved person or somebody with a "substantial and peculiar interest" must show some injury occasioned to him by a criminal act. The victim of a theft may readily fall within this category. But the position may be different where the victim of crime is not readily identifiable or ascertainable. For instance, where a person is accused of defrauding the government of a sum of money the victim may be said to be the taxpayers generally; or where the offence relates to corruption or treason, no individual may be singled out as having peculiarly suffered as a result of the commission of the offence. It is doubtful whether an individual can qualify as a private prosecutor or be said to be an aggrieved person in these instances. The *Mutshegwa* and *Solomon* cases cannot therefore be construed to have laid down general rules. They were decisions made in the context of their own peculiar circumstances. In *Solomon,* the interest of the prosecutor flows from the injury he suffers from the commission of a crime; in *Mutshegwa*, the complainant is an aggrieved person because he is a victim of a crime and may be entitled to compensation should such order be made following a conviction. For other offences affecting the public generally, and where the victim cannot be identified with reasonable certainty, it may be difficult to establish who has a substantial and peculiar interest or is an "aggrieved person".

---

41 Now s 41 of the Customary Courts Act Cap 04:05.
42 [1961] 2 All ER 504 511.
43 Criminal Procedure and Evidence Act Cap 08:02 s 18, then s 314.
44 *Supra* fns 33 and 34.

COMMON LAW

Legislative enactments conferring upon citizens the right to challenge official decisions in the courts do not identify with any particularity the persons who can exercise this right. Phrases have been used which are of a fairly general nature, the interpretation of which does not readily present itself from the terms of the statute – a tendency decried by the courts.[45] Statutes containing phrases like "person aggrieved" abound in Botswana.[46] The determination of who has standing in terms of particular legislation has been left to the courts. This also goes for litigation where standing does not necessarily arise from the terms of a statute. The law of standing is therefore predominently judge-made. This reality has prompted one scholar to write:

> "Standing is part of the law of judicial jurisdiction, that law which defines the role of the court in society and is, of all law, the most judge-made."[47]

This reality is quite evident from the discussion on statutory provisions above where cases featured quite prominently. The intention here is to look at a number of cases that have occupied the bench in Botswana, and to attempt to identify discernible trends in the judicial practice of the country, and then determine whether the attitude of the courts in Botswana has become more liberal over time.

The position taken by the courts in Botswana and in other jurisdictions in matters of *locus standi* has already been alluded to above.[48] It is that a private "individual" must sue on his own behalf, the right he seeks to enforce or the interest he seeks to protect must be available to him personally, or injury for which he claims redress must be sustained or apprehended by himself. He must be an "aggrieved person" having suffered some special injury or damage. Early attempts to interpret the phrase tended to be too restrictive, as a result of the application of technical rules of construction. No attempt was made to examine the particular mischief that the legislature sought to address. Instead, the tendency was simply to look at the terms of the statute and to determine whether a person was vested with some right before he could qualify as an "aggrieved person". This approach was epitomised in the English case of *Buxton v Minister of Housing and Local Government*.[49] Major Buxton, as a neighbour to land on which chalk operations were to be carried out, protested against the granting of permission for development in favour of adjoining land. His main concern was that as a pastoral farmer, the deposit of chalk dust (which an inspector at an inquiry found was highly likely to occur) on his land would be detrimental to his farming activities. This likelihood of interference was confirmed by the inspector's report. The case was decided on the basis that the determination of whether one could be aggrieved by the decision of the minister, depended on the existence of a statutory right.[50] Since a right of appeal to the minister was available only in the event of refusal of an application for development permission, or

---

45 See the authority cited in fn 16.
46 See the legislation cited in fn 17.
47 Vining *Legal identity* (1978) 1. See also *R v Inland Revenue Commissioners exp National Federation of Self-employed and Small Business Ltd* [1982] AC 617 639 per Lord Diplock.
48 See fns 4, 5, 6, 7, 8, 9 and 10.
49 [1961] 1 QB 278. See discussion above at fn 38.
50 *Ibid.*

where permission was granted subject to unacceptable terms, Major Buxton would have no right to appeal to the courts against the minister's grant of planning permission. In other words, a legal grievance, in the context of town and country planning law, could arise only if there was interference with a statutory right. This approach, with respect, is so restrictive as to ignore the application of other principles of law. In accordance with the maxim *generalia specialibus non derogant*, a general statute should not be interpreted so as to alter the specific provisions of an earlier statute or of the common law.[51] The judge should have determined whether the applicant had any right under common law which entitled him to free and uninterrupted user of his land. As Beadle CJ said in *Van Heerden v Queen's Hotel (Pty) Ltd*:

> "I cannot see how a statutory right can be regarded as more sacrosanct than a common law right ... I would regard them as identical, though a persuasive argument could be advanced that, as the rights of man are founded on the 'common law', and as the 'common law' is less subject to change than statutory law, which may vary from year to year according to the whim of a particular legislature, common law rights must be more jealously guarded than statutory law ones."[52]

Under English common law, an owner or occupier of land is liable for damage caused to a neighbour by the escape of a dangerous thing even in the absence of fault on his part.[53] Thus a neighbour in the position of Major Buxton clearly had rights under common law. However, reliance on the "good neighbour" principle enunciated in *Donogue v Stevenson*[54] by counsel for the applicant did not sway the judge. The activities taking place on the land adjoining Major Buxton's were highly likely to affect his farming activities in a negative way, and he therefore had sufficient interest in the matter, and was consequently an "aggrieved person" in terms of the law in question. The use of the words "any aggrieved person" and not "any applicant aggrieved" would appear to suggest that they did not limit the character of aggrieved persons to applicants for planning permission, but contemplated the inclusion of other people with rights under common law. Thus it is submitted that a legal grievance should entail something wider than interference with statutory rights. This argument is further supported by the presumption of statutory interpretation that the legislature is deemed to be acquainted with the general state of the law[55] and that no inference can be drawn that a statute intends to alter the common law unless the statute expressly says that is the intention of the legislature or that intention arises by necessary implication.[56] The position as stated in *Buxton*'s case has since been departed from[57] to allow objectors with sound legal arguments to be heard by a court of law, a move which is, it is submitted, more in accordance with judicial logic than the previous

51 See Cockram *Interpretation of statutes* (1987) 98.

52 1973 2 SA 14 (RAD) 23.

53 *Rylands v Fletcher* [1861–73] All ER 1, (1868) LR 3 HL 330.

54 [1932] AC 562.

55 *Terblanche v SA Eagle Insurance Co Ltd* 1983 2 SA 501 (N).

56 *Casserlay v Stubbs* 1916 TPD 310; *National Assistance Board v Wilkinson* [1952] 1 QB 648 661 per Devlin J (as he then was).

57 *O'Neil v Otago Area Health Board* [1982] 1 NZLR 734; see fn 133 above, *R v Inland Revenue Commissioners Exp National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617; Robertson, "'Persons Aggrieved' and the *locus standi* problem: a territorial approach" 1971 *PL* 169.

one. The position in Botswana has not been as restrictive as it perhaps was in *Buxton*'s case, as will more fully appear below. In *Tsogang Investments (Pty) Ltd t/a Tsogang Supermarket v Phoenix Investments (Pty) Ltd t/a Spar Supermarket*,[58] the issue was whether a competitor was an "aggrieved person" for purposes of the Trading Act, which provided:

> "Any person aggrieved by any decision of a licensing authority may appeal to the Minister who may confirm, vary or reverse the decision of such authority . . ."[59]

The respondent (hereinafter "Phoenix") applied to the Gaborone Town Council for a general dealer's licence and a fresh produce licence. The council rejected the application, whereupon Phoenix lodged an appeal to the minister. The applicant (hereinafter "Tsogang Investments") learnt of the appeal by Phoenix and wrote to the minister objecting to the appeal. The minister dismissed the appeal. Phoenix thereafter made further representations to the minister, who after re-considering the appeal, allowed it on the ground that he had made a mistake of law in arriving at his first decision. Tsogang Investments then applied to the High Court for an order setting aside the minister's decision upholding Phoenix's appeal. Phoenix contended that Tsogang Investments had no *locus standi* to bring the application. Lawrence AJ, before whom the matter came, started by determining the purpose for which the Trading Act, and its successor, the Trade and Liquor Act, were enacted. He observed that the Acts were enacted to regulate the licensing of trade and related matters.[60] In the view of the judge, the Acts were passed not only for the benefit of the public but for that of traders in general.[61] The main argument by Tsogang Investments was that the minister had applied the provisions of the wrong Act (Trade and Liquor Act) which had not yet come into force at the time) in considering the appeal by Phoenix, and that granting the appeal would mean that Phoenix could then trade illegally and unlawfully. On the interest of a competitor, the judge said:

> "Trading contrary to the provisions of either of the Acts would cause damage to a person in trade who complies with the injunctions of the statutes. If a trader who contravenes the statute is trading unlawfully and as that unlawful competition will injure a rival trader, the rival trader is entitled to complain and ask for the protection of the law. The applicant, in my view, has a right to ensure that the trading statutes, which are partly passed for his benefit, are complied with and has *locus standi* to seek to enforce that right at common law."[62]

This accords with the position in South Africa, another Roman-Dutch law jurisdiction. In *Patz v Green and Co*,[63] an application was made by a trader for an order restraining a competitor on the grounds that the competitor was carrying on trade in a manner explicitly prohibited by statute. The court observed:

> "For, granted that the action of the respondents is prohibited by law, and that the applicant is injuriously affected thereby in his business, I am of opinion that a legal right of the applicants' has been infringed – the right, viz, to carry on his trade without wrongful interference from others."[64]

---

58 [1989] BLR 512.
59 Cap 43:02 s 44; now s 65, Trade and Liquor Act Cap 43:02 (1986).
60 519.
61 *Ibid.*
62 *Ibid* C–D.
63 1907 TS 427.
64 436 per Solomon J.

Solomon J, while recognising that grave differences of opinion may arise as to what constitutes wrongful interference with trade, could not conceive of any difference of opinion that could arise upon the point that interference with trade is wrongful, when it is caused by competition which is expressly prohibited by law.[65] He relied on the words of the Law Lords in *Allen v Flood* where Lord Shand, after saying that a trader has a right to trade without hindrance, held:

> "That right is subject to the right of others to trade also and to subject him to competition – competition which is in itself lawful, and which cannot be complained of when no unlawful means have been employed."[66]

Thus the position in Botswana relating to the *locus standi* of a competitor in trade accords with that obtaining under South African and English law. Lawrence AJ took the view that the use of the phrase "any aggrieved person" indicates that it is not only the applicant for a licence or any objector before the licensing authority who may appeal, but anyone who has a right that may be infringed by a wrong decision of the licensing authority.[67] This right does not have to be statutory; it may arise from other sources such as the common law. Since the statute was passed for the benefit of the public and traders in general and since Tsogang Investments was a trader and direct competitor of Phoenix, the former had *locus standi* to challenge the grant of a trading licence to the latter, especially where the grant of such licence was contrary to law. The implication of this approach is that mere membership of a class of persons protected by a statutory provision is sufficient on its own to invest in a member the requisite *locus standi* to challenge anything done contrary to that statutory provision. There is a presumption that the applicant is damnified. This point will be illuminated further below in the context of the discussion of public rights *vis-à-vis* private rights.[68]

The other interesting case is *Attorney-General v Unity Dow*.[69] The respondent, a citizen of Botswana, married Peter Dow, a citizen of the United States of America resident in Botswana, in 1984. Prior to their marriage, a child was born to them in 1979. Two other children were born after the marriage. The matter concerned citizenship of the two children born after the marriage. The Citizenship Act[70] of 1984 provides as follows in sections 4 and 5:

> "4(1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth –
>
> (a) his father was a citizen of Botswana; or
>
> (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana
>
> 5(1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth –
>
> (a) his father was a citizen of Botswana;
>
> (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana."

---

65 *Ibid.*
66 [1898] AC 1 166.
67 [1989] BLR 512 519.
68 See fns 117–134 below.
69 Court of Appeal, Civ App No 4/91 See also 1992 LRC 623.
70 Cap 01:01.

The respondent claimed that sections 4 and 5 of the Citizenship Act offended against section 3(a) of the Constitution of Botswana[71] in that they discriminated between Botswanan women married to alien men on the one hand, and Botswanan men married to alien women on the other. The discriminatory effect of the Citizenship Act, as contended by the respondent, was captured in paragraphs 13 and 14 of her founding affidavit which read as follows:

> "13. I am prejudice[d] by Section 4(1) of the Citizenship Act by reason of my being female from passing citizenship to my two children . . .
>
> 14. I am precluded by the discriminatory effect of the said law in that my said children are aliens in the land of mine and their birth and thus enjoy limited rights and legal protections."

The respondent argued that the limitations and disabilities under which her children were placed by the provisions of the Citizenship Act interfered with her freedom of movement protected under the Constitution.[72] It was contended by the appellant that the respondent had no *locus standi* in that the alleged contravention of the Constitution by the Citizenship Act affected the two children and not the respondent, the more so because she was not bringing proceedings on behalf of the children but on her own behalf. The Constitution provides:

> "If any person alleges that any of the provisions of Sections 3 to 16 (inclusive) of this constitution has been, is being or is likely to be contravened *in relation to him* . . . that person may apply to the High Court for redress."[73]

A non-citizen of Botswana may reside in Botswana for a limited period and under certain conditions laid down in the residence permit issued by the state authority. The permit may be revoked even before expiry, though this is subject to proper exercise of discretion and reasonableness.[74] Since the two children born after the marriage were not Botswanan citizens, they were subjected to disabilities by the Citizenship Act. In consequence of these disabilities, so the respondent argued, her own freedom of movement protected by the Constitution was correspondingly likely to be infringed and the alleged contravention of the Constitution by the Citizenship Act was "in relation to her" thus giving her the *locus standi* to challenge the validity of the Act. The appellant had argued that the respondent's relationship with her children was entirely emotional and thus could not found a legal right, a submission that did not find favour with the court.[75] It was argued further that as a mother she had no responsibility towards the children, since she was not the legal guardian of the children.[76]

Horwitz J, before whom the matter came in the High Court, held that the respondent had *locus standi* to challenge the validity of the Citizenship Act and

---

71 This is essentially the Botswanan Bill of Rights, which protect the fundamental rights and freedoms of the individual and outlaws discrimination on several grounds, including sex.

72 S 14(1) provides: "No person shall be deprived of his freedom of movement, and for purposes of this Section the said freedom means the right to move freely throughout Botswana, the right to reside in any part of Botswana, the right to enter Botswana and immunity from expulsion from Botswana."

73 S 18(1) (emphasis added).

74 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

75 Per Amissah JP 659.

76 In Roman-Dutch law, to which Botswana subscribes, the legal guardian of children born into the marriage is the father. See Cronje *The South African law of persons and family law* (1986) 71; *Dhanabakium v Subranianian* 1943 AD 160.

granted the relief prayed for.[77] The Attorney-General appealed, upon which the Court of Appeal accepted the submission by the Attorney-General that the respondent had no *locus standi* with respect to section 5, as that section provides for citizenship of children born outside Botswana. It did not apply to any of the respondent's children, since they were all born in Botswana. The possibility of the respondent giving birth at some future date to children abroad was too remote to form a basis for a challenge to section 5.[78] The Judge President pointed out, however, without making any final judgment, that the objections to section 4 could well apply to section 5.[79] This is consistent with the position the courts have always adopted that they should be concerned with the settlement of concrete disputes and not hypothetical cases. The words of Innes CJ in *Geldenhuys and Neethling v Beuthin* are very instructive:

> "After all, courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."[80]

In the Zimbabwean case of the *United Parties v Minister of Justice, Legal and Parliamentary Affairs* it was said that a realistic or appreciable probability – and not merely a reasonable possibility – of a dispute must exist to create the requisite basis for a constitutional challenge.[81] In the *Dow* case, though the possibility of the respondent's giving birth to a child abroad could not be ruled out, a sufficient basis had not been laid before the court, either on the affidavits or otherwise, which could give rise to an appreciable probability that the event would occur. The court therefore had to deal with the alleged interference with rights and the alleged contravention of the Constitution on the basis of the implications arising from factual material laid before the court. It is therefore submitted that the court was right in finding an absence of *locus standi* in respect of section 5.

As regards section 4, the Judge President recalled that the Constitution provides:

> "5(1) No person shall be deprived of his personal liberty save as may be authorised by law in the following cases, that is to say –
>
> .....
>
> (f) under order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of 18 years."

The judge observed that a parent, including the mother, has some responsibility towards the child's education and welfare and that he or she can control what happens to the child.[82] During the period of infancy, the movements of the parents, and in particular the mother, are to a large extent determined by the child.[83] Since the immigration authorities could revoke or decide not to renew the residence permits of the two children, it would mean that the children have to leave the country. The respondent's contention was therefore that, should this

77 High Court Misca No 124/90.
78 Amissah JP 662.
79 *Ibid.*
80 1918 AD 426 441.
81 Fn 15.
82 60.
83 *Ibid.*

occur, she would have to leave the country in the company of her children towards whom she had parental responsibilities. This would interfere with her freedom of movement notwithstanding that she is a citizen of Botswana. Section 4 of the Citizenship Act therefore contravened the constitution *in relation to herself*.[84] Amissah JP, who delivered the majority judgment[85] said on this aspect of the case:

> "It is totally unrealistic to think that you could permanently keep the child out of Botswana and yet by that not interfere with the freedom of movement of the mother. When the freedom of the mother to enter Botswana to live and to leave when she wishes is indirectly controlled by the location of the child, excluding the child from Botswana is in effect excluding the mother from Botswana. If the exclusion is the result of a determination of the child's citizenship which is wrong, surely this would amount to an interference with, and therefore an infringement of, the mother's freedom of movement."[86]

The same reasoning has been extended to the position of alien husbands in Zimbabwe, in a case which relied heavily on the words of Amissah JP above.[87] Bizos JA was even more emphatic, as he believed that whatever may aggrieve the children directly affects the mother. The manner in which the movement of alien children affects or interferes with the freedom of movement of a citizen parent is succinctly captured in the words of Amissah JP above, and needs no further elaboration. Suffice it to say that this position is consistent with established authority and common sense. The nub of the appellant's case was that sections 4 and 5 of the Citizenship Act were discriminatory in effect and so offended against the Constitution in that they gave preferential treatment to citizen men married to aliens over citizen women married to alien men, and secondly, that the limitations and disabilities placed on her children interfered with her freedom of movement. If the respondent had been held to lack *locus standi*, the father would not have had the *locus standi* to bring proceedings and such an important matter would not have been adjudicated upon. Consequently, those who suffered as a result of the offending effect of sections 4 and 5 of the Citizenship Act would be left without a remedy. It was held in *R v Inspectorate of Pollution, ex parte Greenpeace Ltd (No 2)*[88] that the likely absence of any other responsible challenges, the seriousness of the issues raised and the nature of the relief sought are factors that should weigh heavily in the mind of the court before it decides to dismiss a case for want of *locus standi*. The relief sought by the respondent was a declaration (which is a less stringent remedy than a mandamus) that the Citizenship Act was unconstitutional, and that the issue concerned the constitutionality of parliamentary legislation, which had implications on the protection of fundamental rights and freedoms guaranteed by the Constitution. A matter which alleges a contravention of the provisions of the Constitution, which

---

84 S 18(1) Constitution.

85 Concurred in by Aguda and Bizos JJA. Of the two dissenting judges of appeal, Schreiner JA was of the view that the respondent had *locus standi* because of the nature of the claim. For him, if at the end of the case the respondent had not shown a contravention (actual or potential) of the Constitution, he would regard it rather as a failure to prove her case than absence of a right to bring it (688). Puckrin JA dismissed the case on constitutional considerations rather than *locus standi*, which he did not consider at all!

86 660.

87 See *Rattigan v Chief Immigration, Zimbabwe* 1995 2 SA 182 (ZS).

88 [1994] 4 All ER 329.

provides the basis for the existence of a democratic polity, should be regarded by a court of law, as the custodian of the constitution, as worthy of determination and should not be lightly dismissed on the basis of technical rules.[89]

The case of *Thorson v Attorney-General of Canada*[90] underscores the proposition that where the issue raised is justiciable and reflects a concern for constitutional issues, the court should normally hear the applicant. While the court has a discretion ultimately to decide whether the applicant has *locus standi*, it has been said that "where issues of constitutional validity and fundamental rights are concerned, the court should favourably exercise its discretion".[91]

The respondent therefore had the *locus standi* to challenge the constitutionality or validity of the offending sections of the Citizenship Act.

THE *BOTSWANA NATIONAL FRONT* CASE[92]

On 26 August 1994, the President of Botswana dissolved Parliament in the exercise of powers vested in him by the Constitution.[93] A writ of election was issued which indicated that a general election was scheduled for 15 October 1994. General elections are conducted in accordance with the provisions of the Electoral Act[94] which requires the preparation of election rolls for registered voters. The Act specifically provides:

> "If application for registration is made during a general registration period . . . the registration officer shall determine whether or not the applicant is entitled to registration . . . and, if satisfied that he is, shall –
>
> (a) complete a voter's registration record card in Form A in relation to the applicant.
>
> (b) require the applicant to make the declaration set out in that Form;
>
> (c) register the applicant as a voter . . . by completing a voter's registration card in Form B in relation to the applicant, and giving it to the applicant; . . ."

In *Botswana National Front v Attorney-General of Botswana*,[95] the issue of *locus standi* arose only in regard to the first, fourth and fifth applicants. The application sought an order declaring, *inter alia*, (i) that the election rolls compiled by the Supervisor of Elections before the general election were null and void and should be struck down; and (ii) that the Supervisor of Elections be ordered to put in place a method of registration and voting for all citizens outside Botswana. The *casus belli* with respect to the first prayer was an amended Form A which had been used by the Elections Office, which in addition to the statutory requirements alluded to above required, *inter alia*, the National Registration number. The Chief Justice had no difficulty in holding that by using the amended form, the supervisor was contravening the Electoral Act and that any such purported amendment was null and void and of no effect.[96] This was based on

89 *Supra* fn 8.
90 *Ibid.*
91 *Botswana National Front v Attorney-General of Botswana* Misca 277/94 (unreported) 6 per Mokama CJ.
92 *Supra.*
93 S 91(3).
94 Cap 02:07.
95 *Supra.*
96 7.

the reasoning that Form A as prescribed by the Act was in a schedule which formed part of an Act of Parliament and an Act of Parliament or its schedule could only be amended by Parliament itself. The amendment by the Supervisor of Elections was therefore *ultra vires* the Act, since he had not been given express power so to do by Parliament. Nor did such power arise by necessary implication, a submission which the respondent properly conceded. It was alleged that the use of the amended form barred certain potential voters from voting, especially those who had no national registration numbers.

The first applicant, the Botswana National Front, is a political party and the only opposition party with elected members in the National Assembly. It was submitted by the respondent that, since it was a political party and not a natural person, the first applicant could not be a voter and could impugn the validity of the election roll only if it alleged a breach of a legal principle prejudicial to itself. It could not, as the submission proceeded, bring an application on behalf of a voter, since the voter was the only person who could assert a right to vote or register or the protection of this right in court. The court held that the first applicant did have *locus standi* to challenge the validity of the election roll. The basis of this conclusion appears from the words of the Chief Justice and it is considered apposite to reproduce his reasoning in respect of this issue. He said:

> "The Botswana National Front is a political party, and like all political parties, depends for its very existence on its followers and supporters. The greater the number of its followers and supporters, the better are its chances of forming a government of the country. Indeed the supporters of a political party are its main assets and the means by which, through the ballot it can achieve power to govern. Unless such supporters are registered voters, such party will always stay in the wilderness, millions of miles away from achieving power. Political parties must of necessity have a vested interest in the smooth running and the proper administration and application of the constitution and the Electoral Act and related legislation."[97]

The Chief Justice took the view that since the main objective of every political party was to become the government at some point in time, an objective to be achieved through the ballot, each political party was specially and directly affected by the electoral process, and as such had the *locus standi* to enforce constitutional provisions, the Electoral Act and other legislation impacting on the electoral process.[98]

While it is submitted that the views taken, the reasoning of and the conclusions reached by the Chief Justice are correct in the light of the allegations raised and the nature of the relief sought in the circumstances of the *BNF* (a acronym for the "Botswana National Front") case, they should not be taken to be laying down a general rule. Much will depend on the nature of the application and relief sought. The Supreme Court of Zimbabwe has held that a political party lacked the *locus standi* to challenge the constitutionality of the Electoral Act because the alleged infringement was not *in relation to itself* but to particular voters.[99] It

97 5.

98 6.

99 S 24(1) of the Constitution of Zimbabwe is in the same terms as s 18(1) of the Constitution of Botswana. See the discussion above and the words of Gubbay CJ in *United Parties v Minister of Justice, Legal and Parliamentary Affairs,* Civ App No 229/95 (fn 15). The applicant sought an order declaring that various sections of the Electoral Act con-

continued on next page

was held that a political party could not be a claimant, since it could not complete a claim form, nor could it be registered on the voters roll. The application could be brought by a voter. The statement by Mokama CJ in the *Botswana National Front* case that "political parties must of necessity have a vested interest in the smooth running and the proper administration and application of the constitution and the Electoral Act and related legislation" must be read in context. That a political party depends for its survival on voters is a truism and much may be said of the interest a political party has in matters concerning voters. Whether this interest is sufficient to invest in a political party the requisite *locus standi* depends on a number of factors, for example, the nature of the application and relief sought,[100] likely absence of any other responsible challenger,[101] the nature of legislation in issue[102] and the *Botswana National Front* case.

THE *MOLOPO FARMS* CASE

On 10 July 1996, the government of Botswana published a notice of "intention to acquire property, under the hand of the Minister of Local Government, Lands and Housing". The property to be acquired was a farm called the Molopo Ranch No 1, situate in the Molopo District (hence "*Molopo Farms* case") together with improvements including livestock. This was to be in terms of the Acquisition of Property Act.[103] The owner of the farm was a company called the Molopo Ranch (Pty) Ltd, in which all the shares were beneficially owned by the Commonwealth Development Corporation (hereinafter "CDC"), a statutory corporation incorporated under the laws of England. The CDC decided in 1995 to dispose of the farm and all the livestock and publicly called for tenders. The notice calling for tenderers indicated that any agreement to purchase the farm would have to be finalised on or before 31 July 1996. CDC would then sell all its shares in the company (Molopo Ranch (Pty) Ltd) so that the successful tenderer would become the sole shareholder in the company, and being the sole shareholder in the company, control the farm and the livestock on it. The respondents' joint tender was successful. They then paid a deposit of P1 million as per the tender conditions to CDC, out of the P13 million agreed as the purchase price. Arrangements and discussions to finalise the details of the purchase and the signing of the agreement started. No agreement had been signed between CDC and the respondents by 10 July 1996, the date of publication of the notice of compulsory acquisition. The respondents challenged the legality of the proposed acquisition on a number of grounds. It is not necessary for present purposes to discuss the nature of these grounds.

The Acquisition of Property Act provides:

> "If any person holding or claiming any interest or title in any property described under Section 5 or 7 disputes the legality of the proposed acquisition or entry into

---

travened s 20(1) of the Constitution, which protects freedom of expression. S 25(1) of the Electoral Act referred to a claimant and a registered voter. The Act defined "claimant" as a person who had completed a claim form or submitted a written application to be registered as a voter. Voter meant a person entitled to vote and registered on a voters roll.

100 *R v Inland Revenue Commissioner Exp National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 322.

101 *Greenpeace* case (fn 85).

102 Cf the *United Party*'s case.

103 Cap 32:10.

possession of such property he may apply to the High Court to determine the same."[104]

The application was brought before the High Court presided over by Nganunu J (as he then was) in *Bruwer and Strumpher v The President of the Republic of Botswana*.[105] It was submitted by the respondents that the applicants had no *locus standi* as they did not come within the purview of section 9 of the Acquisition of Property Act. Nganunu J held that the applicants did have *locus standi* and granted the relief(s) prayed for. The government appealed in the *President of the Republic of Botswana v Bruwer and Strumpher*.[106] The Court of Appeal reversed the decision of Nganunu J but agreed that the respondents had the *locus standi* to challenge the legality of the proposed acquisition. It is considered appropriate here to discuss the judgments in the High Court and the Court of Appeal simultaneously. The reason is two-fold: first, the High Court judgment is more complicated than that of the Court of Appeal; and secondly, the Court of Appeal agreed with the reasoning of the High Court on the *locus standi* issue in any event. It was argued before Nganunu J that the property sought to be acquired by the government was the ranch and livestock, and not the shares in the company which had control over the ranch. The relationship between CDC and the farmers (Bruwer and Strumpher) was that of a proposed seller and buyer respectively of the shares, and therefore, as the submission proceeded, the farmers, as potential but not confirmed buyers, had an interest in the purchase of the shares only. The shares had not been taken over by the government, and the farmers' interest, it was contended, was not sufficient to entitle the farmers to challenge the acquisition under section 9 of the Acquisition of Property Act.

Nganunu J observed that in terms of section 9 of the Acquisition of Property Act three classes of person could challenge the legality of any acquisition, namely: any person who (i) holds any interest, (ii) claims any interest or (iii) holds title, in the property to be acquired. He accepted that it is the acquired property that has relevance, so that a litigant's interest or claim must ultimately relate to it.[107] What had to be determined was the nature of the interest or claim in the property that entitled the holder to dispute the legality of the acquisition. In Botswana, protection against deprivation of property is one of the fundamental rights and freedoms guaranteed by the Constitution. The Constitution provides:

"(1) No property of any description shall be compulsorily taken possession of, and no *interest* in or *right over property* of the description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say –

(a) the taking of possession or acquisition is necessary or expedient

(i) in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement; . . .

(b) provision is made by a law applicable to that taking of possession or acquisition – . . .

(iii) securing to any person having an *interest* in or *right over the property* a right of access to the High Court, either direct or on appeal from any other authority, for the determination of his *interest* or *right*, the legality

104 S 9.
105 Misca No 478/96.
106 Civil Appeal No 13 of 1997.
107 Misca No 478/96 9.

> of the taking of possession or acquisition of the property, *interest* or *right*, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation."[108]

Three points must be made about the provisions of section 8 of the Constitution. First, compulsory acquisition of any property, interest in or right over property of any description, is prohibited unless it is for a public purpose as described in subparagraphs (i)–(iii). Secondly, the acquisition is prohibited if there was no statute providing for access to the High Court to any person who asserts a right or interest in the property to challenge the legality of the acquisition. The Acquisition of Property Act meets this requirement. Thirdly, except in situations where the public purpose exception applies, the Constitution outlaws the taking of (a) property of any description; (b) any interest in property; and (c) any right over property. The Acquisition of Property Act[109] gives a right of access to any person holding or claiming any interest or title in any property acquired. The government argued that, since the Act is the vehicle for the enforcement and implementation of the rights and protection guaranteed by the Constitution, the Constitution excludes from its protection a person holding or claiming an interest or title in the land. Nganunu J observed with respect to this submission:

> "In my view the mere compulsory acquisition of property should not mean that the class or range of protected properties, rights or interests have been whittled or narrowed down in the Acquisition Act [sic] as compared to those protected under Section 8 of the constitution, unless there were clear words to that effect."[110]

He took the view that a wide range of interests in property should be considered protected under section 9 of the Act as are covered by section 8(1) of the Constitution. For him, "any interest" in the property taken includes an interest of a proprietory or pecuniary nature, which, if not immediately held or claimed, "is nevertheless so associated with that property that whatever happens to that property has a material effect on the interest concerned".[111] As regards the substance of the farmers' interest, it was accepted by the judge that what the farmers bargained for were the shares of CDC in the company that controlled the ranch and, strictly speaking, not the farm which was the subject of the acquisition. However, there were certain factors that inextricably linked the farm and shares together. These can be summarised as follows: though the farmers were to buy the shares, their interest ultimately lay in the ranch and its livestock. If they obtained the shares, they would become the indirect owners of the ranch and the livestock. They intended to buy the shares in order to own the company, and by extension, the ranch. The farmers had emerged as the highest bidder, had paid a deposit and expected to have the agreement of sale concluded. It would appear that the purchase would have been completed as a matter of course, since the deposit of P1 million, which was non-refundable, had been accepted from the farmers as the highest bidder. Prior to the institution of the review proceedings, the farmers had obtained leave from the High Court to sue CDC by edictal citation for the transfer of the shares (which were attached to found or confirm jurisdiction).[112] Any threatened or actual acquisition of the ranch would affect the farmers' interest substantially. Their interest, so concluded Nganunu J, was

---

108 S 8(1) (emphasis added).
109 Cap 32:10 s 9.
110 12.
111 13.
112 The action was registered as CC 1443/96. See respondents' heads of argument before the Court of Appeal 32.

such as was covered by section 9 of the Act. In the Court of Appeal, Amissah JP, while admitting that the Constitution did not require the law providing for compulsory acquisition to extend its protection beyond persons actually having an interest or title to those only claiming an interest or title, did not find any prohibition against the extension. He held that the demands of the Constitution were only minimum standards which the acquisition law must satisfy.[113] As long as the law satisfied the minimum requirement, it need not restrict the class of persons protected to those expressly provided for by the Constitution.

This approach is disturbing in one respect. It suggests that a law implementing a provision of the Constitution need only satisfy the expressed objects of that provision, beyond that the legislature may provide for any matter, provided of course that this is not outlawed. The limitations that attach to legislative power in the exercise of its function to enact laws implementing constitutional provisions are unfortunately not set out in the judgment. Certainly the legislature cannot be free to provide for any matter it wishes. Regard should be had to the objects and purposes of the constitutional provision. It would not be enough to suggest that it suffices if the constitutional minimum requirements are satisfied. Accordingly, the statement by the Judge President would be so open-textured as to be imprecise. It is submitted that the interest could have been found to arise on the basis of the factors spelt out by the judge *a quo*, which interest was sufficient to bring the farmers within the category of persons protected under section 9 of the Act. A submission was made that whatever interest the farmers may have could only be one relating to the shares of the company, not the ranch. That interest, it was contended, belonged to the company and not the shareholder. The farmers only had a *spes* of acquiring the shares. While the distinction is always made between the interest of the shareholder and the company, and is accepted in law,[114] "it may lead to extreme results".[115] However, the application of this principle of corporate personality must always be diluted by the facts on the ground. The facts spelt out by Nganunu J and Aguda JA[116] which connected the farmers' interest to their interest in the purchase of the ranch went a long way towards bringing out the real purpose for the proposed agreement: to own and control the ranch and its contents. Any argument based on the corporate personality would be too artificial in the circumstances, and was rightly dismissed.

PUBLIC RIGHTS v PRIVATE RIGHTS

In general, it is not open to an individual to invoke the jurisdiction of a court to challenge the application of legislation or its constitutionality, or to sue for unlawful administrative action, when that individual is not either directly affected by the legislation or administrative action or is not threatened by sanctions for an alleged violation of the legislation. This is the position under English common law,[117] American law[118] and Roman-Dutch law.[119] The individual must

113 13.

114 See *Macaura v Northern Assurance Co* [1925] AC 619, and the Canadian Case of *Wandlyn Motels Ltd v Commerce General Insurance Co* (1970) 12 DLR (3d) 605.

115 Farrar *Farrar's company law* 72–73.

116 52–57.

117 *Gouriet v Union of Post Office Workers* 1978 AC 435.

118 *Frothingham v Mellow, Secretary of the Treasury, et al* 262 US 447 (1923); *Corpus Juris Secundum* Vol 16 (1984) para 65.

119 *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 3 SA 369 (A).

show injury to himself which is real and apprehended as opposed to a hypothetical question. This, as has been said from time immemorial, is to keep at bay some meddlesome interlopers who are bent on involving themselves in matters not concerning them. It is also to limit the proliferation of litigation without legal foundation, that is, to avoid opening the "floodgates" to litigation without prospects of success. An individual can therefore only vindicate private rights, to the exclusion of public rights, which in the majority of legal systems have been made the prerogative of the Attorney-General.[120]

The *actio popularis* of Roman law which gave an individual a right of action in matters of public interest has not been embraced in many legal systems. In English law, as in the majority of the common law systems, the position is that laid down in *Boyce v Paddington Borough Council*[121] where it was held that where public rights are concerned, a private individual may sue without joining the Attorney-General in two instances: (a) where the interference with the public right is such that some private right of his is at the same time interfered with; and (b) where no private right is interfered with, but the private individual suffers some special damage peculiar to himself as a result of the interference with the public right. The first instance would clearly reflect an individual action to vindicate his own private right and cannot strictly speaking exemplify a case where an individual has *locus standi* in respect of public rights. As regards the second, English law proceeds on the principle that in respect of an infringement of a public right, no member of the public can sue individually, unless he has some special interest or sustains some special damage greater than that enjoyed or sustained by ordinary members of the public. The hardship which would result from a general application of this rule is obviated by the procedure which recognises the right of the Attorney-General to intervene in cases in which public rights are threatened, and in which no private person has the special interest entitling him to sue.[122] Roman-Dutch law proceeds on a more liberal basis, via the procedure which recognises the right of the Attorney-General to intervene in cases in which public rights are threatened, and in which no private person has standing. There is no requirement that the interest of the person suing should be greater or more special than that of other members of the public. Provided only that some right he was personally entitled to exercise was interfered with, or that he was personally injured by the act complained of, it makes no difference whether his right or injury is greater than that of other members of the public.[123] He has *locus standi* to seek redress in the courts. The different considerations applying in relation to capacity to vindicate private rights as against public rights may yield some undesirable results in what may be termed constitutional cases. There is little trouble in cases where an individual alleges constitutional infringements in relation to himself. Difficulties may arise where the injury is not particularly discernible in respect of the particular individual suing or where the class alleged to have suffered damage is not readily ascertainable. The position of the courts has been to entertain a matter where constitutional provisions have been alleged to have been violated even in the absence of

120 *Boyce v Paddington Borough Council* [1903] 1 Ch 109. See also Johnson "*Locus standi* in constitutional cases after Thorson" 1975 *Public Law* 137.
121 [1903] 1 ch 109.
122 *Dalrymple v Colonial Treas* 1910 TS 372.
123 *Ibid.*

special harm to the person complaining. The Supreme Court of Canada has determined that a taxpayer may challenge the constitutional validity of an Act of Parliament in his capacity as a taxpayer.[124] The court based its decision on the nature of the legislation impugned and the justiciability of the matter, and factors such as the fact that the legislation is not of a regulatory nature, but declaratory or directory, creates no offences and imposes no penalties, but does involve expenditure. The court was of the view that where all members of the public alike are affected by legislation and no person or class of persons has any particular interest in the matter, and where the legislation is not regulatory in nature but declaratory or directory and creates no offences and imposes no penalties, but does involve the expenditure of public funds, the court has a discretion to allow an action by an ordinary taxpayer to impugn the validity of the legislation.[125] In the English case of *R v HM Treasury, Ex parte Smedley*,[126] the Treasury wished to pay out some money from the consolidated fund to the European Community without seeking the authority of Parliament. Instead, the Treasury proposed to operate a special procedure involving the laying of a draft order-in-council before Parliament, which, if approved by affirmative resolution of both Houses, would entitle the Treasury to make payment. Smedley, a taxpayer, objected to the course the Treasury wanted to take and instituted proceedings to review it. The court said the following about the nature of the challenge:

> "[I]t raises a serious question as to the powers of her Majesty in Council to make an order which would be automatically followed by Expenditure from the Consolidated fund ... I cannot think the right to raise the question by way of judicial review belongs to the Attorney-General alone."[127]

This is a question going to the constitutionality of the exercise of functions by the executive in accessing the consolidated fund, and an ordinary taxpayer was held legitimately to have questioned its legality. Similarly, in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg*, it was held that the applicant had standing to bring proceedings because of his sincere concern for constitutional issues.[128] This relaxation in approach would seem to revive the *actio popularis* and has prompted some prominent scholars to opine that in Britain the *actio popularis* is now allowed in "suitable cases".[129] The position has unfortunately been different in the United States of America, where the Supreme Court still insists that an applicant for review must have personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the respondent. In *Valley Forge Christian College v Americans United for Separation of Church and State*,[130] it was held that a non-profit organisation and its employees committed to the constitutional principle of separation of church and state had no standing to challenge, as violative of the establishment clause of the First Amendment, the conveyance of surplus property under the

---

124 *Thorson v Attorney-General of Canada* (1975) 43 DLR (3d) 1.

125 *Ibid*; see also Peiris "The doctrine of *locus standi* in commonwealth administrative law" 1983 *Public Law* 52 75.

126 [1985] 1 All ER 589.

127 *Ibid* per Slade LJ.

128 (1993) QB 552, 561–562.

129 Wade and Forsyth *Administrative law* (1996) 712; see also Dingake *Administrative law in Botswana; cases, materials and commentaries* (1996) 327.

130 454 US 464 (1982), 70 L Ed 2d 700.

Federal Property and Administrative Services Act of 1949, having suffered no special interest or peculiar damage. In Roman-Dutch law, the position is that depicted by Rumpff CJ, who after analysing the proposition that the *actio popularis* does not apply in Roman-Dutch law said, in *Wood v Odangwa Tribal Authority*:

> "Nevertheless, I think it follows from what I have said above, that although the *actiones populares* generally have become obsolete in the sense that a person is not entitled 'to protect the rights of the public', or 'champion the cause of the people' it does not mean that when the liberty of a person is at stake, the interest of the person who applies for the interdict *de libero homine exhibendo* should be narrowly construed. On the contrary, in my view it should be widely construed because illegal deprivation of liberty is a threat to the very foundation of a society based on law and order."[131]

It is not clear whether the chief justice was referring to a case of the liberty of an individual only. It certainly does not suggest that the illegal deprivation of liberty is the only "threat to the very foundation of a society based on law and order". Once the very foundation of society is threatened, then an individual has the capacity to bring proceedings to challenge the threat in a court of law. To this extent, the traditional technical rules of *locus standi* will be relaxed.

In Botswana, this position was recognised in the *Unity Dow* case referred to above. Though it was a case concerning a challenge to the constitutional validity of an Act of Parliament, *locus standi* could still be and was indeed, found even on the narrow approach of "harm to oneself" because the applicant was able to show how the limitations and disabilities imposed on the children by the Citizenship Act impacted on her own freedom of movement. However, Amissah JP made a weighty statement to the effect that

> "where a person comes requesting the aid of the courts to enforce a constitutional right, therefore, the question which has to be asked in order that the courts might listen to the merits of the case is whether he makes the required allegation with reasonable foundation. If that is shown the courts ought to hear him. Any more rigid test would deny persons their rights on some purely technical grounds".[132]

This is an appeal to a liberal approach to the question of *locus standi.* Requiring a "reasonable foundation" for a constitutional challenge entitles the individual to be heard by the courts. As the Constitution is the basis of the existence and governance of a democratic society, and embodies the will and aspirations of a society, a person who seeks to impugn the validity of an Act of Parliament should not lightly be turned away by the courts on the basis of technical, narrow and rigid rules derived from the common law, even where the injury complained of is not peculiar to himself. The liberal approach was cemented in the *Molopo Farms* case (*supra*) where Aguda JA referred to the view expressed by Tipping J in the New Zealand case of *O'Neil v Otago Area Health Board*, where the latter said:

> "I respectfully agree with the liberalising trend. It is appropriate in a modern parliamentary democracy under the rule of law. Citizens with honest concerns about the legality of activities reasonably in the public area ... should not be lightly shut out from having their concerns considered by the courts. Any person who shows an honest interest in a public issue may invoke the processes of the

131 1975 2 SA 294 (A) 310.
132 *Attorney-General v Unity Dow supra* 658.

> court to have the substantive matter of concern considered . . . It is in my view that the only circumstances in which a plaintiff should be shut out in *limine* for want of standing is where the defendant can show that the plaintiff lacks good faith or that the complaint is clearly frivolous, vexatious or otherwise untenable."[133]

Aguda JA went on to say that in his opinion "these views must represent the position of the law in this country".[134] There is therefore a clear movement away from the traditional common law rules on *locus standi* which insisted on proof of personal injury or special damage by the applicant in review proceedings.

LOCUS STANDI; A PRELIMINARY ISSUE?

Traditionally, the question of *locus standi* was regarded as a preliminary issue, to be dealt with at the threshold of litigation. It was viewed as a matter that is logically prior to and conceptionally distinct from the merits of the case.[135] The reasoning was that the requirement of standing determines the right to bring proceedings, going to the jurisdiction of the court. The litigant would therefore "litigate to litigate". However, since the *Fleet Street Casuals* case,[136] English law has taken a new turn. The House of Lords held, by majority vote, that it is not always right to treat standing as a preliminary issue independently of the merits of the case. It is sometimes necessary to consider the legal and factual context of the claim or matter to which the application relates.[137] Thus it cannot be divorced or isolated from the issues which form the basis of the proceedings, except in the simplest of cases where it can be determined from the outset that an applicant has no interest in the matter. This stems from the living reality that the interest of the applicant in any one matter and the issues he seeks to have the court consider, are sometimes so intertwined that it is not always possible to determine the question of *locus standi* separately from the merits. A consideration of the merits may in some cases determine whether the applicant has *locus standi*. In the *Unity Dow* case, Amissah JP, in whose judgment Aguda and Bizos JJA concurred, left the question of *locus standi* until the end because he felt it necessary to consider the merits before coming to a conclusion on *locus standi*. This was also partly in recognition of the "circularity" of the arguments in the proceedings. In the view of the judge president, "it could not have been determined without going into the merits".[138] This is consistent with the position taken by the same judge in *Legodimo Kgotlafela Leipego v Anthony Pesalema Moapare*, when he said:

> "When points *in limine* are taken, it is sometimes necessary to deal with substantive issues first in order to be able to determine whether the point *in limine* should succeed."[139]

Locus standi therefore is not necessarily a preliminary issue. It will depend largely on the nature of the interest involved, the type of relief sought and other factors.

---

133 [1982] 1 NZLR 734, cited with approval in the *Molopo Farms* case *supra* 57.
134 57.
135 *Scottish Old People's Welfare Council, Petitioners* 1987 SLT 179.
136 *R v Inland Revenue Commissioners Exp National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.
137 *Ibid*; see also the opinions of Lord Wilberforce and Lord Roskill at 630 and 656 respectively.
138 *Attorney-General v Unity Dow supra* 657.
139 Civil Appeal No 10 of 1992 (unreported) 9.

CONCLUSION

It has been shown in this article that the question of *locus standi* is recognised in almost all legal systems as a fundamental concern, namely that of regulating access to the courts. The judiciary is a serious institution whose sanctity must be respected. Abuses of the process of law must be kept to a minimum. As it is an arm of government in modern democracies, its legitimacy depends to a large extent on the performance function of interpreting laws emanating from the legislative process and settling disputes having some foundation; hence the desire to keep out "mere busybodies and meddlesome interlopers".

The determination of the interest required of a litigant is, however, a matter that has not been easy to settle. Various considerations have been taken into account and different decisions reached, depending on the facts of each particular case.

Of particular interest is the trend that has emerged of allowing individuals, in cases impacting on constitutional provisions, to bring proceedings notwithstanding the apparent absence of peculiar or special damage to the individual. The *actio popularis,* though not forming part of the common law and Roman-Dutch law, seems to be concretising into a valid principle of law. In England, where the validity of an Act of Parliament duly assented to by the Queen cannot, strictly speaking, be challenged in the courts,[140] the concern for constitutional matters has nevertheless entitled an ordinary individual to institute review proceedings in the courts.[141] In the *Fleet Street* case, Lord Diplock said:

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."[142]

In Botswana, the judicial system has fallen into step with current trends.[143]

These considerations arise from the limitations attaching to the Office of the Attorney-General as the one traditionally regarded as the sole custodian of the public rights. The efficiency of the office is hamstrung by political, bureaucratic and perhaps financial constraints.[144] The Attorney-General may be reluctant to prosecute an alleged wrong, as his prerogative as the *dominus litis*.[145] A prominent scholar on this subject has said:

> "But since the Attorney-General does not, in practice, support actions against central Government departments, and since the Attorney's General decision whether to support actions against other bodies may (legitimately) be influenced by party political considerations, there is good reason to allow individual members of the public access to represent the public interest."[146]

---

140 See eg *Phillips v Eyre* (1870) QB 1.

141 Eg, the *Smedley* case *supra.*

142 *Supra* 664A.

143 *Dow supra* fn 132; and the words of Aguda JA in the *Molopo Farms* case fn 134, quoting with approval from the judgment of Tipping J in *O'Neil v Otago Area Health Board* fn 133.

144 Dingake *Administrative law in Botswana* 327.

145 See *Attorney-General Ex rel Mc Whirter v Independent Broadcasting Authority* [1973] QB 629; *Gouriet v UPO supra.*

146 Cane "Standing up for the public" 1995 *Public Law* 276 278.

Though the views of the writer have been made in the context of a relator action as the possible solution, they apply with equal force in Botswana, where the Attorney-General under statute is the legal representative of all government departments. Any process against any government department must be served on the Attorney-General. There are therefore several reasons why a citizen action should be entertained in disregard of the traditional rules. The development in the few cases that have come before the courts of Botswana is therefore a healthy one.[147]

HUGO DE GROOT-PRYS

Die Hugo de Groot-prys van R1 000 word elke jaar deur die Vereniging Hugo de Groot uitgeloof aan die outeur wat die beste bydrae oor die Grondwet van die Republiek van Suid-Afrika 108 van 1996 vir publikasie in die THRHR *aanbied. Die redaksiekomitee behartig die beoordeling na afloop van die kalenderjaar. Die redaksiekomitee behou hom die reg voor om die prys nie toe te ken nie indien die bydraes wat ontvang is, na sy mening toekenning nie regverdig nie.*

147 Civil Procedure (Actions By or Against Government or Public Officers) Cap 10:01 s 3; see also s 51 of the Constitution, in terms of which the Attorney-General is the Principal Legal Adviser to the Government of Botswana.

Openbare gesondheid in Rome

Rena van den Bergh
MA LLD
Medeprofessor in die Departement Jurisprudensie, Universiteit van Suid-Afrika

SUMMARY

Public health in Rome

Ancient Rome was a large city with more than one million inhabitants by the middle of the second century. In this article a study is made of local legislation, regulations and other measures governing public health. Topics discussed are the provision of an adequate supply of water, personal hygiene, general hygiene in the city with reference to drains, sanitation and roads, the birth rate and infant mortality, health and medical services, sport and leisure, and accommodation. It is concluded that, despite many shortcomings in the system, the Romans consciously paid a great deal of attention to public health and its effective improvement. Although they had no medical doctors for many centuries, they made an original contribution to public health by means of the development of sanitary institutions and the consideration of hygienic aspects in the building trade. Finally, they realised and publicly acknowledged that personal health is promoted by various factors, such as personal hygiene, a sanitary and safe surrounding, physical exercise, sufficient sleep and the provision of medical services.

1 INLEIDING

Antieke Rome was 'n groot stad – selfs gemeet aan moderne standaarde. Teen die einde van die Republikeinse tydperk (27 vC) is die stad bewoon deur ongeveer 'n driekwart miljoen mense, en teen die middel van die tweede eeu nC was die stad op sy grootste met 'n bevolking van meer as een miljoen.[1] In hierdie artikel sal daar aandag geskenk word aan wetgewing van die plaaslike regering en ander maatreëls wat dit moontlik gemaak het vir soveel mense om in die stad saam te leef. Faktore wat van groot belang was met betrekking tot openbare gesondheid, was watervoorsiening, persoonlike en stedelike higiëne, gesondheid en mediese dienste, die geboortesyfer en kinderoorlewing, behuising, sport en ontspanning en sanitêre dienste.

Die Romeine het vroeg reeds duidelike opvattings en idees oor openbare gesondheid en higiëne gehad. Celsus[2] het uitdruklike reëls vir 'n gesonde lewenstyl uiteengesit: 'n Deeglike besef van die belang van liggaamlike higiëne, 'n gesonde dieet, oefening en gesonde vars lug blyk uit sy mediese geskrifte. Wanneer Martialis 'n gesonde lewe beskryf, beklemtoon hy die belang van oefening, akwadukte en baddens.[3] Vitruvius beskryf 'n gesonde lewenswyse vanuit die

1 Sien Carcopino *Daily life in ancient Rome* (1991) 26–29; Robinson *Ancient Rome: City planning and administration* (1994) 1 8.
2 Celsus 1 1–2.
3 Martialis *Epigrammaton libri* 5 20.

oogpunt van 'n argitek.[4] Volgens hom moes 'n argitek kennis dra van die mediese gevolge van die klimaat, ligging, watervoorsiening, heersende winde en hulle uitwerking en ander faktore wanneer daar besluit word waar 'n stad gebou moet word. Seneca beskryf die besoedeling in Rome en sê dat daar 'n onderdrukkende atmosfeer in die stad is en giftige gasse in die lug wat die gesondheid benadeel.[5]

2 WATERVOORSIENING

Frontinus vertel dat voordat die *Aqua Appia* in 312 vC gebou is, die Romeine op putte, fonteine en die Tiber staatgemaak het vir hulle waterbehoeftes.[6] Die behoefte aan water het egter toegeneem namate die stad gegroei het en teen die tyd van Augustus het Agrippa die watervoorraad deur middel van onder meer nuwe akwadukte verdubbel.[7] Water vanaf fonteine in die omliggende berge is deur middel van ondergrondse pype en akwadukte in die stad ingelei waar dit vir verskeie doelstellings aangewend is. Een van die belangrikste redes vir die groter behoefte aan water was die geweldige hoeveelheid water wat benodig is vir Agrippa se baddens in die Campus Martius wat 'n presedent vir openbare vrygewigheid daargestel het en deur talle later keisers nagevolg is.[8] Teen die tyd van Frontinus was daar nege akwadukte wat die stad daagliks van water voorsien het. Frontinus[9] sê dat daar 591 oop waterbakke (*lacus*) in die stad was waaruit die inwoners hulle daaglikse voorraad geneem het. Water het voortdurend in en uit hierdie bakke gevloei en dit sou die groei van onkruid en alge vertraag, maar nie heeltemal voorkom het nie. Die waterbakke moes gevolglik periodiek gedreineer en skoongemaak word. Persone wat hulle drinkwater hieruit verkry het, is ongetwyfeld aan 'n groter higiëniese gevaar blootgestel as diegene wie se water direk in hulle huise vanuit bedekte verspreidingstenks (*castella*) ingepomp is. Aangesien lood goedkoop en smeebaar was, is dit dikwels vir watertoevoer gebruik ten spyte van Vitruvius se waarskuwing daarteen.[10] Alhoewel die inwoners van Rome teen die tyd van Augustus meer as genoeg water gehad het om aan hulle waterbehoeftes te voorsien, het die meeste nie lopende water in hulle huise gehad nie – veral nie in die boonste verdiepings van die woonstelgeboue nie. Die kwaliteit en suiwerheid van die water het ook nie altyd aan hoë higieniese standaarde voldoen nie: Daar was nie net 'n gevaar van besoedeling by die oop waterbakke nie (as gevolg van die nabyheid van rioolverbindinge en ander vullis), maar ook deur middel van besmette houers wat deur die inwoners gebruik is om water te haal.[11] Die belang van watervoorsiening en die akwadukte

4 Vitruvius *De architectura* 1 1 10. Vitruvius Pol(l)io was 'n Romeinse argitek en militêre ingenieur tydens die bewind van die Tweede Triumviraat en Augustus.
5 *Epistulae morales* 104.
6 *De aquis urbis Romae* 1 4. Sextus Julius Frontinus (*ca* 30–104 nC) is in 97 nC deur Nerva as *curator aquarum* aangestel en in hierdie hoedanigheid het hy in twee volumes 'n verslag oor die watervoorsiening van Rome geskryf.
7 Friedländer *Roman life and manners under the early Empire* (vol 1) (1907) 11: "But perhaps ancient Rome's proudest decoration was the multitude and beauty of her waterworks, which were also invaluable for the health of the inhabitants and compensated many disadvantages of site and building."
8 Scobie "Slums, sanitation, and mortality in the Roman world" 1986 *Klio* 399 423.
9 *De aquis* 2 78 3.
10 *De architectura* 8 6 10–11.
11 Scobie 1986 *Klio* 424.

blyk duidelik uit 'n teks in die *Digesta*[12] waarin dit uitdruklik gestel word dat die herstel van akwadukte belangriker was as die herstel van paaie aangesien mense sou doodgaan van die dors indien akwadukte verwaarloos sou word.

3 PERSOONLIKE HIGIËNE

3 1 Baddens

Romeinse baddens, wat tot in die Middeleeue baie gewild was, het hulle ontstaan in die Griekse *palaestra* gehad.[13] Dit was aanvanklik net 'n paar donker, smal kamertjies wat gebruik is om te was nadat die mans en jongmans op die sand van die *palaestra* geoefen het.[14] Veranderinge het egter geleidelik ingetree, en die baddens het al hoe meer 'n toevlugsoord geword van diegene wat 'n manier gesoek het om die middag mee te verwyl en persoonlike higiëne te bevorder.[15] Sulke baddens was reeds teen die einde van die derde eeu vC vir die publiek beskikbaar en teen die einde van die republikeinse tydperk is dit as 'n sosiale noodsaaklikheid beskou.[16] Die baddens is aanvanklik teen 'n wins bedryf, maar gesubsidieerde, en kort daarna gratis, gebruik daarvan was gou algemeen. Dit was aan imperiale goedgunstigheid te danke.[17] Gedurende die keiserryk is die baddens op groot skaal ontwikkel.[18] Dit het hoofsaaklik geskied deur middel van geskenke van welgestelde Romeine. Ten einde gratis baddens vir die bevolking beskikbaar te stel, het persone groot bedrae geld gegee; óf vir beperkte tydperke óf deur middel van permanente stigtings.[19] Met verwysing na die baddens in Rome is daar gesê dat "the emperors put personal hygiene on the daily agenda and within reach of the humblest; and the fabulous decoration lavished on the baths made the exercise and care of the body a pleasure for all, a refreshment accessible even to the very poor".[20]

Die belangrikste rede vir die verhoging van die watertoevoer na die stad Rome, was dus die groot hoeveelheid water wat vir die openbare baddens benodig was en die groot aantal mense wat daarvan gebruik gemaak het.[21] Volgens Meiggs "it was in the public baths that the Roman kept clean", aangesien daar

12 Venuleius 43 21 4.
13 Grimal *The civilization of Rome* (1963) 291.
14 Seneca *Epistulae* 86 4 6 12.
15 Stobart *The grandeur that was Rome* (1976) 122–123; Grimal 91; Robinson 114.
16 Robinson 114.
17 Sien Carcopino 277.
18 Hands *Charities and social aid in Greece and Rome* (1968) 143. Die keiserlike *thermae*, wat gedurende die eerste eeu nC in getalle toegeneem het, het die gebruik van baddens binne die bereik van almal geplaas. Sonbaddens, op aanbeveling van mediese dokters, kon selfs op die balkonne geneem word. Sien verder Grimal 337.
19 Sien Hands 143. M Agrippa het bv in 33 vC groot bydraes gemaak, en sy voorbeeld is nagevolg deur T Aviasius Servandus te Bononia (D 76) wat voorsiening vir ewig en altyd gemaak het op voorwaarde dat albei geslagte ingesluit is en deur C Aurunceius Cotta te Praeneste (D 75) wat alle tydelike en permanente inwoners en hulle slawe ook ingesluit het. By die baddens, soos by die gimnasia, is olie ook benodig, en sommige skenkers het voorsiening gemaak vir jaarlikse olieverspreiding by die baddens.
20 Carcopino 277.
21 Robinson 113. Sien ook Grimal 293 ev.

vir die gebrek aan private badkamers in alle huise behalwe dié van die welgesteldes gekompenseer is deur die genoegsame voorsiening van openbare badgeriewe.[22]

Die algemene beskikbaarheid van baddens – selfs vir vroue en slawe – is een van die duidelikste aanduidings van die Romeine se positiewe gesindheid ten opsigte van gesondheid.[23] Hulle het besef dat daar 'n verband tussen persoonlike higiëne en siektes is. Daar was egter nog geen besef van die moontlikheid dat siektes deur die gebruik van openbare baddens versprei kan word nie. Persoonlike higiëne was gevolglik relatief eenvoudig en maklik om te handhaaf in openbare plekke, terwyl dit in die woonplekke van die arm stadsbewoners feitlik onmoontlik was. Dit is interessant om daarop te let dat die normale kleding van sowel mans as vroue oor die algemeen bevorderlik was vir gesondheid en maklik om skoon te hou.

Mans en vroue het van dieselfde baddens gebruik gemaak, maar wel op verskillende tye.[24] Alhoewel gemengde badgebruik vroeg in die keiserryk redelik algemeen was, het dit vir sommige persone tog 'n bietjie gewaagd voorgekom. Keiser Hadrianus het dit verbied,[25] en hierdie verbod is deur Marcus Aurelius bevestig.[26] Die verbod, asook die hoër toegangsgeld vir vroue, was egter nie soseer daarop gerig om die gebruik van die baddens deur albei geslagte te ontmoedig nie. Dit was eerder gebaseer op higiëniese gronde, naamlik lang hare en menstruasie. Voldoende watervoorraad en brandstof vir die brandoonde was die enigste vereistes vir die voortbestaan van die baddens en daarmee saam die bevordering van openbare gesondheid.[27]

In die oudheid is die baddens met gesondheid geassosieer: Dit blyk daaruit dat die gode wat die meeste in die *thermae* uitgebeeld is, Aesculapius en sy dogter Hygieia was.[28] Hierdie assosiasie het 'n besondere betekenis gehad vir die siekes en swakkes wat deur onder andere Celsus aangeraai is om na die baddens te gaan ten einde genesing vir verskeie siektes te bevorder. Celsus se *De medicina* toon dat persone met 'n groot aantal uiteenlopende siektes aangeraai is om die baddens te besoek as 'n noodsaaklike deel van hulle voorgeskrewe behandeling. In die geval van algemene ongespesifieerde siektes (*languor*) beveel Celsus 'n besoek aan die baddens aan as een van verskeie remedies.[29] Daarbenewens word spesifieke siektes ook vermeld vir behandeling in die baddens: byvoorbeeld koors (waarskynlik geassosieer met tifus of malaria),[30] lewerabsesse,[31] cholera,[32]

---

22 Scobie 1986 *Klio* 425. Sien ook *The Oxford classical dictionary* (1991) 1137 waar melding gemaak word van die belang van water in die antieke wêreld, en genoem word dat sindelikheid hoog aangeskryf is.
23 Robinson 113; McDaniel *Roman private life and its survivals* (1963) 137.
24 Robinson 115.
25 Dio 69 8; SHA *Hadrianus* 18.
26 SHA *M Ant Aurelius* 23.
27 Robinson 116.
28 Aesculapius is die gelatiniseerde vorm van Asclepius, Griekse held en god van genesing. Hygieia was sy dogter en is beskou as gesondheid gepersonifieer.
29 3 2 6.
30 2 17 2; 2 17 7; 3 6 14; 3 12 3.
31 4 15 4.
32 4 18 1; 4 18 5.

hondsdolheid[33] en oogontsteking.[34] Hy sê ook dat geïnfekteerde wonde nie in die baddens behandel moet word nie aangesien die badwater dit sal besmet.[35] Dit is moontlik dat Hadrianus se maatreël dat siekes die baddens eksklusief tot die agtste uur mag gebruik, gemotiveer is deur 'n wens om die gesondes teen die siekes te beskerm. Dit is egter nie duidelik of die Romeine daarvan bewus was dat siektes soos cholera en disenterie deur sowel water as direkte kontak oorgedra kon word nie. Daar is geen getuienis dat die Romeine die water van die baddens ontsmet het nie.[36] Dit is wel so dat water voortdurend in en uit gevloei het en dit het waarskynlik daartoe bygedra dat die water redelik skoon gebly het. Daar kan ook aangeneem word dat die baddens gereeld skoongemaak is. Volgens Seneca[37] was dit die verantwoordelikheid van die *aediles* om toesig te hou oor die algemene sindelikheid van die baddens. Hy maak ook melding van gefiltreerde water, maar dit was waarskynlik tot baddens in die huise van welgestelde Romeine beperk.[38] Algemeen kan daar dus aanvaar word dat die water in die baddens nie altyd so skoon en higiënies was as wat wenslik sou wees nie, en dat persone gevolglik blootgestel is aan die gevare van infeksies en aansteeklike siektes.[39]

4 STEDELIKE HIGIËNE

4 1 Algemeen

As uitgangspunt moet dit gestel word dat Rome se ligging as sodanig – die hoë voggehalte van die grond tussen al die heuwels – die stad wat openbare gesondheid betref nadelig beïnvloed het.[40] Die moerasagtige omgewing het baie bygedra tot verskeie siektes, waaronder malaria en tifus. Koors was 'n ernstige gevaar, en as gevolg van die hoë digtheid van die bevolking was die gevaar van infeksie altyd groot. Die kanaalnetwerk in die kalksteenheuwels, wat die gevaar van malaria verminder het, het in die oudheid waarskynlik eerder die platteland as die stad self bevoordeel. Volgens Ammianus Marcellinus het siekte in die stad meer skade gedoen. Die inwoners van die stad was oor die algemeen bleek, en Martialis skryf dan ook vir een van sy vriende dat na sy besoek aan die noorde van Italië, sy vriende hom sy rooi wange sal beny, maar dat dit gou weer in Rome sal verdwyn. Die atmosfeer in Rome was gelaai met talle bedwelmende reuke: byvoorbeeld die reuke van talle rokende kombuise en al die stof. Alhoewel Frontinus se rioolhervormings en die vergroting van die watervoorraad ongetwyfeld bygedra het tot die verbetering van die besoedelde lug, was dit onmoontlik om heeltemal daarvan ontslae te raak.

Hoe higiënies was Romeinse stede? Besondere aandag word geskenk aan basiese tekortkominge in Romeinse behuising; gebreke in die verwydering van menslike en diere-afval; asook tekortkominge van die owerheid wat tot gevolg

33 5 27 2B.
34 6 6 17.
35 5 26 28D.
36 Scobie 1986 *Klio* 425.
37 *Epistulae* 86 10. Sien ook Carcopino 278.
38 *Epistulae* 86 11.
39 Scobie 1986 *Klio* 426.
40 Friedländer (vol 1) 27.

gehad het dat groot getalle behoeftige inwoners van Rome in sulke onhigiëniese omstandighede geleef het. Ten spyte van die tekortkominge op die gebied van Romeinse stedelike higiëne, het die Romeine 'n merkwaardige vlak van ontwikkeling bereik in die verskaffing van sekere basiese fasiliteite soos openbare toilette en baddens.[41] Hulle het ook onder meer besef dat persone teen dampe, rook en stoom beskerm moet word en daar is dus deur middel van interdikte voorsiening daarvoor gemaak.[42]

4 2 Riole en afvoerslote[43]

Daar is in die sesde eeu vC begin om riole in Rome te bou wat water en afval na die Tiber moes voer. Hierdie rioolstelsel is tydens die republiek en die keisertydperk voortdurend uitgebrei en verbeter. Die Cloaca Maxima, een van die oudste konstruksies in Rome, is gebou om die gebied om die Forum te dreineer sodat dit nie oorstroom word deur water wat afgevloei het vanaf die Quirinalis en die Viminalis nie.[44] Daarnaas het dit ook afval en vullis in die Tiber afgespoel. Die dreinering van die moerasagtige gebied om die stad deur Agrippa, Augustus, Claudius en Nerva was bevorderlik vir openbare gesondheid. Plinius die Ouere vertel ook van die voortreflike rioolstelsel in die tyd van Agrippa.[45] Die belangrikste en grootste rioolpype is altyd deur die staat versorg, terwyl die kleiner takke deur privaat individue beheer is, gepaard met die openbare aspek wat deur interdikte beheer is.[46]

Naas die drie belangrike riole, naamlik dié in die Campus Martius, die Cloaca Maxima en dié wat langs die Murcia-vallei tussen die Palatinus en die Aventinus gebou is, wat almal sytakke gehad het en met kanale verbind is, het sekondêre takke ook ontwikkel.[47] Daar was egter nie veel nie, en talle distrikte het geen riole gehad nie. Reënwater en vullis het maar eenvoudig weggedreineer in die strate, langs sentrale straatvore, en alhoewel daar openbare toilette in openbare pleine en in die baddens was, het privaatwoonhuise gewoonlik nie toilette gehad nie. Vuil water is gevolglik dikwels eenvoudig in die strate uitgegooi. Rome was bepaald nie 'n skoon stad nie, en die oorvloei van die water van die fonteine, wat in die strate afgevloei het, was gevolglik baie waardevol vir die handhawing van basiese higiëne.

Rome se geplaveide strate, akwadukte en die rioolkonstruksie is egter deur Dionysios van Halicarnassus bewonder. Volgens hom, "once, when the sewers had been neglected and were no longer passable for the water, the censors let out the contract for the cleaning and repairing of them at a thousand talents".[48] Ook

---

41 Scobie 1986 *Klio* 400.

42 *D* 8 2 13 pr Proculus 2 Ep; *D* 8 5 17 2 Alfenus Dig; vgl ook Martialis 13 32.

43 Sien *D* 43 23 1 4: "A drain is a hollow place through which certain waste matter should flow. . ." ; en *D* 42 23 1 6: "Under the term 'drain' are included tubes and pipes."

44 Grimal 297.

45 Plinius *Naturalis historiae* 36 24 104–105. Sien ook Dio 49 43 vir die verhaal van Agrippa wat, nadat hy al die openbare geboue en die strate laat skoonmaak het, die riole skoongemaak het en daarna ondergrond deur hulle geseil het.

46 *D* 43 23 1 2-3; *D* 43 23 1 9; en *D* 43 23 1 16. Sien bv *D* 43 23 1 2: "The praetor has taken care by means of these interdicts for the cleaning and repair of drains. Both pertain to the health of *civitates* and to safety. For drains choked with filth threaten pestilence of the atmosphere and ruin, if they are not repaired."

47 Grimal 297.

48 3 67 5.

Strabo was beïndruk met Rome se strate, akwadukte en riole; al die riole is ook oorvloedig gespoel deur water uit die akwadukte.[49] Hierdie maatreëls wat getref is om openbare higiëne en gesondheid te bevorder, het in die oudheid veel bewondering afgedwing.

4 3 Sanitêre dienste

Wat is voldoende en onvoldoende sanitasie (dit is die wegdoening of verwydering van menslike en ander afval)? Hier is dit waarskynlik goed om te verwys na basiese moderne maatstawwe soos geformuleer deur Salvato:[50]

> "The improper disposal of human excreta and sewage is one of the major factors threatening the health and comfort of individuals in areas where satisfactory sewage systems are not available. This is so because very large numbers of different disease producing organisms can be found in the fecal discharges of ill and apparently healthy persons. . . Knowing that organisms causing various types of diarrhea, bacillary dysentary, infectious hepatitis, salmonella infection, and many other illnesses are found in excreta, it becomes obvious that all sewage should be considered presumptively contaminated, beyond any reasonable doubt, with disease producing organisms . . . Therefore, the mere exposure of sewage, or its improper disposal, immediately sets the stage for possible disease transmission . . . Sewage is satisfactorily disposed of when 1) It will not be accessible to children or household pets, pollute the surface of the ground, or be exposed to the atmosphere when inadequately treated. 2) It will not contaminate any drinking water supply. 3) It will not give rise to a public health hazard by being accessible to insects, rodents, pets, or other mechanical carriers that may come in contact with food or drinking water. 4) It will not give rise to a nuisance due to odor or unsightly appearance. 5) It will not pollute or contaminate the waters of any bathing beach, shell-fish breeding ground, or stream used for public, domestic water supply, or recreational purposes. 6) It will not violate laws or regulations governing water pollution or sewage disposal."

Argeologiese getuienis dui daarop dat die meeste huise, en veral woonstelblokke, nie riolering gehad het nie. Waar dit wel voorgekom het, was dit beperk tot die grondverdieping.[51] Dit was uiteraard vanselfsprekend, aangesien die meeste huise nie van lopende water voorsien is nie.[52] Alhoewel sommige huise sinkputte gehad het, het die meeste mense van nagstoele[53] of eenvoudig van kamerpotte of nagpotte[54] gebruik gemaak. Dit is dan deur slawe in die riole uitgegooi of weggeneem in nagwaens wat nagvuil verwyder het.[55]

Daar was egter talle openbare toilette.[56] Dikwels het hulle deel uitgemaak van die kompleks by die baddens, waar hulle dan die watervoorsiening en riolering kon deel, maar is ook aangetref by ander openbare en gerieflike plekke, soos die teater of *circus*.[57] Sulke toilette is opgerig deur die staat en deur privaatondernemers met

---

49 Strabo *Geography* 5 3 8.
50 Scobie 1986 *Klio* 407–408 waar hy Salvato *Environmental sanitation* (1958) 186 aanhaal.
51 Robinson 119–120; Carcopino 49 ev.
52 Sien Martialis 8 67: "You ask for warm water; my cold has not yet arrived." Water is gewoonlik by straatfonteine (waarvan daar talle was) of waterbakke verkry.
53 Horatius *Satirae* 1 6 109; Petronius *Satyricon* 41 & 47.
54 Petronius *Satyricon* 27; Martialis 6 89.
55 Robinson 120.
56 Volgens die *Breviarium* van die *curiosum urbis* 6 10.
57 Sien Robinson 120.

'n winsoogmerk.[58] Die inhoud van openbare toilette is verwyder by wyse van die *cloacae* (riole) terwyl dié van privaatwoonhuise in openbare riole weggespoel is.[59] Hierdie riole is voortdurend gespoel deur die oorvloei van die openbare waterbakke en fonteine en volgens Frontinus het dit tot die suiwering van die lug en die stad bygedra.[60]

Daar is nie veel literêre getuienis oor riole en toilette in Rome nie. Landboukundige skrywers noem die gebruik van menslike ekskreta as 'n aanvulling tot dierebemesting.[61] Persone wat die sinkputte leeggemaak het, het waarskynlik die inhoud daarvan aan boere verkoop. Daar is enkele ander verwysings na die skoonmaak van riole deur gevangenes[62] en na diegene wat gebaat het by die bestuur van openbare toilette,[63] na die volders se terracottakruike wat op straat geplaas is vir die publiek om as toilette te dien,[64] en na belasting wat Vespasianus op urine gehef het.[65] Die insameling en gebruik van urine deur volders vir die beitsing van sekere kleurmiddels wys op nog 'n gebied van privaatonderneming waar menslike ekskreta verwyder en kommersieel aangewend is. Die sisteem van insameling van urine was nie higiënies nie aangesien die terracottakruike wat in die strate en stegies geplaas is nie geglasuur was nie en ook porieus was, en soms het gekraakte kruike gebars en hulle inhoud in die strate uitgestort met onhigiëniese gevolge.[66] Daar is ook enkele regstekste wat lig op die onderwerp werp. Die *lex Julia municipalis*[67] noem dat die *plostra stercoris exportanda causa* toegelaat is om Rome oordag binne te gaan wanneer die meeste gewielde vervoer verbied is. Verder vertel Ulpianus van 'n praetor se edik wat bepaal dat riole skoongehou en in goeie werkende toestand *quorum utrumque et ad salubritatem civitatium et ad tutelam pertinet: nam et caelum pestilens*[68] *et ruinas minantur immunditiae cloacarum.*[69] Plinius spog dat Rome se riole so goed gebou is dat hulle nie deur geboue wat ineengestort het of deur brande beskadig is nie.[70] Die edik onderskei tussen openbare riole wat deur die staat onderhou is, en privaatriole wat die verantwoordelikheid was van die individuele

58 Friedländer (vol 4) (1928) 284.

59 Friedländer (vol 4) 285. Daar is selfs 'n inskripsie wat oënskynlik verwys na die *destercoratio* (skoonmaak) van openbare toilette, waarvoor 'n Spaanse edelman 'n geldsom bewillig het, en tydens sy aedileskap het M Agrippa persoonlik betaal vir die verbetering van die stad se rioolstelsel. Sien Hands 144.

60 Sien *De aquis* 2 88: "Not even the waste water is lost; the appearance of the City is clean and altered; the air is purer; and the causes of the unwholesome atmosphere, which gave the air of the City so bad a name with the ancients, are now removed"; en *De aquis* 2 111: "I desire that no one shall draw 'lapsed' water except those who have permission to do so by grants from me or preceding sovereigns; for there must necessarily be some overflow from the reservoirs, this being proper not only for the health of our City, but also for use in the flushing of sewers." Sien verder Ashby *The aqueducts of ancient Rome* (1935) 46; Scobie 1986 *Klio* 408.

61 Columella *De re rustica* 1 6 24; Varro 1 13 4.

62 Plinius *Epistulae* 10 32 2.

63 Juvenalis *Satirae* 3 38.

64 Martialis 6 93 1; Macrobius *Saturnalia* 3 16 15; Suetonius *Vespasianus* 23. Sien ook Carcopino 54.

65 Suetonius *Vespasianus* 23 3.

66 Scobie 1986 *Klio* 414. Martialis 6 93 1 ev.

67 CIL 1(2) 593 1 54. Die wet staan ook bekend as die *Tabula Heracleensis*.

68 Vgl Plinius *Epistulae* 10 98 & 99 (Trajanus se antwoord) oor 'n oop riool in Amastris.

69 *D* 43 23 1 2. Sien vn 46 vir vertaling.

70 *Naturalis historiae* 36 24 106.

eienaars wat die reg gehad het om 'n privaatriool met 'n openbare riool te verbind nadat hulle toestemming van die *curatores viarum publicarum* verkry het.[71] Dit wil dus voorkom of daar geen wetlike verpligting op huiseienaars was om hulle huise met openbare straatriole te verbind nie. Daar het ook geen inligting van regsaard behoue gebly oor waar huishoudelike toilette geleë moes wees of hoe hulle gebou moes gewees het nie. Volgens die beskikbare argeologiese getuienis was daar maar weinig privaatwonings in Rome (en ook Ostia en Pompeii) wat met straatriole verbind was. Waar daar wel toilette in huise was, is hulle met 'n sinkput verbind wat nie van lopende water voorsien is nie. Dit was natuurlik nie besonder higiënies nie, aangesien dit gereeld leeggemaak moes word en voorts ook konstante bronne van infeksies en onaangename reuke was. Sover bekend, het die Romeine nie aparte sanitêre en stormwaterriole gebou nie. Hulle het net gekombineerde riole gebou en geken wat gedien het om oortollige water van openbare waterbakke wat dag en nag gevloei het, weg te voer, asook die oorvloei van huishoudelike reënwaterstelsels en reënwater wat direk in die straat geval het en afval wat die dreineringsnetwerk bereik het deur middel van *foricae* wat met die *cloacae* verbind was. Dit is wel so dat die konstante vloei van *aqua caduca* deur 'n gekombineerde dreineringstelsel met 'n voldoende val vanaf oorsprong tot uitgang dit redelik skoon en vry van onaangename geure sou gehou het. Dit is egter ook bekend dat die Romeinse *cloacae* van tyd tot tyd met die hand skoongemaak moes word, en dit dui daarop dat nie alle riole selfreinigend was nie. Verskeie ander moontlike verklarings kan aangevoer word waarom privaathuiseienaars nie hulle toilette met die openbare rioolstelsel wou verbind nie:[72] In laagliggende gebiede sou riole terugstoot wanneer die vlak van die Tiber gestyg het. Rioolafval sou dan teruggestoot word in die netwerk en in die verbindinge van enige huis wat aan die stelsel gekoppel was. Voorts sou ongediertes in die riole ook enige huis wat daarmee verbind was, deur middel van die rioolverbindinge kon binnegaan. Laastens moet daar ook in gedagte gehou word dat spoeltoilette wel hoë higiëniese standaarde tot gevolg mag hê, maar aan die ander kant ook besonder baie vars water, asook substansies wat as bemesting gebruik kan word, mors.

4 4 Strate

Strate in Rome was, op enkele uitsonderings na, smal en is daagliks besoedel deur afval en vullis van die aanliggende huise en woonstelgeboue. Julius Caesar het 'n munisipale wet[73] uitgevaardig waarkragtens huiseienaars met huise wat aan die straat front, beveel is om voor hulle deure en mure skoon te maak. Voorts is die wyse waarop die *aediles* die strate moes skoonhou, voorgeskryf. Die verwydering van menslike en diere-afval in die strate van Rome was dus die verantwoordelikheid van die *aediles* as deel van hulle *cura urbis*. Daar was ook voorskrifte vir geplaveide strate met sypaadjies – iets wat egter nie altyd gerealiseer het nie.

As gevolg van die besoedeling van strate, was vlieë een van die algemene plae in Rome. Alhoewel daar vliegafweermiddels was waarvan die welvarende Romeine gebruik gemaak het, was dit nie altyd ewe effektief nie – veral nie in

71 *D* 43 23 1 9.
72 Scobie 1986 *Klio* 413–414.
73 Sien vn 67. *Tabula Heracleensis* vv 20–23; 50–52; 56–61; 66–67. Sien ook *D* 43 10 1 Papinianus *de cura urbium*.

die somer en buitenshuis nie. Romeinse koswinkels, wat nie deur vensters of skerms beskerm is nie, en aan die strate gegrens het, sou ook baie daaronder gely het. Dit sou veral die geval gewees het in slaghuise waar die diere geslag is alvorens die vleis verkoop is. Die verbod in die *Digesta* op dierevelle in die strate dui daarop dat die slagters velle en ander afval in die strate gegooi het.[74] Dit is dus duidelik dat daar in Rome 'n besondere hoë gevaar van voedsel- en waterbesoedeling was as gevolg van direkte of indirekte kontak met menslike of diere-afval wat op ontoereikende wyse deur die owerhede hanteer is.

Volgens Papinianus[75] was dit nie net verbode om gate in die strate te grawe nie – 'n maatreël wat die tipiese Atheense toilet sou uitgeskakel het – maar was daar ook wette wat verbied het dat ekskreta, lyke en dierevelle in die strate gegooi word.[76] Dit was eweneens 'n oortreding om openbare water te besoedel of om enige persoon met mis of vullis te bedek.[77] 'n Inskripsie bokant 'n waterbak in Pompeii wat 'n verbod plaas op die besoedeling van water met ekskreta, toon dat amptenare dit nodig gevind het om moontlike oortreders te waarsku.

Republikeinse regulasies met betrekking tot die gebruik van voertuie in Rome het in die keisertydperk onveranderd voortbestaan. Caesar se munisipale wet het die gebruik van voertuie, op enkele uitsonderinge na, in die strate van Rome gedurende die eerste tien ure van die dag verbied.[78] Daar was egter dag en nag 'n feitlik onophoudelike geraas op straat, deur mense en voertuie veroorsaak, wat volgens Juvenalis die inwoners van die stad tot onophoudelike slapeloosheid verdoem het: 'n ernstige gesondheidsgevaar![79]

5 GEBOORTESYFER EN KINDEROORLEWING

Gedurende die laaste eeu van die republiek en die vroeë eeue van die keiserryk het families van die hoër klasse geleidelik uitgesterf. Verskeie redes word aangevoer vir hierdie verskynsel, waaronder loodvergiftiging.[80] Die ware oorsake was waarskynlik die gevolg van mediese onkunde en onbekwaamheid, en die afwesigheid van enige kennis van antiseptiese middels.[81] Die hoë insidensie van onvrugbaarheid, miskrame en baba- en kindersterftes was 'n ander probleem. Daar is baie getuienis van onvrugbaarheid.[82] Miskrame was baie algemeen: Julia, Caesar se dogter, het eers 'n miskraam gehad en het later tydens geboorte gesterf.[83] Baba- en kindersterftes was ook baie algemeen.[84] Indien die dood van babas en jong kinders so algemeen was onder die welgestelde Romeine, het wanvoeding en die afwesigheid van mediese versorging tesame verseker dat dit nog meer onder die armes voorgekom het.[85] Onder die armes het blootlegging

74 *D* 43 10 1 5.
75 *D* 43 10 1 2.
76 *D* 43 10 1 5.
77 *D* 47 11 1 1.
78 Sien ook Friedländer (vol 4) 28; Carcopino 61–63.
79 3 236–259. Vgl verder Martialis 12 57.
80 Balsdon *Life and leisure in ancient Rome* (1969) 82–85. Sien ook Vitruvius 8 6 10–11.
81 Balsdon 85.
82 So het beide Julius Caesar en Augustus seuns begeer, maar nie gehad nie.
83 Balsdon 87.
84 *Idem* 88. So het net drie van die twaalf kinders van Tiberius Gracchus en Cornelia oorleef. In die tweede eeu nC het Fronto vyf kinders na mekaar verloor.
85 Van die 164 oorblywende grafskrifte van Jode in Rome, is 65 dié van kinders onder die ouderdom van 10.

van babas dikwels 'n baie eenvoudige rede gehad, naamlik dat die ouers eenvoudig nie die kind kon grootmaak nie.

Daar moet op gelet word dat nie net die sterftesyfer onder babas en kinders baie hoog was nie, maar ook dat die lewensverwagting van die meeste volwassenes bitter kort was.[86]

6 GESONDHEID EN MEDIESE DIENSTE

6 1 Algemeen

Net soos daar weinig getuienis is dat daar werklike hongersnood, in teenstelling met honger, in Rome was, so ook word daar min gesê oor virulente peste en plae. Siekte was egter endemies.[87] Die enigste ware remedie teen ernstige epidemies was om die stad te verlaat, en dit was vanselfsprekend nie vir die meeste mense moontlik nie. Volgens Ammianus Marcellinus[88] was die siektes in Rome ernstiger as elders omdat daar soveel mense was, en was die mediese kennis van die tyd dikwels nie in staat om dit te genees of vergemaklik nie. Daar is egter pogings aangewend om siekes te isoleer, en slawe wat gestuur is om na hulle welsyn navraag te doen, moes deeglik was voordat hulle teruggekeer het. Gedurende sowel die republiek as die keiserryk het daar dikwels epidemies in die stad uitgebreek wat talle slagoffers geëis het.[89]

In die latere keiserryk is daar kommer uitgespreek oor higiëne in tronke. Ingevolge 'n konstitusie van 320 nC[90] moes 'n beskuldigde in die gevangenis

> "not suffer the darkness of an inner prison, but he must be kept in good health by the enjoyment of light, and when night doubles the necessity of his guard, he shall be taken back into the vestibules of the prisons and into healthful places".

Provinsiale goewerneurs moes op Sondae die tronke inspekteer ten einde te verseker dat kos voorsien is aan diegene wat nie 'n privaatbron gehad het nie, en verder moes gevangenes begelei deur betroubare wagte na die baddens geneem word.[91]

6 2 Mediese dienste

Die mediese professie was 'n beroep wat volgens Plinius die Ouere in sy tyd selde deur Romeine beoefen is.[92] Julius Caesar het, deur aan medici vanuit Egipte en Griekeland burgerregte te verleen, die status van die mediese beroep verhoog en immigrasie van buitelandse medici aangemoedig.[93] Die beroep het

---

86 Balsdon 126.
87 Robinson 112.
88 14 6 23.
89 Friedländer (vol 1) 27.
90 *Codex Theodosianus* 9 3 1.
91 *Idem* 9 3 7 (409 nC).
92 23/24–79 nC.
93 Suetonius *Julius Caesar* 42. Sien ook Koelbing *Arzt und Patient in der antiken Welt* (1977) 187–188 wat daarop wys dat kennis van die Griekse mediese wetenskap op drie wyses in Rome ingevoer is, naamlik deur vrygebore mediese dokters, kundige slawe en by wyse van boeke oor die mediese wetenskap. Die Romeine het in die algemeen die medisyne as 'n nuttige beroep beskou wat 'n besliste mate van kennis en intelligensie vereis het. Cicero (*De officiis* 1 42 151) plaas mediese dokters op dieselfde vlak as

vervolg op volgende bladsy

egter in die algemeen lae aansien geniet, en eers veel later algemene erkenning verkry. Mediese dienste en hospitale (of enigiets soortgelyk daaraan) is eers in die vierde eeu nC as normaal of gewoon deur die meeste inwoners van die stad aanvaar.[94] Die plaag van 295 vC het aanleiding gegee tot die bou van die Tempel van Asclepius op die eiland in die Tiber.[95] Alhoewel dit die eerste plek was wat spesifiek vir siek mense bestem was, was dit maar weinig meer as 'n wagkamer vir gebed.[96] Op die enkele uitsondering na van Celsus (wat waarskynlik eerder 'n amateur as 'n professionele man was), was al die mediese verhandelinge in Grieks, en was daar net een Latynse woord (*valetudinarium*) wat vir hospitale en soortgelyke inrigtings gebruik is.[97] Eienaars van groot landgoedere en die hoofde van groot huishoudings was almal in staat om na hulle afhanklikes om te sien en het dit ook as hulle verantwoordelikheid beskou.[98] Sodanige siekes is in siekeboeë en herstelareas geplaas.[99] Selfs in die leër het persone wat daarop aanspraak gemaak het dat hulle mediese opleiding gehad het, eers tydens die keiserryk hoë aansien op grond daarvan verwerf.[100] Daar was waarskynlik vroeg reeds militêre hospitale, maar hospitale vir burgerlikes was eers 'n ontwikkeling van die Christelike keiserryk.[101] Modestinus, 'n outeur uit die laatklassieke tydperk, vertel dat medici vrygestel is van voogdyskap en ander openbare verpligtinge.[102] Daar was ongetwyfeld bepaalde standaarde waaraan 'n persoon moes voldoen om as 'n opgeleide dokter te kwalifiseer, en daar is selfs sprake van 'n sekere mate van spesialisasie.[103]

Op 'n baie laat stadium in die keiserryk was mediese dienste nog hoofsaaklik in die hande van Grieke wat dikwels slawe en vrygelatenes was.[104] Die hoër klasse in die stad het neergesien op die meeste dokters. Die laer klasse, daarenteen, het alle medici as kwaksalwers beskou.[105] Alhoewel die sosiale status van medici ongetwyfeld verbeter het vanaf die tweede eeu,[106] was dit nog geensins besonder hoog nie.[107] Medici wat hulle slawe as dokters opgelei het en daarna vrygelaat het, se vriende moes dikwels gratis deur sulke vrygelatenes besoek en

---

argitekte en onderwysers, terwyl Varro (*Res rusticae* 1 16 4), daarenteen, hulle as handarbeiders saam met verwers en smede klassifiseer.

94 Robinson 127. Sien ook Koelbing se bespreking (178 ev) van die eerste agt boeke van Plinius die Ouere se *Naturalis historiae* waarin min of meer alles wat tot in sy tyd oor natuurgeneeskunde en die mediese wetenskap bekend was, sonder veel kritiek byeengebring is.

95 Livius 10 47; Valerius Maximus 1 8 2.

96 Robinson 127.

97 *Xenodochium, nosocomium, brephotrophium* en *orphanotrophium* was almal Grieks van oorsprong.

98 Robinson 127.

99 Martialis 14 78.

100 *D* 4 6 33 2 Modestinus.

101 Celsus pr 65.

102 *D* 27 1 6 1–4.

103 Daar word melding gemaak van 'n *medicus clinicus, chirurgus, ocularius, auricularius* en 'n tandarts (Martialis 10 56).

104 *D* 38 1 25 2.

105 Martialis 1 47: "Diaulus, ex-physician, Now works as a mortician. What's in a name? The job's the same."

106 Soos daaruit afgelei kan word dat pasiënte se kontrakte met hulle verander het vanaf *locatio conductio* na *mandatum*. Sien hieroor *D* 17 1 16 Ulpianus 31 ad ed.

107 Soos afgelei kan word uit *D* 50 6 7 (6).

behandel word. [108] Vrygebore medici in Rome was gewoonlik vreemdelinge. Die meeste van hulle was Grieke en Oosterlinge, veral Egiptenare, en is na Rome ontbied om siektes te genees wat inherent aan hulle eie lande was. In Rome het die mense meer vertroue in die buitelandse medici gehad, alhoewel daar teen die vroeë keiserryk reeds talle goeie Romeinse medici was. Die Romeine het die meeste van hulle mediese kennis, idees en gebruike van die Grieke oorgeneem, en Plinius die Ouere vertel dan ook dat die mediese wetenskap die laaste van die kunste was wat deur die Romeine van die Grieke oorgeneem is. Alhoewel 'n werklik bedrewe medikus 'n aansienlike mate van kultuur en sosiale aansien moes geniet het, het die Romeinse hoër klasse lank gevoel dat dit onwaardig was van so 'n persoon om onder kontraktuele verpligting 'n ander te dien. Selfs tydens die keiserryk het die mediese wetenskap net indirekte ondersteuning gekry in die vorm van belastingvrystellings vir dokters, eers deur Vespasianus en later deur Hadrianus. Dit kon moontlik gepaard gegaan het met 'n morele eerder as 'n kontraktuele verpligting in die belang van diegene wat nie kon bekostig om mediese fooie te betaal nie.[109] Dit was egter eers tydens die heerskappy van Antoninus Pius in 161 nC dat, in assosiasie met die beperking van die aantal bevoordeelde dokters in elke munisipaliteit ooreenkomstig die grootte daarvan, die toekenning van hierdie voordeel onder meer daarvan afhanklik gemaak is dat die dokters hulle pligte met ywerigheid moes uitvoer. Die eerste melding van 'n mediese amptenaar vir Rome dateer uit 368nC wanneer daar melding gemaak word van senior medici vir elkeen van die gebiede wat eerder eerbaar na die armes moet omsien as om die rykes skaamteloos te dien.[110] Daar word algemeen aanvaar dat gratis behandeling van die armes verwag is. Dit blyk ook uit Libanius se verklaring in die vierde eeu dat "the law demands of the doctors a single public obligation (*liturgy*), namely that which arises from their craft".[111] Daar is egter geen bevestigende getuienis dat daar enige verpligting van regsweë op dokters gerus het om siekes gratis te behandel nie. Daar kan ook nie aanvaar word dat die armer klasse besonder gebaat het by die ontwikkeling van hospitale tydens die later keiserryk nie. In ooreenstemming met die pragmatiese aard van die Romeine lees ons dat die eerste voorsiening van hierdie aard gemaak is vir die siekes en gewondes in die legioene, maar die *valetudinaria* en *sanatoria* het gou na die huishoudings van die rykes en die keiserlike hof uitgebrei.[112] In sulke huishoudings is mediese sorg dikwels aan minder belangrike lede van die huishouding verleen (byvoorbeeld slawe of vrygelatenes), maar nooit juis in gevalle waar daar geen persoonlike verhouding by betrokke was nie.

Kennis van die praktyksgebruike van medici is taamlik volledig as gevolg van die beskikbare inligting oor hierdie beroep. Die omvangryke werk van Claudius Galen verskaf veel inligting daaroor: Hy het 'n uitgebreide praktyk gehad, en in een somerseisoen in Rome meer as vier honderd ernstige gevalle gehad. Sy vry pasiënte, met ander woorde dié wat nie bedlêend was nie, was ongeveer drie- tot vierduisend per jaar.[113] In die oudheid was daar geen eksamens nie en weinig verantwoordelikheid. Talle ongekwalifiseerde persone het

108 Friedländer (vol 1) 168.
109 Hands 140.
110 *Codex Theodosianus* 13 3 8–9.
111 Hands 140.
112 *Idem* 141.
113 Friedländer (vol 1) 170.

hulle dus tot die mediese beroep gewend en as dokters gepraktiseer – tot nadeel van die pasiënte. Naas die groot aantal algemene praktisyns, was daar ook assistente (wat genesende kruie versamel het, geneesmiddels gebrou het, verbande aangesit het, lawemente toegedien het en bloedgelaat het) en spesialiste. Daar was oogspesialiste, oorspesialiste, tandartse en ander wat, sover bekend is, breuke, fistulae en uvulae behandel het.[114] Voorts was daar ginekoloë en vroue-dokters. Die meeste was vroedvroue wat 'n volledige mediese opleiding geniet het en ook ander vrouesiektes behandel het. Chirurge het meer as enige ander groep gespesialiseer. Medici moes weet hoe om medisynes voor te berei, en 'n groot voorraad resepte was 'n onontbeerlike kwalifikasie: dikwels die enigste een.[115]

7 SPORT EN ONTSPANNING

As deel van die Griekse lewenstyl wat die Romeine in die tweede eeu vC oorgeneem het, is dit as verstandig beskou (en hierdie siening is deur dokters soos Galen ondersteun) om voor 'n groot maaltyd te oefen.[116] Alhoewel die Romeine gedurende die republiek neergesien het op atletiek, het hulle gehou van harde oefening en is dit beskou as goed vir die gesondheid en ontspanning.[117] Daar is dus algemeen aanvaar dat oefening goed was vir die gesondheid, en die verskaffing van fasiliteite vir oefening dui op amptelike besorgdheid oor openbare gesondheid. Onder die hoër klasse in Rome het dit dus in Rome en op die platteland gebruiklik geword om te oefen in die vroeë namiddag en daarna na die baddens te gaan.

Naas fisiese oefening, het die Romeine ook geglo dat vars lug in parke en tuine noodsaaklik vir hulle gesondheid was. Hulle het die stadsparke geniet, en alhoewel dit bloot toevallig mag wees dat parke deur die hele stad versprei was, was dit moontlik 'n taktiese erkenning van hulle voordele vir die openbare gesondheid en gemoedstoestand.[118] Dit is interessant dat Julius Caesar sy tuine langs die Tiber aan die Romeinse volk nagelaat het vir hulle gebruik en genot,[119] en dat ook Agrippa tuine aan die volk bemaak het.[120] Augustus het die woude en wandelpaaie in die omgewing van sy mausoleum aan die volk geskenk.[121] Voorts het suilegange ook die geleentheid gebied om – beskut teen die weer – in die buitelug te stap.

Die atletiek- en musiekkompetisies van Griekeland was van die laaste gebruike wat in Rome ingeburger geraak het. In die Romeinse wêreld het sport geen eeuelange tradisie gehad nie: Atletiekbyeenkomste is ingevoer as 'n vorm van vermaak vir die massas deur ambisieuse politici, en hulle grootste aantrekkingskrag was geleë onder welgestelde en literêre klasse.[122] Dit was glad nie

114 *Idem* 171.
115 Martialis 14 78.
116 Galen 6 757 ev.
117 Gardiner *Athletics of the ancient world* (1930) 117–118. Sien ook Seneca *Epistulae morales* 15 2 waarin hy gereelde oefening as deel van 'n goeie en gesonde lewe propageer.
118 Grimal 243.
119 Dio 44 35; Plutarchos *Brutus* 20.
120 Dio 54 29.
121 Suetonius *Augustus* 100.
122 Harris *Sport in Greece and Rome* (1972) 73.

algemeen ten tyde van die Republiek nie, en het eers tydens die keiserryk, met die geleidelike samesmelting van Romeinse en Griekse kulture en gewoontes, gewild geraak. Die Griekse atletiekspele is aanvanklik met vyandigheid en argwaan deur streng regsinnige Romeine bejeën. Sommige was egter reeds gebruiklik in Rome en in die weste, en openbare boks-, stoei- en vuisgevegte is in Rome gehou. Ten spyte daarvan dat dit so laag geag is, was Griekse oefeninge teen die einde van die republikeinse tydperk so gewild dat ten minste een gimnasium vir elke villa vereis is. Hierdie gimnasia het gedien vir genesende of herstellende oefening. Nero het Griekse atletiek geesdriftig bevorder en aangemoedig, dit ingevoer in 'n amptelike fees, 'n gimnasium gebou, en groot geskenke aan atlete gegee.[123] Griekse atletiek het mode geword, en is deur die afrigters as onontbeerlik verklaar vir perfekte gesondheid en 'n perfekte liggaam.[124]

Die meeste mense wat geoefen het, het dit vroeg in die namiddag gedoen. Jong mans uit die hoër klasse en lede van jeugorganisasies se tyd was egter nie so beperk nie en hulle het waarskynlik groot dele van die oggend ook met fisiese oefening deurgebring. Jong aristokrate het gejag en aangesien daar van hulle verwag is om altyd gereed te wees vir oorlog, is hulle ook in die kuns van oorlogvoering onderrig.[125] Boks, spiesgooi en gewigstoot, asook wedrenne en stoei, het Rome eers bereik deur hulle kontak met Griekse state in die suide, en het dus eers laat deel geword van die Romeinse opvoeding.[126] Dit het reeds in hulle kinderdae begin en voortgeduur tot die ouderdom van sewentien, waarna militêre opleiding begin het. Volgens Cicero was dit die deel van hulle lewe wat aan oefening en sport op die Campus Martius gewy is.[127] Nadat hulle geoefen het, het hulle eenvoudig in die aangrensende Tiber gespring en geswem.[128] Gedurende die laat republiek en die vroeë keiserryk was daar drie soorte oefening of sport. In die Romeinse aristokratiese tradisie was jag, perdry en wapenkompetisies. Daarna het gevolg die sportsoorte wat hoog aangeslaan is deur die Grieke, naamlik boks, stoei, wedrenne, diskusgooi en spiesgooi asok swem en hoogspring, wat beide deel van 'n rekruut in die leër se opleiding uitgemaak het. Laastens was daar gewigoptel, die rol van 'n hoepel en 'n groot aantal balspele. Vir die meeste volwasse mans, veral in die baddens, het oefening die vorm van balspele aangeneem.[129] Wat vroue betref, kan net kortliks opgemerk word dat alhoewel daar enkele uitbeeldings is van vroue wat aan balspele deelneem, dit oënskynlik nie algemeen was nie. Daar kan dus aangeneem word dat sommige vroue wel geoefen het, maar nie in dieselfde mate as mans nie. Waar baddens vir vroue behoue gebly het, wil dit voorkom of hulle nie toegang tot die *palaestra* (waar die mans geoefen het) gehad het nie.[130] Met die uitsondering van

123 Friedländer (vol 2) (1909) 123.
124 *Idem* 123.
125 Balsdon 159.
126 Ovidius *Fasti* 2 365–368.
127 Strabo 5 3 8 het die Campus in Rome beskryf as "a vast area with unlimited space for driving chariots and riding and at the same time for all the people playing ball, trundling hoops and wrestling".
128 Vegetius 1 10: "So the Romans of old, who from successive wars and incessant danger acquired mastery of the art of war, selected the Campus Martius as being near the Tiber so that, after their fighting exercises were finished, the young people might wash off the sweat and dust and by hard swimming recover from the exhaustion of the races."
129 Ovidius *Tristia* 2 485 ev; Galen *De parvae pilae exercitio* 5 899–910.
130 Balsdon 167.

strydwa-renne en perdry, waarvoor groot ruimtes nodig was, het oefening meestal in die *palaestra* plaasgevind wat vanaf die laat republiek aanliggend aan die baddens was.

8 BEHUISING

In Rome het welgestelde mense hul huise gebou op die riwwe of hange van heuwels waar dit goed geventileer, gedreineer en sonnig was, terwyl die armes in die valleie tussen die heuwels gewoon het, of in die gebiede naby die Tiber.[131] Wanneer die rivier sy walle oorstroom het – wat dikwels gebeur het – het die vloedwater fondamente weggespoel en uitgekalwe, of moddermure is deurweek en het gevolglik ineengestort. Vitruvius verwys na *leges publicae* wat verbied het dat gemeenskaplike mure dikker as een en 'n half voet gebou word, en dat die ander mure dieselfde breedte gebou is ten einde binneleefruimte beter te benut.[132] Hierdie teks is veelseggend aangesien dit nie alleen 'n moontlike verklaring bied vir strukturele ineenstortings as gevolg van die ontoereikendheid van gewigdraende mure op die onderste verdiepings van woonstelgeboue nie,[133] maar ook die taamlik sorgelose en onagsame houding van Romeinse amptenare met betrekking tot die daarstelling van verantwoordelike en effektiewe bouregulasies.[134] 'n Wet wat die maksimum breedte van gemeenskaplike mure neerlê, maar die minimum breedte van alleenstaande, gewigdraende buitemure ignoreer, kon maklik uitgebuit word deur spekulasiebouers wat geld wou bespaar op materiaal en huurinkomste wou vergroot deur die grootste moontlike woonoppervlaktes te verhuur aan die grootste aantal huurders. Dun skeidsmure en afskortings in die woonstelgeboue het daarbenewens geen beskerming teen hitte en koue gebied nie. Dit is van hout of panele gemaak en het gevolglik ook 'n ernstige gesondheidsgevaar ingehou.[135] Onder sulke omstandighede kon oorbewoning by strukturele gebreke 'n bydraende faktor gewees het. Ander Romeinse bouregulasies gee egter die indruk dat daar tog kommer was oor die strukturele veiligheid van die woonstelgeboue. Die belangrikste sodanige regulasie was die hoogtebeperking van 70 Romeinse voet wat deur Augustus neergelê is.[136] Gereelde herhaling van hierdie en die enkele ander wette wat die onderhoud van geboue geraak het, dui daarop dat dit in 'n groot mate deur die eienaars van die geboue geïgnoreer is.[137] Die staat het nie oor die infrastruktuur beskik om hierdie basiese bouregulasies af te dwing nie, en behoeftige huurders sou nie maklik skuldige verhuurders vervolg wat die ineenstorting van huureiendomme met

131 Scobie 1986 *Klio* 404–405.

132 *De architectura* 2 8 17.

133 Sien Carcopino 43 volgens wie die elegante voorkoms van die geboue dikwels verkry is ten koste van stewigheid aangesien talle geboue ineengestort het omdat die mure nie sterk genoeg was nie.

134 Scobie 1986 *Klio* 405. Sien egter Vitruvius (*De architectura* 7 3 4) wat sê dat kegels eenvoudig moet wees en derhalwe maklik afgestof kan word in kamers waarin daar vure of lampe was "[f]or plaster work, with its glittering whiteness, takes up the smoke that comes from other buildings as well as from the owner's".

135 Friedländer (vol 1) 21.

136 Hierdie hoogte is vasgestel met inagneming van die hoogte van die geboue in verhouding tot die breedte van die straat. In hierdie geval sou die gevolge in baie gevalle onbevredigende ventilasie en onvoldoende lig op straatvlak wees.

137 Bv die herhaaldelike herhaling van die verbod op die afbreek van dakke en die sloping van stedelike geboue *negotiandi causa.*

algehele onverskilligheid beskou het ten aansien van die lot van hulle huurders nie.[138] Alle getuienis met betrekking tot akkommodasie in Rome dui daarop dat daar 'n groot mate van ongeërgdheid aan die kant van die staat met betrekking tot die behuisingsbehoeftes van die behoeftige massas was. Dit blyk egter uit tekste in die *Digesta* dat die owerheid wel besorg was oor die misbruik en uitbuiting van huurders deur gewetenlose verhuurders en onderverhuurders en dat sulke persone ernstige strawwe opgelê is.[139] Daar moet egter nie aangeneem word dat alle woonstelgeboue in Rome struktureel onveilig was nie; so 'n aanname sou net so vals wees as die stelling van Vitruvius dat alle inwoners van residensiële woonstelblokke gerieflik gehuisves is en 'n aangename uitsig op die stad gehad het.[140]

9 SLOTSOM

Die algemene indruk wat verkry word uit die beperkte juridiese, argeologiese en literêre getuienis wat hierbo bespreek is, is dat die inwoners van Rome in 'n omgewing geleef het wat in talle opsigte ooreengestem het met toestande wat tot na 1842 in die groot Europese stede geheers het.

Wat watervoorsiening betref, moet dit beklemtoon word dat die owerheid besonder veel moeite gedoen en onkoste aangegaan het om 'n genoegsame voorraad water aan die stad te lewer. Alhoewel die gemiddelde Romein nie oor lopende water in sy huis beskik het nie, was daar honderde fonteine en waterbakke deur die stad versprei wat dit redelik maklik gemaak het om water vir huishoudelike gebruik te bekom. Die higiëniese standaard daarvan was nie altyd ewe hoog nie, maar die owerhede het nietemin voortdurend pogings aangewend om dit te verbeter en op standaard te hou. Die beheer en toesig daaroor is dan ook aan spesiale amptenare opgedra wie se taak dit was om die water skoon te hou.

Daar is verwys na die ongesonde fisiese ligging van die stad. Aangesien dit nie moontlik was om die stad te verskuif nie, het die Romeine maar probeer om die ergste probleme self op te los. So is daar groot riole en afvoerslote gebou om die moerasagtige gebiede te dreineer en sodoende die gesondheidsgevare inherent daaraan, te verminder en uit die weg te ruim. Sanitêre maatreëls was vanuit 'n moderne oogpunt redelik primitief, maar die verskaffing van doeltreffende openbare toilette op so 'n groot skaal, en die voorsiening van 'n genoegsame voorraad water om straatriole en ander afvoerslote voortdurend te spoel, het wel bygedra tot 'n redelik higiëniese omgewing in die omstandighede wat nie 'n besondere gesondheidsgevaar daargestel het nie.

Die feit dat die Romeine bewus was van die belang van persoonlike higiëne vir gesondheid en dat sindelikheid vir hulle van groot belang was, is interessant. Die verskaffing van openbare baddens wat ter beskikking van selfs die behoeftigste Romein was waar hy homself met warm water kon reinig, is werklik lofwaardig.

---

138 Scobie 1986 *Klio* 405.

139 Sien *D* 19 2 in die algemeen oor huur en verhuur. Sien verder *D* 19 2 3; *D* 13 7 11 5.

140 *De architectura* 2 8 17: "And so by means of stone pillars, walls of burnt brick, party walls of rubble, towers have been raised, and these being joined together by frequent board floors produce upper stories with fine views over the city to the utmost advantage. Therefore walls are raised to a great height through various stories, and the Roman people has excellent dwellings without hindrance."

Die beheer oor strate wat in 'n groot mate eeuelank deur Caesar se munisipale wet gereël is, het ook 'n bydrae gelewer tot 'n meer higiëniese omgewing vir die Romeinse bevolking. Alhoewel die bepalings van die wet nie altyd deurgevoer is nie, het dit tog gehelp om die strate skoner te hou en om verkeersveiligheid te bevorder.

Mediese dienste in Rome was in vergelyking met moderne standaarde swak en onvoldoende. Daar moet egter wel erkenning verleen word aan pogings wat deur die regering aangewend is om dit te verbeter deur byvoorbeeld belastingtoegewings aan dokters, die verlening van burgerregte aan buitelandse medici, en die verskaffing van openbare mediese dienste aan behoeftiges.

Dit blyk voorts uit hierdie oorsig dat Romeine sport en ontspanning as 'n belangrike bydraende faktor tot persoonlike gesondheid beskou het. Die verskaffing van openbare sportgeriewe en ook verskeie parke waar inwoners kon ontspan, moet geloof word. Die feit dat al hierdie geriewe gratis aan die inwoners beskikbaar gestel is, is lofwaardig en dit wil werklik voorkom of die owerhede, wat hulle motiewe ook al mag gewees het, besorg was oor openbare gesondheid in die stad en hulle veel daarmee bemoei het om dit te verbeter.

Behuising in Rome, so 'n digbevolkte stad binne die fisiese beperkings van die omliggende heuwels, het uiteraard probleme geskep. Alhoewel daar talle bouregulasies en ander voorskrifte was, was dit nie altyd moontlik om te verseker dat daar aan hierdie regulasies voldoen word nie aangesien die nodige infrastruktuur daarvoor dikwels nie bestaan het nie. Gewetenlose bouers en woonsteleienaars het gevolglik dikwels hierdie voorskrifte oortree met die oog op groter finansiële winste en dit het daartoe gelei dat huurders soms in gevaarlike wonings gewoon het wat dikwels gesondheids- en lewensgevaar ingehou het.

Ten spyte van talle tekortkominge wat uit hierdie oorsig blyk, volg dit dat daar in Rome soveel aandag aan openbare gesondheid geskenk is, en met soveel effektiwiteit, dat die inwoners van talle moderne stede dit net kan beny. Alhoewel hulle vir honderde jare geen medici gehad het nie, het hulle 'n oorspronklike bydrae gelewer tot die gesondheidswese by wyse van hulle ontwikkeling van sanitêre instellings (waterleidings, verhitte baddens en rioolstelsels) en deur die inagneming van higiëniese aspekte in die boubedryf. Die Romeine het deur middel van hulle erkenning en besef dat verskeie faktore tot persoonlike gesondheid bydra, waaronder 'n genoegsame watervoorraad, persoonlike higiëne, 'n sindelike en veilige omgewing, fisiese oefening, genoeg slaap en die lewering van openbare gesondheidsdienste, verseker dat hulle – vir sover dit onder die omstandighede moontlik was – alles gedoen het waarvan hulle op daardie stadium bewus was om openbare gesondheid te bevorder.

AANTEKENINGE

SOME THOUGHTS ON CORPORAL PUNISHMENT (AND THE LAWFUL USE OF FORCE) AT SCHOOL

1 Background

It is well-known that section 10 of the South African Schools Act (Act 84 of 1996) abolishes corporal punishment at school. This section provides as follows:

> "(1) No person may administer corporal punishment at a school to a learner.
>
> (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault."

The two main issues in regard to this section are, first of all, its correct interpretation and scope, and secondly its constitutionality. In this note the first issue will be addressed briefly before reference is made to the Constitutional Court's approach to the constitutionality of section 10 (*Christian Education South Africa v The Minister of Education* 1998 BCLR 1449 (CC)).

Then follow some brief comments on the lawful use of force at school which is not intended as punishment.

2 Interpretation of section 10

No person

The expression "no person" in section 10 is clearly very wide and probably also includes the learner's parent. Thus an educator may not summon a parent to school to administer corporal punishment to a child of that parent. One may also conclude that an educator at a school may not administer corporal punishment to his or her own child who attends that school *at the school itself.* The parent cannot give any authority to an educator to administer the forbidden form of punishment. The intention of the legislature seems to be that no capacity or authority whatsoever can be relied upon for justifying corporal punishment at a school. Obviously school prefects and any other learners may not administer corporal punishment to a fellow learner. May a parent lawfully authorise an educator to administer punishment outside the "school context" – for example, at the parent's home? (See also below on the expression "at a school".) In the light of the relationship between educator and learner, the answer to this is probably in the negative.

Administer corporal punishment

There may be difference of opinion about the exact definition and meaning of "corporal" or "physical" punishment. The Schools Act does not define this concept and it must therefore be given its usual meaning (see Parker-Jenkins

"Sparing the rod: schools, discipline and children's rights in multicultural Britain" in De Groof, Bray, Mothata and Malherbe *Power sharing in education: dilemmas and implications for schools* (Acco 1998) 215–219). Punishment refers to an act which is intended to cause suffering or discomfort to someone on account of wrongdoing by the latter. In a narrow sense, corporal or physical punishment means the whipping or beating of the body of a person. In a wider sense it may refer to punishment aimed at causing physical inconvenience to the body of a person or having such an effect on a person's body.

Should detention (which is widely propagated as an alternative to corporal punishment – see eg Parker-Jenkins 222) not be seen as a form of corporal punishment? It is interesting to note that the guidelines on a code of conduct and school discipline published by the Minister of Education (see GN 776 of 1998 in *Gazette* 18900 1998-05-15, par 10.1) do *not* refer to detention as a permissible form of punishment. Although this does not necessarily outlaw detention, the omission of any reference to detention may suggest official disapproval of detention because of its closeness to corporal punishment. And what is the position if a learner is directed to perform physical exercises, or is ordered to perform certain exhausting physical tasks? On a wide interpretation this may possibly also be seen as constituting "corporal punishment".

The best interpretation of section 10 seems to be the narrow one which includes only whipping and beating (and closely related forms of punishment).

To "administer" corporal punishment obviously includes giving assistance to a person actually administering the punishment or ordering or requesting another person to administer such punishment. The principal and educators of a school who tolerate or allow school prefects to administer corporal punishment to learners may therefore also be seen as "administering" this form of punishment.

Consent

Consent to injury is a recognised ground of justification (see generally Neethling, Visser and Potgieter *Law of delict* (1999) 96–103). In the light of the express prohibition on corporal punishment in the school context, neither the learner nor the parent will be able to consent to such punishment. The consent will probably be regarded as *contra bonos mores,* since the legislature has already decided on the *mores* of society in this regard.

At a school

The prohibition in section 10 is clearly limited in terms of the phrase "at a school" (see also par 3 5 below). The definition of "school" in the Schools Act is not helpful save for the fact that it refers to a public as well as an independent (private) school. "At a school" should, in view of what the legislature presumably intended to achieve, be interpreted as the premises (including a vehicle) used by the school for the purposes of education as well as any occasion (regardless of the venue) where the official relationship educator-learner exists, or where educational objects of the school are being pursued and educators exercise control over learners (see generally par 3.7 of the Ministerial guidelines referred to above). A hostel administered by the governing body of a school presumably also falls within the meaning of "at a school" (see s 20(1)(g) of the Schools Act).

Learner

In terms of the Schools Act (s 1(ix)) this means any person receiving education or who is obliged to receive education in terms of the Schools Act.

3 A constitutional challenge to section 10 of the Schools Act

3 1 *Christian Education South Africa v The Minister of Education supra* represents the first constitutional challenge to a provision of the Schools Act. The applicant, a voluntary association of independent schools, sought an order declaring section 10 discussed above to be invalid to the extent that it is applicable to independent schools, or alternatively that it is invalid in regard to children whose parents have given written consent to corporal punishment to be administered. Although the case was more concerned with the issue of direct access to the Constitutional Court, some remarks of relevance to corporal punishment can also be found in the judgment.

3 2 It was argued on behalf of the applicant that all its members subscribe to the belief that corporal punishment in their schools (as in the home) forms part of a system of discipline based upon Christian faith and Scriptures. Corporal punishment (also described as "corporal correction") is also part of their common culture and therefore falls under the cultural protection afforded by sections 15(1), 29(3) and 31(1) of the Constitution. It was argued that the moderate chastisement administered at schools does not amount to assault (par 2 of the judgment).

3 3 The application for direct access to the Constitutional Court (which was not opposed by the respondent) was mainly based on the argument that it was in the interests of justice for the matter to be directly heard by the Constitutional Court (par 5). It was further submitted that the matter was one of urgency by reason of the uncertainty regarding the constitutionality of section 10 and that it was in the public interest that legal certainty should be achieved quickly:

> "Firstly, the uncertainty relates to teachers who would be exposed to the risk of conducting themselves on the assumption that section 10 is unconstitutional and therefore invalid. Secondly, it was contended in the founding affidavit lodged on behalf of the applicant that if the matter were to be brought before a High Court, the decision of such court would only be binding in its area of jurisdiction, and not nationally, and that this would result in uncertainty about the true legal position amongst the applicant's constituent members elsewhere in the Republic" (par 10).

The Constitutional Court (per Langa DP) unanimously rejected these arguments in the following terms (after having referred to the decision in *Bruce v Fleecytex Johannesburg CC* (1998 2 SA 1143 (CC)):

> "The importance of establishing the constitutional validity of section 10 is no greater than that which ordinarily exists with regard to provisions of other Acts of Parliament. I do not agree that there is any greater urgency arising from the fact that some teachers may ignore the prohibition imposed by section 10 and thus expose themselves to prosecution. If they choose to take the risk, knowing full well that the provision's constitutionality is under challenge, then there should be no complaint if appropriate consequences follow their deliberate conduct. It is moreover clear that the prohibition in section 10 is concerned only with corporal punishment which is imposed within a school context. It has not been contended, and indeed it could not have been, that the provision makes such severe inroads into the disciplining of children as to render the matter so urgent that ordinary procedures would not suffice. The Act has been in force since 1 January 1997, a full eighteen months before these proceedings were launched. It was not suggested that discipline at schools has crumbled in the meantime or was threatening to do so. I am satisfied that no case for urgency has been established" (par 11).

3 4 The decision is probably correct on the issue of direct access. In matters such as this, the Constitutional Court should have the benefit of the views of the

High Court (see par 12). As far as section 10 itself is concerned, the judgment is an early indication that the court will probably not be prepared to hold that section 10 is invalid for the reasons advanced by the applicant. However, it is not clear what important government purpose is served by a general prohibition on corporal punishment in independent schools. Moderate corporal correction has been declared not to be contrary to either the Constitution of the United States or the European Convention on Human Rights (see *Christian Education South Africa v Minister of Education supra* par 2; *Ingraham v Wright* 430 US 651 (1977); *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112). Whether these foreign cases can be relied upon to justify the *striking down of a prohibition on corporal punishment*, is another matter. It would seem that legislative change is possibly the best way of allowing more freedom in independent schools on the issue of corporal punishment.

3 5 The court's reference to "school context" regarding the field of application of section 10, indicates some limits to that provision. It would probably not be illegal for an educator to advise a parent, who believes in the correctness of corporal punishment, that a child of that parent deserves such punishment. The parent may then act upon such advice outside the "school context" and section 10 will not be contravened in the process.

4 Lawful use of force at school

4 1 The prohibition on corporal punishment obviously does not render unlawful the use of force against the body of a learner where there may be a recognised ground of justification for such action. For example, an educator is entitled to rely on private defence if force is used to ward off an unlawful attack or threatening attack against himself/herself or against another person – for example another learner (see generally Neethling, Visser and Potgieter 75). Necessity may also justify the use of force in certain circumstances (*idem* 84). Where the lawful arrest of a learner is to be effected at a school, section 49 of the Criminal Procedure Act (Act 51 of 1977), which permits the use of legitimate force, will obviously be applicable.

4 2 As there is no *numerus clausus* of grounds of justification, it is arguable that in addition to private defence and necessity, an educator probably also has the power to use reasonable force against a learner to restrain him/her whenever this may be necessary. An example may be where a learner seriously disrupts a class and does not want to leave the class at the direction of the educator. Although private defence or necessity does not seem to be relevant in these instances, the educator should be entitled to use reasonable force, for example, to cause the learner to leave the class and to remain outside. Another example is where reasonable force is used to cause a young learner to board or leave a vehicle used for the transportation of learners. It is less clear whether an educator may use force to compel a learner to keep quiet in class. A further instance where force may probably be used is where a learner is lawfully obliged to endure detention (see par 2 above) and attempts to leave the place of detention without a good reason. The use of physical force (or a threat of physical force) in these circumstances cannot not be classified as corporal punishment and thus unlawful in terms of section 10. Force may also be used if necessary (eg in the absence of the police) to prevent a suspended or expelled learner from attending school.

4 3 It may be advisable to adopt legislation (if this does not already exist) to justify the actual taking of reasonable steps aimed at ensuring that disruptive behaviour of learners is prevented or limited to a minimum.

PJ VISSER
University of Pretoria
Centre for Education Law and Policy (CELP)

AGAINST THE CRIMINALISATION OF HIV-RELATED SEXUAL BEHAVIOUR

> "Respect cannot be achieved by the same methods as power. It requires not chiefs, but mediators, arbitrators, encouragers and counsellors, ... who do not claim to have a cure for all ills, and whose ambition is limited to helping individuals to appreciate each other and to work together even when they are not in complete agreement, ensuring that disputes do not become suicidal" – (Zeldin *An intimate history of humanity* (1994) 144).

The issue of whether HIV-related sexual behaviour should be a criminal offence is considered by the South African Law Commission in a discussion paper entitled "Aspects of the law relating to AIDS: The need for a statutory offence aimed at harmful HIV-related behaviour" (Discussion Paper 80, Project 85, 1999). The question is: Should the criminal law punish an HIV-positive person who, during sexual intercourse, deliberately or negligently transmits the virus to another or exposes the other to the virus without actually transmitting it? The Commission does not commit itself, but presents all that needs to be considered in coming to an answer. The Commission is of the view that the spread of HIV is not best combated by the criminal law and that HIV/AIDS is mainly a public health issue best dealt with non-coercively. However, it accepts that there is a role, albeit a limited one, for the criminal law to play in targeting harmful behaviour, such as when the HIV virus is deliberately transmitted.

First of all, it surveys the difficulties of using the existing common-law crimes to punish HIV-related sexual conduct. Next, the various forms that a new statutory offence aimed specifically at HIV-related sexual behaviour may take are set out. However, no draft legislation is proposed and the public is asked to comment on the topic. (See the Summary in the discussion paper at iv–xvii.) I would argue against the criminalisation of HIV-related sexual conduct, whether at common law or by statute. By sexual conduct, I mean consensual intercourse, where there is consent to the act of intercourse, rape or sexual assault. "I'm telling you stories. Trust me", says the narrator in Jeanette Winterson's novel *The passion* (1987) 5. If HIV-related sexual behaviour were to be punished under the existing common law or as a new statutory offence, what story would be told about HIV/AIDS and could the law's narration be trusted?

Within a master narrative of crisis and solution (see Seldin "Just when you thought it was safe to go back in the water ..." in Abelove *et al* (eds) *The lesbian and gay studies reader* (1993) 221), such a criminal trial dramatises the

condemnation of the guilty individual, the diseased, by the healthy majority, for threatening innocent victims (see Watney "Taking liberties: an introduction" in Carter and Watney (eds) *Taking liberties* (1989) 11 36). An early, discredited theory of the origin of HIV/AIDS was that of "patient zero" – that the original HIV-carrier in North America was a gay Canadian airline steward called Gaetan Dugas, who is alleged to have had several hundred sexual partners and to have infected them deliberately (Williamson "Every virus tells a story: the meanings of HIV and AIDS" in *Taking liberties supra* 69 73; see also Closen *et al* (eds) *AIDS: Cases and materials* (1989) 65–66). Like this tale of a latterday Typhoid Mary, the trying of HIV-transmission plays in a siege mentality, where infected outsiders are a threat to the uninfected nation. At the beginnings of the HIV/AIDS epidemic and still, to an extent, in North America and Europe, these "other people" (Watney *Policing desire: Pornography, AIDS and the media* (1997) 148) were largely and neatly members of pre-existing categories, such as gays and Hispanics. HIV/AIDS revivified the stereotypes of these groups of people. With the prevalence of HIV in all population groups and across all sexual orientations in South Africa today (see Webb *HIV and AIDS in Africa* (1997) ch 1), "these others" need a new categorisation, and stigmatising initiatives such as criminalisation create the category.

The story of criminalisation is therefore to minoritise HIV/AIDS. Is the story true?

> "The point is that our sense of who is vulnerable to AIDS is based not on conclusive information about the disease, but on assumptions about its victims. Those who believe AIDS could permeate society tend to see carriers as ordinary people who were infected by specific practices. Any act that spreads the disease is potentially dangerous, regardless of its moral meaning. Those who are convinced the risk is low or non-existent tend to see these acts, and the people who perform them, as isolated and perverse. Normal people do not do these things, and therefore, they will be spared" (Goldstein "AIDS and the Social Contract" in *Taking liberties supra* 81 82).

The minoritising story is based on the latter assumption – but surely the former assumption is the correct one. Statistically and demographically, in actuality and potentially, HIV/AIDS is a risk for everyone. (See the section on the "Prevalence of HIV/AIDS in South Africa" in the discussion paper (paras 2.48–2.50) for epidemically proportioned statistics.) A chief aim of health education is safer sex, and safer sex "involves everyone regardless of their known or perceived HIV antibody status" (*Policing desire supra* 147). The message proclaimed by the criminal law should be one of collective responsibility, of co-responsibility within any sexual encounter. Of course, there may be power imbalances within sexual encounters, but one cannot assume that the imbalance usually favours an HIV-positive partner. To place sole responsibility on HIV-positive people is to misconstrue the mystery of sex as if it were a rational transaction. We need "modifications in behaviours that are linked to deep biological and psychological drives and desires" (Bayer *Private acts, social consequences: AIDS and the politics of public health* (1989) 11). Writing from a gay perspective, Watney has a specific suggestion:

> "Changes in sexual behaviour cannot be forced, they can only be achieved through consent, consent which incorporates change into the very structure of sexual fantasy. Hence the urgent, the desperate need to eroticize information about safe sex, if tens of thousands of more lives are not to be cruelly sacrificed on the twin altars of prudery and homophobia" (*Policing desire supra* 128).

In sum, the key opposition in thinking about HIV/AIDS between the public health (as a concern of the healthy majority) and personal liberties (of the infected minority) is a false polarity. The latter is an aspect of the former.

Assume, however, that we were able to distinguish between "normal" (HIV-negative) people and "abnormal" (HIV-positive) people. Say that the virus only infected a certain minority. The epidemic would still not be a minority issue suitable for the drama of a criminal trial. To penalise people with HIV/AIDS is to blame them for their situation, to say that they inflicted it on themselves. Their physical vulnerability is perceived as "an indication of moral decay" (Brandt *No magic bullet: A social history of venereal disease in the United States since 1880* (1987) 202, as quoted in *Policing desire supra* 10). Sexuality usually trails moralising in its wake, and the fact that HIV is mainly transmitted through sexual intercourse brings notions of heresy and sin into the picture. What is really a blood disease is regarded as a venereal disease (*Policing desire supra* 10). Watney's constant theme is that "the epidemic has been used to articulate values and beliefs that have nothing to do with AIDS" ("Taking Liberties" in *Taking liberties supra* 19). Criminal conviction for HIV-transmission through sexual intercourse articulates deep fears about our own sexuality as well as that of others. It attempts to exorcise those fears and to read them onto the body of the person with HIV/AIDS. Such a person becomes defined by her or his physical condition as a killer of herself or himself, and potentially of others. The criminal law reinforces the notion of disease as punishment (see Watney "Taking liberties" in *Taking liberties supra* 36). The creation of such a monster of a person (see Williamson in *Taking liberties supra* 72) is monstrous. Even if HIV/AIDS were an issue of (uninfected) us and (infected) them, compassion should derive from the knowledge of our shared fears of sex, vulnerability and mortality, and make us balk at the stigmatisation of people who have HIV/AIDS.

ANGELO PANTAZIS
University of the Witwatersrand

There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge muddles the password and the wrong door opens. But we do not believe in fairy tales any more.

Lord Reid "The judge as law maker" 1972 J of Public Teachers of Law *22.*

VONNISSE

DIE LASTERREG EN DIE MEDIA: STRIKTE AANSPREEKLIKHEID WORD TEN GUNSTE VAN NALATIGHEID VERWERP EN 'N VERWEER VAN MEDIAPRIVILEGIE GEVESTIG

National Media Ltd v Bogoshi 1998 4 SA 1196 (HHA)

Hierdie beslissing van die Hoogste Hof van Appèl slaan, wat sekere aspekte van die lasterreg betref, 'n radikale nuwe koers in. Dit is nie ons oogmerk om appèlregter Hefer se uitspraak volledig te bespreek nie, maar om kommentaar op die belangrikste aspekte daarvan te lewer. (Vir besprekings van *Bogoshi*, sien Burchell "Media freedom of expression scores as strict liability receives the red card: *National Media Ltd v Bogoshi*" 1999 *SALJ* 1; *Personality rights and freedom of expression* (1998) 210 262 320.)

1 Die volgende bevindings van die hof kan as agtergrond vir ons bespreking dien:

(a) Die publikasie van 'n lasterlike bewering laat vermoedens van sowel onregmatigheid as *animus iniuriandi* ontstaan wat die las op die verweerder plaas om die vermoedens te weerlê (1202G–H):

> "In considering the validity of [a] defence it is useful to bear in mind that liability for defamation postulates an objective element of unlawfulness and a subjective element of fault (*animus injuriandi* – the deliberate intention to injure). Although the presence of both elements is presumed once the publication of defamatory material is admitted or proved, the plaintiff is required to allege that the defendant acted unlawfully and *animo iniuriandi*, and it is for the defendant either to admit or deny these allegations. A bare denial, however, is not enough: The defendant is required to plead facts which legally justify his denial of unlawfulness or *animus injuriandi* as the case may be."

(b) Daar bestaan nie 'n *numerus clausus* regverdigingsgronde nie (1204C–I):

> "[I]t is hardly necessary to add that the defences available to a defendant in a defamation action do not constitute a *numerus clausus*. In our law the lawfulness of a harmful act or omission is determined by the application of a general criterion of reasonableness based on considerations of fairness, morality, policy and the Court's perception of the legal convictions of the community. In accordance with this criterion Rumpff CJ indicated in *O'Malley's* case [1977 3 SA 394 (A)] at 402*fin*–403A that it is the task of the Court to determine in each case whether public and legal policy requires the particular publication to be regarded as lawful . . . Accordingly, as EM Grosskopf JA observed in the last mentioned case [*Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A)] at 590C–D, '(w)here public policy so demands, (the Court) would be entitled to recognise new situations in which a defendant's conduct in publishing defamatory matter is lawful'."

(c) Die appèlhofbeslissing in *Pakendorf v De Flamingh* 1982 3 SA 146 (A) wat die aanspreeklikheid van die media vir laster op 'n strikte of skuldlose grondslag geplaas het, is verkeerd (1205 ev 1210F–1211C):

> "In endorsing this view I should add that it makes no difference that South Africa has only recently acquired the status of a truly democratic country. Freedom of expression, albeit not entrenched, did exist in the society that we knew at the time when *Pakendorf* was decided . . . although its full import, and particularly the role and importance of the press, might not always have been acknowledged . . . If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been rejected in *Pakendorf* . . . In my judgment the decision in *Pakendorf* must be overruled. I am, with respect, convinced that it was clearly wrong."

(d) Die publikasie van valse of onware lasterlike bewerings is regmatig mits die publikasie redelik of in ooreenstemming met die regsopvattings van die gemeenskap is – sogenaamde politieke of mediaprivilegie as nuwe regverdigingsgrond (1211C–1213F):

> "It has been said . . . that the criterion of unlawfulness must be the legal convictions in South Africa and not elsewhere. But the solution of the problem in England, Australia and the Netherlands seems to me to be entirely suitable and acceptable in South Africa. In my judgment we must adopt this approach by stating that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.
>
> In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance that greater latitude is usually allowed in respect of political discussion . . . and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper.
>
> I have mentioned some of the relevant matters; others, such as the opportunity given to the person concerned to respond, and the need to publish before establishing the truth in a positive manner, also come to mind. The list is not intended to be exhaustive or definitive."

(e) Aanspreeklikheid van die media weens laster word nie op *animus iniuriandi* nie, maar wel op nalatigheid gegrond (1214B–I):

> "Against this background, it is necessary to raise the question left open in *Pakendorf* (at 155A), namely whether absence of knowledge of wrongfulness can be relied upon as a defence if the lack of knowledge was due to the negligence of the defendant.
>
> If media defendants were to be permitted to do so, it would obviously make nonsense of the approach which I have indicated to the lawfulness of the publication of defamatory untruths . . .
>
> Defendants' counsel, rightly in my view, accepted that there are compelling reasons for holding that the media should not be treated on the same footing as ordinary members of the public by permitting them to rely on the absence of *animus injuriandi*, and that it would be appropriate to hold media defendants liable unless they were not negligent in the circumstances of the case . . . In that country

> [Australia], and in all the others mentioned earlier where strict liability is not accepted, the media are liable unless they were not negligent. Taking into account what I said earlier about the credibility which the media enjoys amongst large sections of the community, such an additional burden is entirely reasonable."

(f) Die *onus* om afwesigheid van onregmatigheid of nalatigheid te bewys, berus by die media (verweerder) (1215B–I):

> "In civil law ... considerations of policy, practice and fairness *inter partes* may require that the defendant bears the overall *onus* of averring and proving an excuse or justification for his otherwise unlawful conduct. This remark is particularly apposite to cases of the present kind, where there is a presumption of unlawfulness arising from the publication of defamatory material ... [Defendant's] counsel accepted that the *onus* relating to justification rested upon them, but argued that it would at least be for the plaintiff to prove negligence on their part ... Bearing in mind that the evidence relating to negligence may be intertwined with evidence on some other issue, it is unrealistic to expect the plaintiff to prove some of the facts and the defendant to prove others. In my judgment it is for the defendant to prove all the facts on which he relies to show that the publication was reasonable and that he was not negligent. Proof of reasonableness will usually (if not inevitably) be proof of lack of negligence."

(g) Alhoewel die reg op die goeie naam nie *eo nomine* deur die Grondwet beskerm word nie, word hierdie reg onder die reg op menswaardigheid in die handves van menseregte tuisgebring. Terselfdertyd word die hoë premie uitgelig wat op die reg op waardigheid geplaas word (1216I–1217B – met goedkeuring aangehaal uit *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 607E–G):

> "[R]ecognition of every person's 'right to respect for and protection of his or her dignity' must encompass ... the right to a good name and reputation. A further consideration is that the Constitutional Court ... has given primacy to the rights to life and dignity in the catalogue of constitutional protections. As Chaskalson P ... stated in *S v Makwanyane and Another* 1995 3 SA 391 (CC) 451C–D:
>
> > 'The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.'"

(h) Aangesien die gemenereg 'n behoorlike afweging van die reg op die goeie naam en die reg op die vryheid van spraak bewerkstellig, is die lasterreg in ooreenstemming met die Grondwet (1215J–1218H):

> "[A]s I indicated before, the right to protect one's reputation weighed no less than the freedom of expression in pre-transition times; and the quotation from the judgment in *Makwanyane* confirms my own impression that the interim Constitution rated personal dignity much higher than before. The ultimate question is whether what I hold to be the common law achieves a proper balance between the right to protect one's reputation and the freedom of the press, viewing these interests as constitutional values. I believe it does ... I have already found that the common law, as expounded in this judgment, is in conformity with constitutional values."

2 Die volgende aspekte is vir doeleindes van hierdie bespreking van belang: die erkenning van 'n verweer van politieke of mediaprivilegie; die vervanging van strikte aanspreeklikheid van die media deur aanspreeklikheid gegrond op nalatigheid; en die vraag na die bewys- of weerleggingslas by onregmatigheid, *animus aniuriandi* en nalatigheid.

(a) *Die verweer van politieke of mediaprivilegie* In *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 1 SA 708 (A) het die vraag na die erkenning van 'n nuwe regverdigingsgrond, sogenaamde mediaprivilegie, ter sprake gekom.

Die kernvraag by hierdie verweer is of in die besondere omstandighede die openbare belang op sigself, dit wil sê sonder dat die lasterlike bewerings ook waar is, 'n lasterlike publikasie kan regverdig. In die hof *a quo* antwoord regter Kriegler, in navolging van regter Coetzee se uitspraak in *Zillie v Johnson* 1984 2 SA 186 (W), bevestigend hierop (sien die *Neethling a quo*-saak 1991-01-07 saaknommer 24659/89 (W); Neethling *Persoonlikheidsreg* (1998) 188 vn 255; Neethling en Potgieter "Openbare belang as selfstandige verweer by laster" 1993 *THRHR* 323–324). Appèlregter Hoexter is egter sterk gekant teen die erkenning van so 'n verweer. Volgens hom verteenwoordig regter Kriegler se uitspraak "not only a marked departure from precedent and principle. Into what juristic niche it is designed to fit is, I think, a matter of some difficulty" (775). Hy is trouens van mening dat bedoelde verweer "entirely alien" vir ons reg is (777). Hierbenewens is die onderhawige verweer volgens regter Hoexter onaanvaarbaar omdat dit "accords to the press a licence" wat vir die Suid-Afrikaanse reg onaanvaarbaar is (776). Die toe heersende benadering word goed geïllustreer deur die volgende *dicta* in twee uitsprake: *Iyman v Natal Witness Printing and Publishing Co (Pty) Ltd* 1991 4 SA 677 (N) 684–686 waar beslis is dat die "publication of defamatory matter which is only partly true can, of course, never be in the public interest"; en *Couldridge v Eskom* 1994 1 SA 94 (SOK) 103 waar dieselfde gedagte kortweg soos volg uitgedruk word: "A lie can never be for the public benefit." Ons het ons destyds met hierdie standpunt vereenselwig omdat ons van mening was dat die bestaande regverdigingsgronde nie te geredelik uitgebrei moet word om die publikasie van onware beriggewing te regverdig nie (Neethling en Potgieter 1993 *THRHR* 326, "Laster: Die bewyslas, media-privilegie en die invloed van die nuwe Grondwet" 1994 *THRHR* 516).

In hierdie verband moet onthou word dat die *Neethling*-saak beslis is voor die inwerkingtreding van die interim-Grondwet 200 van 1993 wat vryheid van spraak (in besonder vryheid van die pers) as fundamentele reg in artikel 15(1) gewaarborg het (vgl a 16(1)(a) van die Grondwet 108 van 1996). Daarom betoog Van Aswegen "The implications of a bill of rights for the law of contract and delict" 1995 *SAJHR* 61 dat die *Neethling*-beslissing waarskynlik anders onder die interim-Grondwet daar sou uitgesien het (vgl verder Neethling *Persoonlikheidsreg* 185 vn 256). Verskeie beslissings het sedertdien dan ook aangedui dat die grondwetlike vryheid van spraak as verweer teen 'n lasteraksie geopper kan word, en sodoende die weg gebaan vir die erkenning van 'n spesiale verweer van media- of politieke privilegie wat die publikasie van lasterlike bewerings in die openbare belang regverdig sonder dat die bewerings noodwendig waar hoef te wees (sien bv *Mandela v Falati* 1995 1 SA 251 (W) 257–260; *Jurgens v Editor, Sunday Times Newspaper* 1995 2 SA 52 (W); *Gardener v Whitaker* 1995 2 SA 672 (OK) 687 ev; *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 601–620; vgl *O v O* 1995 4 SA 482 (W) 490). In *Holomisa* is regter Cameron trouens van oordeel dat die bestaande lasterreg ingrypend deur die nuwe grondwetlike bedeling geraak word (601–606) en dat regverdiging in die lig van konstitusionele waardes (in besonder die reg op vryheid van spraak) (606–613) uitloop op 'n nuwe regverdigingsgrond (613–618), naamlik dat "free and fair political activity is constitutionally protected, even if false, unless the plaintiff shows that, in all the circumstances of its publication, it was unreasonably made" (618; vgl *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 884–885; sien verder Neethling en Potgieter "Regsonsekerheid in die lasterreg in die lig van die Grondwet – die pad vorentoe?" 1996 *THRHR* 708–709). Hierteenoor is daar egter 'n reeks beslissings wat sodanige ingrypende beïnvloeding van die lasterreg deur die Grondwet

ontken (sien bv *De Klerk v Du Plessis* 1995 2 SA 40 (T) 43 ev; *Potgieter v Kilian* 1995 11 BCLR 1498 (N), 1996 2 SA 276 (N) 296 ev; *Bogoshi v National Media Ltd* 1996 3 SA 78 (W) 82–84; *Hall v Welz* 1996 4 SA 1070 (K) 1072; vgl *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 1 SA 391 (A) 400–402 (mbt die interdik)). In die verhoorhof in *Bogoshi* verklaar regterpresident Eloff byvoorbeeld (84):

> "The right of free speech is subject to the right of a person . . . to preserve his reputation unblemished. The defendants can only escape liability . . . if they can at least establish that what they said was true. It is no answer to say that the articles . . . concern matters of public interest" (sien verder Neethling en Potgieter 1996 *THRHR* 707–708; Van der Walt "Freedom of expression and defamation: A reflection on recent developments" 1998 *TSAR* 208–209, "Truth and public interest in German defamation litigation against the media" 1998 *TSAR* 483 ev).

Hoe ook al, sonder om hoegenaamd na die *Neethling*-saak of hierdie teenstrydige uitsprake te verwys, kom regter Hefer in *Bogoshi* (1212B–C) – na 'n ondersoek van relevante Australiese, Engelse en Nederlandse regspraak, waarin die klem op die "reasonableness of conduct" val wat net beskerming verleen aan onware lasterlike publikasies "in which the public has an interest" – tot die slotsom dat die openbare belang op sigself wel die publikasie van onware lasterlikhede kan regverdig. Hy stel dit so:

> "It [die openbare belang-toets van 'n Engelse beslissing] serves to indicate that the publication in the press of false defamatory statements of fact will be regarded as lawful if, in all the circumstances of the case, it is found to be reasonable; but *it emphasises what I regard as crucial, namely that protection is only afforded to the publication of material in which the public has an interest* (ie which is in the public interest to make known as distinct from material which is interesting to the public" (ons kursivering).

Sonder om enigsins afbreuk te doen aan die waarskynlike meriete van hierdie standpunt en, soos hierbo blyk, die erkenning van 'n verweer van mediaprivilegie (alhoewel nie by name nie) in *Bogoshi* (te wete dat "the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time" – 1212G), vind ons dit tog onverklaarbaar dat die hoogste hof van appèl 'n direk teenoorstaande standpunt as sy maar net vyf jaar vantevore bevinding in *Neethling* inneem sonder om hoegenaamd na laasgenoemde beslissing te verwys. Dit is nog vreemder as appèlregter Hefer verklaar dat "I am not aware of a previous case in which a plea along these lines was considered before by a court in this country" (1204C) terwyl, afgesien van die *Neethling*-appèlsaak, provinsiale beslissings soos *Zillie supra* en die verhoorhof in *Neethling* 'n soortgelyke standpunt as regter Hefer gehuldig het. Die twee botsende appèlhofuitsprake in *Neethling* en *Bogoshi* skep uiteraard regsonsekerheid oor die erkenning van die verweer van mediaprivilegie – 'n aangeleentheid waaroor die hoogste hof van appèl hopelik by die eersvolgende geleentheid uitsluitsel sal gee.

Vir sover die verweer van mediaprivilegie wel erkenning geniet, spreek dit vanself dat, aangesien dit hier oor die regverdiging van onwaarhede gaan, die toepassing van die verweer met omsigtigheid hanteer moet word. Noukeurige riglyne moet daarom vir die begrensing daarvan neergelê word, soos die hof in *Bogoshi* dan ook inderdaad doen (1212G–1213E, hierbo aangehaal). Ter wille van volledigheid doen ons aan die hand dat onder meer die volgende riglyne ook

voor oë gehou word: Die oorwegings wat gewoonlik by die verweer waarheid en openbare belang in ag geneem word om te bepaal of die betrokke bewering in die *openbare belang* is (sien Neethling *Persoonlikheidsreg* 186–188; Neethling en Potgieter 1993 *THRHR* 324–325, 1994 *THRHR* 516–519, 1996 *THRHR* 710–711); die erns van die aangeleentheid waarop die laster betrekking het (bv dat dit die voortbestaan van die regsorde bedreig: sien die *Neethling a quo*-saak 244–245); die dringendheid van die kommunikasie aan die publiek; 'n onbehoorlike motief aan die kant van die verweerder (soos waar die verweerder geweet het dat die publikasie onwaarhede bevat, of waar die publikasie net ten doel het om die publiek se sensasielus te bevredig (vgl die hof *a quo* in *Neethling* 224); die noodsaaklikheid, nie alleen van die feit van publikasie nie, maar ook van die wyse waarop dit gedoen is; en die omvang van die verspreiding en die mark waarop die publikasie gemik is (vgl Neethling *Persoonlikheidsreg* 315–316 mbt die regverdiging van 'n identiteitskending deur die openbare inligtingsbelang).

(b) *Die vervanging van strikte aanspreeklikheid van die media deur aanspreeklikheid gegrond op nalatigheid* In *Pakendorf v De Flamingh* 1982 3 SA 146 (A) 156–158 is die aanspreeklikheid vir laster wat tradisioneel op *animus iniuriandi* gegrond was, ten opsigte van die pers deur strikte aanspreeklikheid vervang. Hierdie erkenning van strikte aanspreeklikheid is egter veral in die lig van die erkenning van vryheid van uitdrukking (spraak) van die pers en ander media as fundamentele reg ernstig bevraagteken omdat sodanige aanspreeklikheid vryheid van spraak onredelik sou beperk (vgl bv Van der Walt en Midgley *Delict: Principles and cases* (1997) 22–24; Midgley "The attenuated form of intention: A constitutionally acceptable alternative to strict liability of the media" 1996 *THRHR* 635–636; Van Aswegen 1995 *SAJHR* 60–61; *Gardener v Whitaker* 1995 2 SA 672 (OK) 687; sien in die algemeen Neethling *Persoonlikheidsreg* 73–74 203 vn 362).

Indien aanvaar word dat die strikte aanspreeklikheid van die pers weens laster die reg op die goeie naam wel onbillik teenoor die reg op vryheid van spraak bevoordeel, sou 'n mens een van twee moontlikhede kon oorweeg om 'n beter ewewig tussen die twee regte te bewerkstellig.

Aan die een kant sou strikte aanspreeklikheid deur aanspreeklikheid gegrond op opset (*animus iniuriandi*) vervang kon word (vgl Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 441). Daar was reeds aanduidings in uitsprake van pogings om *animus iniuriandi* weer as aanspreeklikheidsvereiste vir laster ten aansien van die media te vestig, onder andere deur afwesigheid van *animus iniuriandi* as verweer op te werp (vgl hieroor *Jurgens v Editor, Sunday Times Newspaper* 1995 2 SA 52 (W) 55–56 ("express malice"); *Gardener v Whitaker* 1995 2 SA 672 (OK) 687; *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 594 599–601; *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 884; *McNally v M & G Media (Pty) Ltd* 1997 4 SA 267 (W) 273 274 275–276). Ook in die VSA het die pendulum sedert *New York Times Co v Sullivan* 376 US 254 (1964) meer ten gunste van die pers geswaai en word 'n skuldverwyt van "actual malice", analoog aan ons *animus iniuriandi,* nou vereis vir aanspreeklikheid weens belastering van openbare amptenare en openbare figure. (Hiervolgens moet die eiser bewys dat die lasterlike bewerings vals is en dat die lasteraar geweet het dat dit vals is.) Aangesien dit baie moeilik is om opset by die media tuis te bring – 'n belangrike beleidsoorweging waarom strikte aanspreeklikheid in ons reg ontwikkel het (sien *SAUK v O'Malley* 1977 3 SA 394 (A) 404–405–407; Neethling *Persoonlikheidsreg* 204 vn 361) – het lastereise

teen die media deur openbare amptenare en openbare figure in Amerika feitlik doodgeloop: 'n toedrag van sake wat op 'n onhoudbare negering van die fundamentele reg op die goeie naam in Suid-Afrika sou neerkom en daarom nie vir ons reg aanvaar behoort te word nie (Neethling en Potgieter 1995 *THRHR* 713; vgl ook Midgley 1996 *THRHR* 636–637). In *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 613–615 is regter Cameron insgelyks van mening dat die Amerikaanse benadering in *New York Times Co v Sullivan* 376 US 254 (1964) ontoepaslik en onwenslik vir ons reg is, veral omdat "it gives wholly insufficient weight to an individual's right of reputation" (615; vgl verder Erasmus "*New York Times v Sullivan* and South African law" 1997 *THRHR* 665 ev).

Aan die ander kant sou nalatigheid *de lege ferenda* as basis vir aanspreeklikheid weens laster deur die media in ons reg aanvaar kon word (sien Burchell *The law of defamation in South Africa* (1985) 185 ev 193–194; vgl Neethling *Persoonlikheidsreg* 74 198 vn 322 199 vn 323 204 vn 361 362; sien egter Midgley 1996 *THRHR* 637–638). Na ons mening lyk dit na die beste kompromie tussen strikte aanspreeklikheid wat voorkeur aan die beskerming van die goeie naam verleen, en aanspreeklikheid gegrond op *animus iniuriandi* wat die klem op die handhawing van die reg op die vryheid van spraak plaas (vgl ook *Gardener* 688). Soos Burchell *Principles of delict* (1993) 184 dit stel, 'n

> "negligence criterion for ... mass media defendants would have established a fairer balance between protection of reputation and freedom of expression and would have been easier to apply in practice".

Die posisie in *Hassen v Post Newspapers (Pty) Ltd* 1965 3 SA 265 (W) illustreer die sinvolheid van 'n nalatigheids- eerder as 'n opsetsgrondslag goed (sien ons bespreking in 1995 *THRHR* 713–714).

Soos hierbo aangetoon, word hierdie gevolgtrekking tereg ook in *Bogoshi* bereik. Die hof skaf strikte aanspreeklikheid van die pers weens laster af deur onomwonde te beslis dat sy standpunt in *Pakendorf* duidelik verkeerd was. Regter Hefer is egter nie bereid om bloot die gemeenregtelike posisie van aanspreeklikheid gebaseer op *animus iniuriandi* te herstel nie, aangesien die media hulle dan te maklik – selfs waar hulle nalatig opgetree het – met sukses op afwesigheid van onregmatigheidsbewussyn as element van opset sou kon beroep. Gevolglik besluit hy om nalatigheid as aanpreeklikheidsgrondslag te erken (1213G–1214I; sien ook Neethling, Potgieter en Visser *Law of delict* (1999) 371–372).

(c) *Die bewys- of weerleggingslas* Soos uit die hierbo aangehaalde *dictum* uit *Bogoshi* blyk (1202G–H), lewer 'n eiser wat aantoon dat 'n publikasie volgens die redelike man-toets lasterlik is en op hom betrekking het, *prima facie* bewys van onregmatigheid en *animus iniuriandi* (sien ook *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 1 SA 708 (A) 767–769; *SAUK v O'Malley* 1977 3 SA 394 (A) 401–403; *Borgin v De Villiers* 1980 3 SA 556 (A) 571; *May v Udwin* 1981 1 SA 1 (A) 10; *Marais v Richard* 1981 1 SA 1157 (A) 1166–1167; *Joubert v Venter* 1985 1 SA 654 (A) 695–697; *Herselman v Botha* 1994 1 SA 28 (A) 35; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 588 589–590). Trouens, daar ontstaan dan 'n *vermoede* dat die publikasie onregmatig is (en *animo iniuriandi* geskied het) en dit plaas die las op die verweerder om die vermoede(ns) te weerlê.

Die vermoede dat die publikasie onregmatig is, plaas volgens die *Neethling*-saak (768–770) 'n volle bewyslas (*onus*) op die verweerder om die vermoede te weerlê, terwyl die vermoede dat die publikasie *animo iniuriandi* geskied het, net

'n weerleggingslas of voortgangsverpligting vir die verweerder skep. Hierdie beslissing van die appèlhof is aan skerp kritiek onderwerp omdat dit na bewering ook om hierdie rede (vgl *supra* par 2(a)) die fundamentele reg op vryheid van spraak of uitdrukking op 'n onaanvaarbare wyse sou beperk (sien bv Van Aswegen 1995 *SAJHR* 61; Burchell *Personality rights* 245–250; vgl Neethling en Potgieter 1994 *THRHR* 518–519). In *Gardener v Whitaker* 1995 2 SA 672 (OK) 686 ev 691 bevind regter Froneman inderdaad dat die tussentydse Grondwet die posisie verander het en dat die

> "plaintiff now bears the *onus* of showing that the defendant's speech or statement is, for example, false; not in the public interest; not protected by privilege; unfair comment, and the like".

Hoe ook al, daar bestaan, ook wat die bewyslas betref, uiteenlopende beslissings oor die invloed van artikel 15 van die 1993-Grondwet op die lasterreg (vgl bv *Gardener v Whitaker* 1995 2 SA 672 (OK) 691 en *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 608 met *Potgieter v Kilian* 1995 11 BCLR 1498 (N) (1996 2 SA 276 (N) 290), *McNally v M & G Media (Pty) Ltd* 1997 4 SA 267 (W) 273 274 276, *Hall v Welz* 1996 4 SA 1070 (K) 1072 en *Buthelezi v SABC* [1998] 1 All SA 147 (D) – die *Holomisa-* en *Buthelezi*-saak het besondere aandag in *Bogoshi* 1217G–1218E gekry (vgl ook Burchell 1999 *SALJ* 8–10)).

In *Bogoshi* bevestig die hoogste hof van appèl egter (hierbo aangehaal: 1215B–F) – maar sonder vermelding van die *Neethling*-saak – dat die verweerder die *onus* dra om die vermoede van onregmatigheid te weerlê. Appèlregter Hefer gaan verder (1215F–I) en beslis dat die verweerder ook die bewyslas het om afwesigheid van nalatigheid aan sy kant aan te toon, hoofsaaklik omdat die verweerder kennis dra van die omstandighede of feite wat op afwesigheid van sy nalatigheid kan dui, en hierdie feite bowendien verweef kan wees met dié wat op die redelikheid en dus regmatigheid van die publikasie kan dui. Hy kom dus tot die slotsom (1215I) dat

> "it is for the defendant to prove all the facts on which he relies to show that the publication was reasonable and that he was not negligent. Proof of reasonableness will usually (if not inevitably) be proof of lack of negligence".

Soos ons reeds aan die hand gedoen het, is dit miskien wenslik, ten einde 'n beter balans tussen die reg op die goeie naam en dié op vryheid van spraak te bereik, om die *status quo ante Neethling* te herstel, naamlik dat die eiser die volle bewyslas dra om die skuldoorsaak (laster as *iniuria*) te bewys, maar dat die verweerder 'n weerleggingslas het om die vermoede(ns) van onregmatigheid en skuld (nalatigheid en opset) te weerlê (sien Neethling en Potgieter 1995 *THRHR* 711–713, 1996 *THRHR* 710; Van der Vyver "Constitutional free speech and the law of defamation" 1995 *SALJ* 599; sien ook Neethling *Persoonlikheidsreg* 173 vn 136; Neethling, Potgieter en Visser *Delict* 343 vn 146; Van der Walt 1998 *TSAR* 205–207; vgl Burchell 1999 *SALJ* 8–10).

Die ingrypende veranderinge van die lasterreg wat die hoogste hof van appèl ten aansien van die verweer van mediaprivilegie en nalatigheid as aanspreeklikheidsgrondslag van die media in *Bogoshi* ingevoer het, word verwelkom omdat dit na ons mening 'n beter afweging van en daarom balans tussen die reg op die goeie naam en die reg op vryheid van uitdrukking in die gemenereg bewerkstellig. Wat veral opval, is dat die inherente vermoë van die gemenereg om – sonder 'n beroep op die Grondwet – hierdie resultaat teweeg te bring, gesaghebbend bevestig is. Desnietemin is die resultaat wat bereik is klaarblyklik – soos die hof inderdaad bevind en wat waarskynlik nie sonder die aandrang van skrywers en

regspraak op verandering van die lasterreg in die lig van die Grondwet sou plaasgevind het nie – ook in ooreenstemming met die eise van die grondwetlike handves van regte.

J NEETHLING
JM POTGIETER
Universiteit van Suid-Afrika

SIVIELREGTELIKE SANKSIES INGEVOLGE DIE WET OP BETAALMIDDELS EN WISSELKOERSE 9 VAN 1933 EN DIE OORERFLIKHEID VAN AKSIES

Groenewald NO v Behr NO 1998 4 SA 583 (T)

1 Inleiding

Alhoewel hierdie saak hoofsaaklik handel oor die uitleg van artikel 9 van die Wet op Betaalmiddels en Wisselkoerse 9 van 1933 (aangehaal 587C–F) en die regulasies wat ingevolge die wet uitgevaardig is, noop die uitspraak mens om die rol van die oorerflikheid van aksies deeglik in oorweging te neem.

2 Uitspraak

2 1 Feite

Die vereenvoudigde feite is kortliks die volgende: Die eerste eiser is die Senior Adjunkgoewerneur van die Suid-Afrikaanse Reserwebank en die tweede eiser is die Minister van Finansies (voortaan "die eisers"). Die eerste en tweede verweerders is die eksekuteurs in die boedel van wyle John Kristeller (oorlede op 1993-06-27) en die derde verweerder is die Meester van die Hooggeregshof onder wie se toesig die likwidasie van die boedel plaasvind (voortaan "die verweerders"). Die eisers eis 'n bedrag van R1 251 106,18 van die verweerders. Die eis is gebaseer op 'n oortreding van regulasie 10(1)(c) deur die oorledene welke oortreding tydens sy lewe deur die oorledene erken is.

2 2 Regsvrae en bevinding

Ingevolge Reël 33(4) van die Eenvormige Hofreëls het die partye ooreengekom om twee regsvrae vir beslegting aan die hof voor te lê. Die vrae is soos volg geformuleer:

> "(1) whether on the agreed facts the plaintiffs became vested with a claim to recover by virtue of the provisions of reg 22C(1)(i) of the Exchange Control Regulations, from the deceased, during his lifetime, the amount of R1 251 106.18; and
>
> (2) whether the plaintiffs' right to recover the amount involved in contravention of reg 10(1)(c) of the Exchange Control Regulations, which arises by virtue of the provisions of reg 22C(1)(i) of the Exchange Control Regulations, lies against the estate of the deceased" (585H–I).

Regter Kirk-Cohen beantwoord die twee vrae soos volg:

> "1 The plaintiffs do not have any claim to recover by virtue of the provisions of reg 22C(1)(i) from the defendants the sum in question.
>
> 2 See 1 above: The answer is 'No'.
>
> My conclusion is that the plaintiffs' contentions cannot be upheld and that the argument of the defendants on this issue is correct. In view of this finding it is unnecessary to consider the further arguments raised by counsel for the defendants" (592F).

Hierdie gevolgtrekking is op die volgende argument gebaseer:

> "A cardinal point in the plaintiffs' argument, and on which it is based, is that upon the deceased's admission that he had contravened reg 10, the plaintiffs then (and, presumably, then only) acquired a vested right which they now seek to enforce. I do not agree that the plaintiffs then acquired such a vested right.
>
> In terms of the regulations they acquired the right to attach money or goods the moment the deceased wrongly exported capital. The admission that he had committed the contravention is merely of evidential value only. It did not create any right. Once that pillar of the submission fails, the whole argument is untenable.
>
> The subregulation upon which the plaintiffs admittedly rely relates to relief which may be claimed against an existing person and not against that person's deceased estate. The argument presented on behalf of the plaintiff is not covered by the interpretation of the subregulation. However reasonable such a provision would be, interpretation is limited to the four corners of the regulations and to uphold that argument would be to read into the regulations something not contained therein" (592C–D).

3 Evaluering

Artikel 9(2)(a) van die Wet op Betaalmiddels en Wisselkoerse 9 van 1933 (aangehaal op 587D) magtig die President om regulasies uit te vaardig waarin siviele en kriminele sanksies aan sekere optrede geheg kan word. Artikel 9(2)(b) (aangehaal op 587D–F) maak spesifiek voorsiening vir die verhaal van geld of goedere wat betrokke is by die oortreding van die regulasies.

Die regulasies uitgevaardig ingevolge hierdie wetgewing maak dan ook voorsiening vir sowel strafregtelike sanksies (reg 22), as siviele sanksies (reg 22A–C). (Oor die onderskeid tussen "crime" en "delict" sien McKerron *The law of delict* (1971) 1; Neethling, Potgieter en Visser *The law of delict* (1999) 7–8.) In hierdie regulasies is daar 'n duidelike onderskeid tussen strafregtelike en sivielregtelike sanksies. Dit is interessant dat die beperking op die voorgeskrewe straf by die strafregtelike sanksie voorsiening maak vir 'n korrelasie tussen die boete en die waarde van die geld of goedere betrokke by die oortreding.

Ek stem nie saam met die verweerders se argument (586I) dat die verhaalsreg geskep in regulasie 22C (aangehaal op 588F–589B) strafregtelik van aard is nie. Daar word geen ag geslaan op die onderskeid wat in artikel 9 van die wet tussen strafregtelike en sivielregtelike sanksies gemaak word nie en ook nie op die feit dat die sanksie in regulasie 22 strafregtelik van aard en dié in regulasie 22C sivielregtelik van aard is nie. Die hof het hom egter nie oor die aard van die verhaalsreg uitgelaat nie.

In antwoord op die eerste gestelde vraag het regter Kirk-Cohen die argument van die eisers verwerp dat hulle 'n gevestigde reg gekry het op die oomblik wat die oorledene erken het dat hy regulasie 10 oortree het. Hy verwerp hierdie argument deur daarop te wys dat die oorledene se erkenning slegs bewyswaarde het en nie die reg tot stand laat kom het nie. Hy meen dan voorts dat as hierdie been

van hulle argument verval het, hulle hele argument verval. Volgens hom kon die eisers van die oorledene ingevolge artikel 22(1)(c) geëis het, maar nie van sy boedel nie aangesien die artikel nie daardie moontlikheid dek nie.

Volgens my ontleding van die situasie kan daar wel tot 'n ander gevolgtrekking geraak word. Regulasie 22(C) verleen na my mening 'n besondere statutêre verhaalsreg aan die Tesourie, *in casu* die eisers. Hierdie regulasie magtig die Tesourie om verhaal te neem op (oa) die persoon wat 'n betrokke regulasie oortree het deur beslag te lê op geld of goedere op die wyse wat hy goed dink ("the Treasury may *recover* any amount . . . from the *person who committed* the contravention . . . by attaching *in such manner as it may deem fit any other money*") (my kursivering). Hierdie regulasie verleen aan die Tesourie 'n wye bevoegdheid om skade te verhaal.

Regulasie 22(C) is naas regulasie 22, wat strafregtelike aanspreeklikheid reël, uitgevaardig om die Tesourie in staat te stel om die skade wat as gevolg van die oortreding gely is, te verhaal selfs (in sekere beperkte omstandighede, wat nie hier ter sake is nie) van persone wat nie by die oortreding betrokke was nie. Ek stem dus volkome saam met die eisers se argument ten aansien van die vestiging van 'n reg ten gunste van die eisers (589C–E), asook met hulle siening van die betekenis van "recover" (verhaal) (589E–I).

Normaalweg word skade sivielregtelik verhaal deur 'n aksie op grond van onregmatige daad in te stel. Die eiser het 'n aksiegrond ("cause of action") as hy meen dat hy die bestaan van al die elemente van die onregmatige daad in 'n hof sal kan bewys. Regstegnies ontstaan die (vorderings)reg op grond van onregmatige daad eintlik eers as die hof bevind het dat 'n onregmatige daad inderdaad gepleeg is. Voor sodanige bevinding het die eiser nie niks nie, maar wel 'n eisoorsaak of aksie. As al die elemente van die onregmatige daad bewys is, ontstaan daar 'n verbintenis uit onregmatige daad en moet die dader die eiser se skade vergoed. As hy dit nie doen nie, kan die eiser die normale eksekusiemaatreëls (soos beslaglegging) gebruik om voldoening af te dwing. As die dader sou sterf voordat die aksie ingestel is, kan die eiser nog steeds skadevergoeding van sy boedel eis op grond van die beginsel van oorerflikheid van aksies, waarop ek hieronder sal terugkom.

Regulasies 22A–C skep in wese vir die Tesourie 'n eenvoudiger prosedure deur administratiewe (buitegeregtelike) beslaglegging te magtig ten einde verhaal van die betrokke geld of goed moontlik te maak. (Oor die administratiewe geaardheid van regulasies 22A–C sien Oelofse *Suid-Afrikaanse valutabeheerwetgewing* (1991) 99.)

In die onderhawige geval het die eisers egter verkies om liewer 'n aksie in te stel as om op die geld of goed beslag te lê. Inderwaarheid het hulle dus die judisiële weg eerder as die buitegeregtelike weg gevolg. (Sou die eisers in elk geval nie ook probleme met die eksekuteurs ondervind het nie as hulle op die geld en goed in die boedel beslag wou lê?) Hierdie geskil sou dan tog ook deur die hof besleg moes word. Die vraag wat dan waarskynlik beantwoord sou moes word, is of die statutêre beslagleggingsreg teen die dader op sy erfgename (sy boedel) vererf.

Ek stem nie saam met verweerders se argument (586J) dat die wet beslaglegging as die enigste wyse van verhaal voorskryf nie. Ek kan nie sien dat 'n magtiging tot so 'n nogal drakoniese ingreep die moontlikheid van die normale judisiële aksie uitsluit nie.

Die verhaalsreg (vorderingsreg) wat in regulasie 22C ter sprake is en wat tot die onderhawige aksie aanleiding gegee het, is statutêr van aard en fundamenteel op skadevergoeding gerig. Om vas te stel of so 'n vorderingsreg teen die boedel afdwingbaar is (oorerflik is), sal na analogie van die posisie ten opsigte van bestaande erkende vorderingsregte geargumenteer moet word. Die wetgewer het hier 'n vorderingsreg geskep. Vorderingsregte ontstaan gewoonlik uit verbintenisse. Hulle kan dus *ex contractu, ex delicto, quasi ex contractu* en *quasi ex delicto* ontstaan. Die onderhawige vorderingsreg vertoon 'n baie sterk ooreenkoms met 'n eis vir skadevergoeding op grond van onregmatige daad. Ek sal dus na die oorerflikheid van aksies op grond van onregmatige daad gaan kyk en meer spesifiek die aquiliese aksie aangesien mens hier met 'n eis vir skadevergoeding te doen het.

In die onderhawige geval het die eisers nie die aksie teen die boedel as derde "persoon" ingevolge die regulasies ingestel nie, maar in effek teen die erfgename in ooreenstemming met die beginsels van toepassing op die oorerflikheid van aksies. (Oor die gebruik van dié term sien TJ Scott *Die geskiedenis van die oorerflikheid van aksies op grond van onregmatige daad in die Suid-Afrikaanse reg* (1976) 175–176.)

Alhoewel die verweerders geargumenteer het dat die boedel van die oorledene nie 'n "persoon" is waarna in regulasie 22C(1)(i) verwys word nie (586H), wys die regter tereg daarop dat die eisers hulle argument ook nie op hierdie been laat rus het nie (590A). Hy gaan dan tog voort en wy twee bladsye van sy uitspraak daaraan om met die hulp van woordeboeke en 'n appèlhofsaak aan te toon dat die boedel nie 'n "persoon" is nie.

Die argumente oor die boedel as "persoon" en sy aanspreeklikheid as sodanig berus myns insiens op 'n mistasting oor die regsbeginsel wat in die onderhawige geval ter sprake is. Die boedel se aanspreeklikheid berus hier op die beginsel van oorerflikheid van aksies. Dit gaan nie oor die boedel se aanspreeklikheid ingevolge regulasie 22C as "persoon" daarin genoem nie. Die eisers steun in elk geval ook nie daarop dat die boedel as "persoon" ingevolge regulasie 22C aanspreeklik is nie.

Die regter moes myns insien dus meer aandag aan die oorerflikheidsaspek van die geding gegee het. Hy het in wese geen aandag hieraan gegee nie, aangesien hy reeds ten aansien van die eerste gestelde regsvraag bevind het dat die eisers nie 'n eis gehad het nie. Dit was dus nie vir hom nodig om op die oorerflikheidsaspek in te gaan nie.

Interessantheidshalwe sal ek 'n kort uiteensetting gee van hoe mens hierdie aspek van die saak sou kon beredeneer. Aangesien die eisers se skadevergoedingseis *sui generis* is, sal na aanleiding van die posisie in die gemenereg vasgestel moet word of die aksie passief oorerflik is (dws teen die boedel oorgaan). Die grondbeginsels wat 'n rol speel by die bepaling of 'n erflater se verpligting op die boedel oorgaan al dan nie moet dus in oënskou geneem word. Die tipering van 'n aksie as straf- of vergoedingsaksie was gedurende die ganse geskiedkundige ontwikkeling deurslaggewend vir die vraag of 'n aksie passief oorerflik was al dan nie.

Aanvanklik was alle strafaksies in die Romeinse reg passief onoorerflik (TJ Scott 6 ev). Van Oven (*Leerboek van Romeinsch privaatreg* (1948) 336) stel die grondgedagte vir die onoorerflikheid van aksies baie mooi soos volg: ". . . want een erfgenaam verwierf het vermogen van den oorledene, maar niet een bevoegdheid die niet tot vermogensherstel maar tot bestraffing diende . . ."

Vanweë die swak ontwikkelde strafregsisteem van die Romeine was selfs die *actio legis Aquiliae* (die hoeksteen van ons hedendaagse skadevergoedingseis) passief onoorerflik (TJ Scott 19). Die rede hiervoor is geleë in die feit dat ook hierdie aksie 'n strafaksie was (*idem* 20).

Vir doeleindes van die onderhawige geval is dit ook belangrik om vas te stel waarom die Romeine die *actio legis Aquiliae* as 'n strafaksie beskou het. Aanvanklik is met hierdie aksie privaatstraf gevorder. Hierdie privaatstraf het egter self ook van vroeg reeds 'n metamorfose ondergaan. In die vroegste tye is dit geopenbaar in primitiewe daadwerklike wraaktoepassing (*talio*-beginsel). In die klassieke periode bestaan dit nog slegs in die geldboete waarmee die wraak afgekoop word. Alhoewel die *actio legis Aquiliae* in wese 'n skadevergoedingsaksie was, openbaar die poenale aard daarvan sig in verskeie kenmerke:

(1) die feit dat die waarde van die beskadigde saak ten tye van beskadiging nie in ag geneem is by die vasstelling van die *quantum* van die eis nie; maar die hoogste waarde van die saak in die voorafgaande jaar, of die hoogste waarde daarvan in die afgelope dertig dae (afhangende van die omstandighede);

(2) die feit dat daar 'n verdubbeling van die aanvanklike eis plaasgevind het in gevalle waar die dader die eis teen hom ontken het en die eiser dan suksesvol was;

(3) die kumulatiewe aanspreeklikheid van mededaders;

(4) die feit dat dit as *actio noxalis* ingestel kon word teen die eienaar van die slaaf wat sonder sy eienaar se wete die delik begaan het; en (vreemd genoeg)

(5) die feit dat die aksie passief onoorerflik is (TJ Scott 4–5; McKerron 7).

Reeds in die Justiniaanse reg het uitsluitlik twee strafelemente oorgebly, naamlik (1) en (2) hierbo genoem. Dit is eintlik vreemd dat (5) as kenmerk van 'n strafaksie beskou is, aangesien oorerflikheid bepaal is met verwysing na die vraag of die aksie 'n strafaksie was of nie. Deur die eeue het die reipersekutoriese aard van die aquiliese aksie toegeneem namate die strafreg selfstandig begin ontwikkel het (TJ Scott 52–54 99–100 118–124 137–142 154–160).

As bogenoemde eienskappe van 'n strafaksie in ag geneem word, kan daar nie geargumenteer word dat die eisers se remedie ingevolge regulasie 22C(1)(i) strafregtelik van aard is nie. Daar moet in gedagte gehou word dat regulasie 22 die strafregtelike sanksie bevat en dat die eisers se eis nie daarop gebaseer is nie. Die strafsanksie in regulasie 22 sou inderdaad nie teen die boedel afgedwing kon word nie want hulle is deur-en-deur op straf gerig. Die verweerders se redes vir die stelling dat die aksie "was a penalty and therefore not transmissible" (586I) word nie verskaf nie en daar word dan eenvoudig aanvaar dat dit onoorerflik is sonder om op die grondslae van die sogenaamde onoorerflikheid in te gaan.

Daar kan nie geargumenteer word dat dit 'n strafaksie is omdat die vergoeding van 'n ander "persoon" geëis word nie, aangesien die eisers van die dader (se boedel) eis. Dit gaan ook nie oor "clean money" nie want dit gaan steeds oor die vermoë van die dader. By bepaling van die strafregtelike aard van 'n aksie moet in gedagte gehou word dat die strafkarakter, soos uit die bespreking hierbo blyk, deurgaans verband gehou het met die feit dat die eiser meer kan eis as die skade aan sy vermoë. Hier eis die eisers presies dieselfde bedrag.

Sou mens "Romeinsregtelik" argumenteer, sou jy natuurlik ook kon sê dat indien die erfgename (boedel) nie aanspreeklik gehou word nie, hulle verryk word aangesien daardie bedrag nie deel van die boedel sou gewees het as die

eisers voor die erflater se dood reeds daarop beslag gelê het nie. Dit is dus onbillik dat die eisers skade moet ly net omdat die dader oorlede is en sy erfgename daardeur ten koste van die eisers verryk word.

Die onbillikheid van die onoorerflikheid van die *actio legis Aquiliae* is baie vroeg reeds aangevoel omdat die eiser bloot as gevolg van die dood van die dader nie meer in staat was om sy skade te verhaal nie (TJ Scott 20 ev). Die skadevergoedingsaspek van die aquiliese aksie het geleidelik die straffunksie daarvan begin oorskadu. In vroeë tekste word reeds aangetoon dat die strafdoel van die aksie verdring is namate die reipersekutoriese aard daarvan meer en meer beklemtoon is.

Die besef dat die passiewe onoorerflikheid van die aksie onbillik teenoor die eiser werk, het vroeg reeds daartoe gelei dat twee uitsonderings op die passiewe onoorerflikheid van die aquiliese aksie toegelaat is: die erfgename van die dader is aanspreeklik gehou in die mate waarin hulle deur die onregmatige daad bevoordeel is (wat ek hierbo die "Romeinsregtelike" argument genoem het: sien TJ Scott 21 ev) en die aksie het na *litis contestatio* wel oorgegaan. Justinianus het later die *actio legis Aquiliae* teen die erfgename toegestaan tot die hoogte van hulle verryking op grond van die delik. Grueber (*The lex Aquilia* (1886) 70) verduidelik die aanspreeklikheid van die erfgename soos volg:

> "But the heir ought not to make any profit out of the delict of the deceased . . . and therefore he is declared to be liable to an action as far as his property is increased by the damaging act."

(Oor die fynere teoretiese teksontledings en -kritiek op die Romeinse reg, sien TJ Scott 26–31. Oor die presiese grondslag (delik of verryking) van die erfgename se aanspreeklikheid word veral veel bespiegel.)

Alhoewel die aquiliese aksie dus in die Romeinse reg formeel en materieel die eienskap van passiewe onoorerflikheid behou het, kon die eiser die erfgename aanspreeklik hou vir sy skade tot die hoogte van die erfgename se verryking uit die delik *sine causa*. *De facto* is die effek van die verrykingsaksie dus dieselfde asof die oorspronklike aksie oorerflik was (TJ Scott 38–39).

Die Glossatore het die *actio legis Aquiliae* nog as strafregtelik van aard beskou en dus as passief onoorerflik. Hulle was van oordeel dat die aksie strafregtelik *sui natura* was. Dit is ook interessant om daarop te let dat 'n aksie volgens 'n Accursiese glos slegs poenaal is *as dit die waarde van die werklik gelede skade oorskry* (TJ Scott 48).

In die Kanonieke reg is 'n wesenlike verandering aan die passiewe onoorerflikheid van die *actio legis Aquiliae* te bespeur. Die aksie self is passief oorerflik, maar daar was verskil van mening of dit tot die hoogte van die skade of tot die hoogte van die erfenis moes vererf (TJ Scott 52–71).

Alhoewel die Kommentatore nog grootliks die Romeinse reg aangehang het en passiewe oorerflikheid slegs erken het tot die hoogte van die *id quod pervenit,* is daar tog 'n duidelike verwantskap te bespeur tussen die ontwikkeling van die *actio legis Aquiliae* tot 'n suiwer reipersekutoriese aksie en die passiewe oorerflikheid daarvan. 'n Verdere gevolg van hierdie ontwikkeling is die feit dat die grondslag vir aanspreeklikheid van die erfgename nie meer ongeregverdigde verryking is nie, maar die delik self (TJ Scott 83–94).

Die Romaniste van die sestiende eeu het in 'n groot mate nog aan die passiewe onoorerflikheid van die *actio legis Aquiliae* gekleef – behalwe tot die hoogte van die erfgename se verryking. Daar was egter stemme wat opgegaan het ten gunste

van passiewe oorerflikheid tot die hoogte wat die aksie reipersekutories van aard is (TJ Scott 96–115).

Die Duitse Pandektiste het die aquiliese aksie as passief oordraagbaar beskou, met wisselende benaderings tot die hoogte van die aanspreeklikheid van die erfgename (TJ Scott 136–151).

In die tyd van die sogenaamde Romeins-Hollandse skrywers tref mens 'n duidelike wegbeweeg van die Romeinsregtelike posisie en die belangrikste bewysplaas hiervoor is waarskynlik Voet *Commentarius ad Pandectas* 9 2 12. Voet sit hier eers die Romeinsregtelike posisie uiteen en verduidelik daarna hoe die reg van sy tyd daar uitsien. Die evolusie van die aquiliese aksie vanaf 'n strafaksie tot 'n suiwer reipersekutoriese aksie is in hierdie periode voltooi en daarmee saam word die aksie dan ook as ten volle passief oordraagbaar beskou (TJ Scott 153–171 en veral 167–168; McKerron 7).

In die Suid-Afrikaanse reg (waar daar nou vanweë die stelsel van boedeladministrasie) nie werklik meer sprake van oorerflikheid van aksies op die erfgename is nie, is die vraag natuurlik of die boedel aanspreeklik is om die verpligtinge van die erflater na te kom. Die aquiliese aksie as suiwer skadevergoedingsaksie is dan ook volkome passief oorerflik (TJ Scott 175–209 en veral 193–199 208).

Na my mening het ons in die onderhawige geval met 'n suiwer skadevergoedingseis te doen wat as sodanig passief oorerflik is. Die wetgewer het naas die strafsanksie 'n verhaalsreg (skadevergoedingsaksie) aan die Tesourie (eisers) verleen om skade te verhaal sonder dat dit nodig is om die gemeenregtelike aquiliese aksie te gebruik. Daar kan ook nie geargumenteer word dat dit onbillik teenoor die erfgename (boedel) werk nie, aangesien daardie bedrag nie deel van die boedel sou gewees het as die erflater nie doodgegaan het voor die eisers teen hom kon optree nie. Om af te sluit met die woorde van Van Oven, "want een erfgenaam verwierf het vermogen van den oorledene, maar niet een bevoegdheid die niet tot vermogensherstel maar tot bestraffing diende . . ."

SUSAN SCOTT
Universiteit van Suid-Afrika

MISTAKE, FINANCIAL INSTITUTIONS, AND THE CONTRACT OF SURETYSHIP

Prins v ABSA Bank Ltd 1998 3 SA 904 (C)

Although the debate about contractual mistake and its theoretical foundations has evolved to the point where disagreement and contradiction has in recent times been replaced by a far higher degree of certainty and clarity (Van der Merwe and Van Huyssteen "Reasonable reliance on consensus, iustus error and the creation of contractual obligations" 1994 *SALJ* 679 686; Hutchison "Contract formation" in Zimmermann and Visser (eds) *Southern Cross: Civil law and*

common law in South Africa (1996) 193), judgments dealing with the question of mistake will no doubt continue to provide interesting insights into this area of the law. *Prins v ABSA Bank Ltd* serves as a case in point.

The facts of this case were, briefly, as follows: Mrs Frick had purchased a plot of land from her husband, Mr Frick, her intention being to build a house on it (906F). Although Mrs Frick had been granted a building bond for this purpose by the United Building Society, the money could not be made available to her immediately. Thus Mr Frick (who apparently handled all his wife's financial affairs (906G)) approached the respondent bank and requested that his wife be allowed a R10 000 overdraft for a period of six months to ensure that she had funds in this interim period. The bank was happy to agree to this, provided that Mrs Frick could find somebody who would be prepared to secure the arrangement. Mr Frick telephoned the appellant (Mrs Frick's brother, Mr Prins, who lived in Johannesburg (905F)) and asked him whether he would be prepared to provide security for an amount of R10 000 for a limited period of six months. Prins stated that he would be happy to oblige (906H).

On 7 July 1988, when Prins was next in the Cape, he accompanied his sister to the Bellville branch of the bank, where he explained to the bank official that he had come to sign a document "for bridging finance for a limited period of six months"(906H 910B–C 910G–H 911B–C). The official then placed the back page of a document before Prins, and asked him to sign, which he did. Prins neither saw nor read the first page of the document, which was the standard form of document which was signed in cases where unlimited suretyship agreements were to be concluded (in other words, the document did not contain any provisions limiting the liability of a signatory to a particular time or amount of money). At some stage (it does not say when this occurred in the report) Prins also handed over to the bank the title deed to property which he owned, and which the bank had demanded as collateral security for the arrangement (907B). On 10 August 1988, Mrs Frick received a letter (signed by Mr CJ Bekker, manager of the Bellville branch of the bank) which stated that she was to enjoy an overdraft facility to the tune of R10 000 for the period up to 30 November 1988 (910G).

Almost five years later, in May 1993, when Mrs Frick owed R142 049,23 on her overdraft (905J), the bank sued her for payment of the debt. Mr Frick and Prins, who the bank alleged had bound themselves to the bank as sureties and co-principal debtors, were joined as second and third defendants respectively. Just before the trial commenced, Mr and Mrs Frick consented to judgment being granted against them (905H). Thus the trial proceeded against Prins alone, the bank relying on what they alleged was an unlimited deed of suretyship signed by Prins on 7 July 1988. In his defence, Prins alleged that he had been mistaken about the unlimited nature of the agreement he had signed (what one would describe as a material *error in negotio*). He stated that the arrangement had always been to conclude a limited deed of suretyship for R10 000 for six months only, that this had been explained to the bank official when he had arrived at the bank, and that although he had neither seen nor read the first page of the document which he had signed, he had presumed that it was a deed of suretyship limited to the above amounts (906I–J). Prins declared that if he had been told that the deed of suretyship was unlimited he would not have signed it, since he "[did not] believe in signing his life away" (910D). The bank conceded in evidence that it was possible for a person to enter into a limited agreement of

suretyship, but that a different document to the one which Prins had signed would have been required (910I).

The parties rightly agreed that Prins bore the *onus* of proving that the mistake was one which was reasonable and justifiable, and would allow him to escape liability on the deed of suretyship (*George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A) 470A; Kerr *Principles of the law of contract* (1998) 229–230). In the court *a quo*, Prins was unsuccessful in this regard. The magistrate came to this conclusion for four reasons: first of all, he refused to accept Prins's evidence that he had gone to the bank merely to sign a document for bridging finance. Secondly, it was held that it did not make sense that a businessman like Prins would be prepared to sign a deed of suretyship without reading it first. Thirdly, the magistrate drew a negative inference from Prins's failure to call Mrs Frick as a witness, since she had been present when the deed was signed, and could easily have corroborated his evidence. Lastly, the magistrate held that Prins's failure to ask for the return of his title deed from the bank after six months was particularly important, and that his explanation that he had not asked for the title deed because he did not need it was not a reasonable one in the circumstances (906J–907D). Judgment was therefore granted against Prins.

Prins appealed against the decision on two grounds. The first ground was that the bank had failed to prove that the deed of suretyship complied with the formalities laid down in section 6 of the General Law Amendment Act 50 of 1956 (907E). This argument was summarily rejected by the court on the basis that such a defence had neither been canvassed nor even contemplated by the parties in the court *a quo*, and that the appellant was therefore not entitled to raise the defence on appeal (908C). The second ground was that Prins had indeed discharged the onus of proving that the unlimited deed of suretyship had been signed by mistake, and that the mistake amounted to a *justus error* (907E–F 908D).

Davis AJ (who delivered the judgment of the court, Friedman JP concurring) proceeded to undertake a short analysis of the doctrine of *justus error*. Citing the systematic analysis of Hutchison and Van Heerden "Mistake in contract: a comedy of (justus) errors" 1987 *SALJ* 523 524, the judge identified three circumstances which will entitle a party to avoid a purported agreement on the basis of a *justus error*. These are: (1) where the mistaken party is not to blame for the mistake in that he behaved reasonably at all times; (2) where the mistake was induced by a misrepresentation or non-disclosure made fraudulently, negligently or innocently; and (3) where the party seeking to enforce the agreement is being unreasonable in relying on the appearance of consensus (908E–H). Davis AJ approved of Hutchison and Van Heerden's suggestion (1987 *SALJ* 526) that the second and third categories may be combined, and set out a number of questions that may be asked to determine whether a mistake has occurred or not. (These questions will be listed and discussed below.) To elaborate upon this series of questions, Davis AJ pointed out that in the leading case of *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 3 SA 234 (A), the Appellate Division (now the Supreme Court of Appeal) had endorsed the reliance theory of contract in cases of mistake, and hence the critical enquiry in cases of mistake is to investigate the reasonableness or otherwise of the reliance upon apparent *consensus* by the party seeking to enforce the contract (909F–G). Davis AJ crisply defined the issue faced by the court in this case as follows (909J–910A):

> "The question thus arises as to whether the bank ought to have been aware of the misapprehension on the part of the appellant and hence failed to correct such misapprehension, resulting in appellant signing a contract of suretyship which contained terms which were markedly different from those to which he thought he was contracting."

The court undertook a careful analysis of the evidence on record before holding that the appeal should succeed. Davis AJ held that Prins's evidence that he had gone into the bank to sign a limited deed of suretyship for bridging finance only should be accepted, and that at all times in the preliminary negotiations between all three parties (the bank, Prins and the Fricks) it was understood that the suretyship agreement would be of a limited nature only. The court placed a great deal of emphasis on the fact that the letter sent by the manager of the Bellville branch to Mrs Frick in August 1988 stated that she was to enjoy overdraft facilities for R10 000 for a limited period only, and that this letter provided objective corroboration of Prins's contention that he understood at all times that the suretyship agreement would be of a limited nature only (910F–H). Davis AJ also held (in contradistinction to the court *a quo*) that Prins's failure to reclaim the title deed to his property was understandable in the circumstances (911C).

As far as the bank was concerned, Davis AJ held that the bank ought reasonably to have realised that Prins might have been labouring under a misapprehension about the document which he was signing, and that the bank therefore had a duty to clear up any potential misunderstanding by explaining the nature and scope of the document to Prins before he signed it. The bank's failure to do so meant that it would be unreasonable for the bank to rely on the unlimited deed of suretyship, and that "the appellant [had] discharged the onus of proving that he was under a misapprehension when he signed the document and that such misapprehension [amounted] to a *justus error*" (911E).

This judgment is instructive in that it reinforces certain important trends that have emerged in recent times with respect to the resolution of cases of mistake in contract. First of all, Davis AJ emphasised the fact that in cases of mistake, the subjective approach to contract formation which forms the basis of our modern law of contract (*Saambou Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A)) is moderated by the application of the reliance theory, most famously embodied in the dictum of Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597 607 (*Saambou v Friedman supra; Sonap v Pappadogianis supra*; Hutchison and van Heerden 1987 *SALJ* 523; Reinecke "Regstreekse of onregstreekse toepassing van die vertrouensteorie?" 1989 *TSAR* 509; Van der Merwe and Van Huyssteen "Kontraksluiting en toerekenbare skyn" 1993 *TSAR* 493; Maclennan "Reliance and justus error: theories of contract" 1994 *SALJ* 232; Van der Merwe and Van Huyssteen 1994 *SALJ* 679). Despite the absence of true consensus, a contract will be considered to have been concluded if there has been a reasonable reliance on the appearance of consensus by the party seeking to enforce the agreement. Kerr (*Principles of the law of contract* 9) describes this as the doctrine of apparent agreement, and Christie (*The law of contract in South Africa* (1996) 12) the doctrine of quasi-mutual assent. Like all principles of the common law, this approach is now subject to constitutional scrutiny in terms of section 39(2) of the Bill of Rights. It is interesting to note that in an earlier case (*Goldberg v Carstens* 1997 2 SA 854 (C) 860A–C) Davis AJ held (quite correctly, it is submitted) that the reliance theory is indeed compatible with the spirit, purport and objects of the Bill of Rights, particularly in the way that the theory appropriately balances the concept of the sanctity of contract on the one hand, and the need for good faith in contractual dealings on the other hand.

The second interesting point about the judgment, though, is that in line with most recent decisions on mistake, the judge saw fit to deal with the case using the terminology of the doctrine of *justus error* (see *inter alia Maresky v Morkel* 1994 1 SA 249 (C); *Kok v Osborne* 1993 4 SA 788 (SE); *Goldberg v Carstens supra*). This should not be treated as a negation of Davis AJ's comments about the reliance theory; rather, it should be interpreted as providing further evidence that the courts are quite comfortable about perceiving an innate synergy between the reliance theory and the doctrine of *justus error*. This reconciliatory approach was first hinted at by Fagan CJ in *George v Fairmead (Pty) Ltd supra*, and was endorsed by Harms AJA in *Sonap v Pappadogianis supra* (see Floyd and Pretorius "A reconciliation of the different approaches to contractual liability on the absence of consensus" 1992 *THRHR* 668; Lubbe and Murray in Farlam and Hathaway *Contract cases materials and commentary* (1988) 164). Thus in cases where a mistake is alleged to have occurred, the mistake will be a *justus error* if the other party's reliance upon the appearance of consensus is considered to be unreasonable (Hutchison in *Southern Cross* 191; *Nasionale Behuisingskommissie v Greyling* 1986 4 SA 917 (T) 927). It has correctly been argued that, from a doctrinal point of view, this invocation of the *justus error* approach is impure and misleading, and results in the term *justus error* becoming a mere label (Hutchison and Van Heerden 1987 *SALJ* 525). However, from a practical point of view, it seems as if this approach is here to stay in our law. The result is that, although the courts seem set to continue to use the term *justus error* in their judgments, three key points need to be understood: first, the courts must not simply evaluate the *error* (in the singular) of the party alleging there is a mistake, as the literal words of the term suggest – most often there are mistakes on both sides (Kerr *Principles of the law of contract* 228 231); secondly, the courts should assess the conduct of both parties to the alleged agreement in determining whether there has been a mistake recognised by law (Van der Merwe and Van Huyssteen 1994 *SALJ* 685); thirdly, however, in line with the foundational reliance theory, the reasonableness or otherwise of the conduct of the party seeking to rely upon the purported agreement will be the decisive consideration in the court's decision either to declare that there is a contract, or to declare there is no contract at all (Hutchison in *Southern Cross* 192).

In the *Prins* case, the court therefore correctly placed the spotlight on the conduct of the bank in order to determine whether or not it was reasonable for them to rely on the document signed on 7 July 1988 (909J–910A). On the basis of the summary of the judgment in the court *a quo* provided by Davis AJ, it would seem, with respect, that the magistrate placed too great a reliance on the conduct of Prins in coming to his decision, without giving due regard to the reasonableness or otherwise of the conduct of the bank official. Despite Prins's careless failure to read the document which he had signed, the court held on appeal that on the basis of the previous negotiations, the declaration made to the bank official, and the correspondence between the bank and Mrs Frick, the bank ought reasonably to have realised that Prins could be labouring under a mistake about the nature of the deed of suretyship. In the premises, the nature and ambit of the document should have been explained to Prins before he was asked to sign it. The unreasonable behaviour of the bank therefore meant that there was no contract, even though Prins himself had contributed to the confusion by failing to read the document. In this respect, the decision mirrors the result in cases like *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 3 SA 537 (W), *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A), *Spindrifter v Lester*

Donovan supra and *Sonap v Pappadogianis supra*, where litigants were successful in pleading mistakes even though their own carelessness had contributed to the mistakes being made.

The third notable feature of the judgment under consideration is that Davis AJ set out a number of questions which are designed to facilitate the solution of mistake problems. He stated (909B–C):

> "In other words, the following series of questions can be used to determine whether reliance on the contract was reasonable in terms of the conduct of the party allegedly creating the impression of *consensus* and the conduct of the other party in believing this impression:
>
> 1. Is there *consensus*?
> 2. If not, is the *dissensus* caused by a mistake?
> 3. Is the other party aware of the resiler's mistake?
> 4. Who induced the mistake and was it done by commission or omission which was either fraudulent, negligent or even innocent? . . .
>
> This set of questions is designed to assist the enquiry into the justification for relying on the form of the contract and hence the appearance of *consensus*."

These questions require some analysis, and in particular the specific terminology employed requires clarification. First, Davis AJ does not explain what he means by the term dissensus in question two. There is some debate among leading writers about the meaning of this particular term. On the one hand, Kerr (*Principles of the law of contract* 227) suggests that there is a contract in our law in two situations: (a) if there is actual agreement between the parties; or (b) if there is apparent agreement between the parties, recognised by law in terms of the principles of the reliance theory. In cases where there is neither actual nor apparent agreement, then there is dissensus, and no contract at all. On the other hand, Lubbe and Murray (Farlam and Hathaway *Contract cases materials and commentary* 164) seem to suggest that in all cases where there is no actual agreement or a subjective meeting of the minds of the parties, there will be dissensus. Despite this dissensus, there may yet be a contract if there has been reasonable reliance upon the appearance of agreement. Although it is submitted that the approach of Kerr is preferable, it would seem as if Davis AJ has adopted the approach of Lubbe and Murray in using the word dissensus. Thus the answer to question two really means that, despite the absence of actual agreement, a party will be able to escape liability *ex contractu* only if he can prove a mistake recognised by law. Questions three and four would appear to be the factors which one should take into account in order to determine whether there is a mistake, and no contract. In this respect, it is submitted that it might have been better for Davis AJ to have described questions three and four rather as sub-questions (a) and (b) of question two, to put these questions in their appropriate context.

With respect to question three, the term "resiler" needs to be clarified. Although it may be a convenient term to use to describe someone who wants to show there is no contract on the basis of mistake, it is submitted that it is not an accurate one. If a person is able to prove a mistake recognised by law, there is no contract, and therefore nothing to "resile" from. In this respect, it would be better to refer to the mistake "of the party alleging there is no contract". When read in conjunction with question three, question four is also slightly overstated. It appears from these two questions that misrepresentation, and knowledge and non-disclosure, are the only grounds on which it can be proven that the reliance of the party seeking to enforce a purported agreement is unreasonable. Although

the vast majority of cases are decided on this basis, it must be said that the courts have been prepared to find a mistake in other circumstances (Christie *The law of contract in South Africa* 353; *Van Rensburg v Rice* 1914 EDL 217). In *Sonap v Pappadogianis* (*supra* 239J) Harms AJA was more careful, holding that an investigation into the presence of misrepresentation, or knowledge and non-disclosure is "usually necessary". Although Davis AJ's questions are useful ones, it is hoped that they will be read and understood in the light of the above comments.

The final interesting point about this judgment is that by holding that the bank official had acted unreasonably in not explaining the true nature of the document, the decision falls into line with recent opinions concerning the conclusion of contracts of suretyship. For example, in *Diner's Club SA (Pty) Ltd v Livingstone* 1995 4 SA 493 (W) the court expressed its disapproval of Diner's Club's failure to draw Livingstone's attention to the existence of a clause imposing personal liability in the alternative upon a signatory to an application for a corporate credit card. Livingstone had signed a standard application form on behalf of his company, believing that the company alone was being considered as an account holder. In this case, Diner's Club's application for summary judgment against Livingstone in his personal capacity was refused. The unreasonable nature of Diner's Club's conduct in failing to notify Livingstone of the details in the fine print was highlighted by Cilliers and Luiz ("*Caveat subscriptor* – beware the hidden suretyship clause" 1996 *THRHR* 168 175).

Similar sentiments have been expressed in the Supreme Court of Appeal in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (SCA). (Although *Saayman* was reported before *Prins*, the decision in *Prins* was handed down on 1996-11-07, seven months before the judgment in *Saayman*, which was handed down on 1997-05-30. The *Saayman* judgment would therefore not have been available to Davis AJ.) In *Saayman*, Olivier JA (albeit in a minority opinion) stressed that it was important from the perspective of public policy that the full implications of suretyship agreements be explained to prospective signatories by banks (331E). This was held to be particularly important in cases where there was a relationship between the parties involved, or where the signatory appears not to understand the true implications of the contract of suretyship (331F). The reference to public policy is by no means novel. The importance of good faith in assessing problems of mistake, and the principle that the dictates of good faith often require a full explanation of complex financial arrangements, has been emphasised by Kerr ("Good faith in negotiating a contract. The duty to enquire if there is a perceived or apparent mistake in communication" 1993 *THRHR* 296).

In conclusion, the decision in *Prins* is indicative of the growing uniformity with which the courts seem to be approaching cases of mistake in our law. In his judgment Davis AJ reflects the academic trend of attempting to simplify the enquiry in cases of mistake by setting up a structured set of questions that may be used by a court to determine the issue of reasonable reliance. Since it is this feature of the judgment that is likely to be cited in future cases, these questions ought to be read in the light of the gloss to them which is provided earlier in this note. Finally, the judgment also furnishes further welcome evidence of the recent judicial propensity to place a relatively heavy onus on financial institutions to explain fully to prospective clients the implications of financial agreements before they are concluded.

GB GLOVER
Rhodes University

BONA FIDE-VERKRYGING VIR WAARDE EN ESTOPPEL

Caldeira v Ruthenberg 1999 1 All SA 519 (A)

Gemeenregtelik bestaan enkele uitsonderings op die algemene beskikbaarheid van die *rei vindicatio* as tipiese sakeregtelike remedie van die eienaar wat daarmee van die hof verlang om sonder meer in besit herstel te word van sy eiendom wat in beheer van die teenparty is. Van die uitsonderings het verband gehou met die eiesoortige reëls wat vryemarkverkope beheers het, die rol van die ouklerekopers, die tafelhouders en pandjiesbase en die beskutte posisie van die goud- en silwersmede. (Sien Sonnekus en Neels *Sakereg vonnisbundel* (1994) 469 ev.) Soms is daardie uitsonderings gemeld saam met die reëls rakende die benutting van 'n *faktoor*. (Die besondere aan die benutting van 'n faktoor vind wel neerslag in die vervanging van die skuldvereiste by estoppel deur 'n benadering wat herinner aan risiko-aanspreeklikheid waar die prinsipaal verantwoordelik gehou word vir die skynverwekkende optrede van die faktoor omdat dit billiker is dat hy wat die verhoogde risiko van benadeling geskep het die gevolge van sy optrede dra eerder as 'n onbetrokke niksvermoedende derde. Sien Van der Walt en Pretorius "Verkoping deur 'n verkoopsagent en faktoor as verweer teen die rei vindicatio" 1989 *TSAR* 625 642–648.)

Gemeen aan daardie uitsonderings was dat die persoon by wie die eienaar sy eiendom opgespoor het nie sonder meer verplig kon word om die saak af te gee nie. Indien die onregmatige besitter maar te goeder trou en teen verskaffing van teenwaarde, in beheer van die saak gekom het, kon die eienaar slegs met die *rei vindicatio* slaag indien hy eers die onregmatige besitter skadeloos gestel het deur hom die koopsom wat hy aan sy verskaffer betaal het, te vergoed. Verkeerdelik is reeds uit die eiesoortige reël afgelei dat die *bona fide*-verkryging as sodanig die eienaar sy eiendomsreg ontneem het. Van Heerden het daaruit afgelei dat daardie reëls as analogie kan dien vir 'n stelling dat die gemenereg aansluiting bied vir die regverdiging van die erkenning van die "finale ontwikkeling" van die effek van 'n suksesvolle opwerp van estoppel teen die *rei vindicatio*. (Sien Van Heerden "Estoppel: 'n wyse van eiendomsverkryging?" 1970 *THRHR* 19 en "Estoppel en eiendomsverkryging: 'n herevaluering" in Kahn (red) *The quest for justice – essays in honour of MM Corbett* (1995) 304.) Daarvolgens sou dan aanvaar moes word dat die Suid-Afrikaanse reg reeds erkenning verleen aan die nuwe (oorspronklike) wyse van eiendomsverkryging bekend as verkryging te goeder trou. Juis die feit dat die gemeenregtelike reëls hoogstens vir die opskorting van die *rei vindicatio* tot na vergoeding van die koopsom aan die *bona fide* verkryger voorsiening gemaak het, het die onjuistheid van die analogie beklemtoon. Die feit dat die eienaar inderdaad uiteindelik steeds op sy *rei vindicatio* kon steun, het bevestig dat die *rei vindicatio* bloot opgeskort was maar dat die eiendomsreg nie weens die "verkryging te goeder trou" verlore gegaan het, of, nog erger, wonderbaarlik oorgedra is op die *bona fide*-verkryger in stryd met die bekende *nemo plus iuris*-reël nie.

In die gerapporteerde Suid-Afrikaanse regspraak het die verdere aanwending van daardie gemeenregtelike uitsonderings mettertyd weinig vermelding geniet. Na die enkele gerapporteerde uitsprake van ongeveer 'n eeu gelede (bv *Van der*

Merwe v Webb (1883–1884) 3 EDC 97; *Woodhead Plant and Co v Gunn* (1894) 11 SC 4); *Muller v Chadwick and Co* 1906 TS 30; *Morum Bros Ltd v Nepgen* 1916 CPD 392 394) is vir jare geen woord oor die verdere aanwendbaarheid van daardie eiesoortige vereistes gerep nie. Die feit dat die uitsonderings hetsy op ou stadkeuren van bepaalde Hollandse stede of besondere statutêre beskermings vir bepaalde bevolkingsgroepe uit die middeleeue teruggegaan het wat nie as sodanig in die Suid-Afrikaanse reg geresipieer is nie, het die houdbaarheid van enige beweerde spreekwoordelike visum van daardie uitsonderings in die moderne Suid-Afrikaanse reg verdag gemaak. (Sien Van Rensburg *Opvolging van roerende goed in die derde hand* proefskrif US (1930) 10–110 vir 'n volledige bespreking van die gemeenregtelike herkoms van die beperkings op die opvolgingsreg van die eienaar in dié gevalle.)

In *Pretorius v Loudon* 1985 3 SA 845 (A) het hoofregter Rabie wel gewag gemaak van die uitsondering van die *bona fide*-verkryger maar dit nie nodig gevind om te beslis of daardie uitsondering steeds in die Suid-Afrikaanse reg bestaansreg geniet nie. Danksy die goed uitgewerkte norme van die estoppelreg is daar rede om te vermoed dat daardie gemeenregtelike uitsonderings of deur onbruik verval het of minstens opgegaan het in die op billikheid gebaseerde verweer van estoppel.

Per slot van rekening word oënskynlik in beginsel dieselfde resultaat met estoppel bereik: die estoppelopwerper wat kan aantoon dat hy afgaande op die skuldige skynverwekking van die estoppelontkenner tot sy nadeel gehandel het deur die bepaalde saak aan te skaf, kan *ad infinitum* die *rei vindicatio* van die estoppelontkenner afweer. Binne die sleutel van die verweer van estoppel kan die suksesvolle estoppelopwerper, anders as by die gemelde gemeenregtelike uitsonderings, ook nie eers uit sy beskermde beheer van die saak regtens verjaag word met 'n blote aanbod van die koopprys wat hy daarvoor uitgegee het nie.

Die gemelde oënskynlik identiese resultate is egter nie die volle verhaal nie. Aan die ander kant sou argumenteer kon word dat juis die skuldvereiste van estoppel die posisie van die *bona fide*-verkryger verswaar. Dit is nie voldoende om aan te toon dat hy self *bona fide* was met die verkryging van die saak nie, maar hy moet boonop aantoon dat onagsaamheid die optrede van die eienaar ten laste gelê kan word. (Ná die bekende trilogie van appèlhofuitsprake (*Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 3 SA 420 (A); *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 1 SA 394 (A); *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 1 SA 441 (A)) word tans aanvaar dat skuld minstens in alle vindiserende gevalle 'n onvermydelike vereiste vir 'n suksesvolle beroep op estoppel is.) Of dit 'n geldige beswaar is, is egter 'n ander saak. Die skuldige optrede van die estoppelontkenner bied myns insiens die regverdiging vir die opskorting van sy *rei vindicatio*. Ek is nie oortuig dat die moderne regsgevoel deurgaans bevredig word indien ook die eienaar, wat geensins verwytbaar opgetree het nie, "gestraf" word met 'n verpligting om die *bona fide*-besitter eers sy uitgawes te vergoed aleer hy sy eiendom kan vindiseer. Dit spreek boekdele dat ook Van Heerden, nieteenstaande sy betoog vir die erkenning van die eindontwikkeling van verkryging te goeder trou, steeds beklemtoon dat die "deurhaking van 'n belangekonflik tussen die skuldige eienaar en die onskuldige koper ten gunste van laasgenoemde . . . immers juis dit [is] wat die leerstuk van estoppel ten grondslag lê" (1995) 306.

Is daar werklik naas die *onus* wat weens die skuldvereiste op die estoppelopwerper in vergelyking met die verkryger te goeder trou geplaas word, 'n

verskil tussen die resulate wat met die twee benaderings bereik kon word indien dit beoordeel word uit die horison van 'n onbetrokke derde wat later die saak van die verkryger te goeder trou/die estoppelopwerper ontvang? Word aanvaar dat die suksesvolle opwerp van estoppel geen regsveranderende gevolge meebring nie, is dit duidelik dat die verkryger aan wie die voormalige estoppelopwerper die saak oordra geen beter regte kan ontvang as wat die oordraer self gehad het nie. Hy sou dus ook geen outomatiese verweer teen die *rei vindicatio* van die voormalige estoppelontkenner as eienaar hê nie. Uit die beskikbare gemeenregtelike bronne is ek nie oortuig dat die regsposisie van die derde verkryger te goeder trou enigsins beter daaraan toe was nie. Van Heerden maak in dié verband 'n kursoriese opmerking waaruit blyk dat hy rekening hou met die moontlikheid dat die enigste rede hoekom die "voormalige" eienaar na vergoeding van die koopsom die saak wel kon terugvorder, daarmee verband hou dat hy deur "terugbetaling van die koopprys sy verlore eiendomsreg kon herwin" ((1995) 308). Dit oortuig nie voluit nie. Één van twee moontlikhede kan geldig wees: Volgens die eerste konstruksie het die verkryger te goeder trou eiendomsreg langs 'n nuwesoortige *oorspronklike* wyse verkry aangesien die *afgeleide* wyses weens die *nemo plus*-reël nie aanwending kan vind nie. In hierdie geval kan daar geen sprake wees van 'n *herwinning* van die vorige eiendomsreg nie. Dit is danksy die oorspronklike wyse van regsverkryging onherroepelik iets van die verlede. Volgens die tweede konstruksie is die *rei vindicatio* van die oorspronklike eienaar bloot opgeskort. In laasgenoemde geval is daar ruimte vir die herwin van sy saak, maar nie van sy eiendomsreg nie – hy was tog deurentyd eienaar. In eersgenoemde geval kan daar nooit sprake wees van 'n "herwin" van "sy verlore eiendomsreg" nie.

In die onderhawige saak het C as eienaar 'n duur 1996 Mercedes Benz 600 SL uit Engeland via Walvisbaai ingevoer. Na behoorlike inklaring van die voertuig laat C die voertuig na die Republiek invoer en versoek daarop Exclusive Boys Toys (E) in Randburg om 'n koper vir die voertuig vir hom te vind. Sy uitdruklike opdrag aan E was om 'n koper te vind teen nie minder nie as R560 000 plus 'n matige winsgrens vir homself en 'n kommissie vir E. E het dus op geen stadium die onbeperkte *ius disponendi* ten aansien van die voertuig gehad nie. Ene Mohamed van Motorlink (M) wat reeds tevore met E sake gedoen het, skakel E met die oog daarop om die voertuig in te koop. Hy laat die voertuig in sy eie naam registreer en verkoop dit dadelik weer aan 'n tussenhandelaar Bloomsbury (B) sodat B die voertuig uiteindelik aan Ruthenberg kan verkoop teen R807 000. M spreek met E af dat die koopsom van R725 000 by wyse van skuldvergelyking ten aansien van twee vorige transaksies wat M en E gehad het en welke betalingsverpligtinge nog nie deur E voldoen is nie, verreken word. Nadat die leidende figuur van E landuit gevlug het sonder om C te betaal, spoor C sy voertuig in R se beheer op.

In die hof *a quo* slaag R, B en M daarin om 'n bevel teen C en die polisie te verkry om hulle te belet om beslag op die voertuig te lê. Regter Traverso beslis in effek dat R die *bona fide*-besitter van die voertuig is en nie in sy besit gesteur durf word nie omdat M die regmatige eienaar daarvan is (520h–i).

Teen daardie beslissing het C suksesvol appèl aangeteken. Die appèlhof bevind by monde van regter Vivier dat M se weergawe van die gebeure nie klop met die werklikheid nie, soos blyk uit die getuienis van ene Gous, 'n werknemer van E wat tydens die gebeure teenwoordig was. M se bewering dat hy kwansuis *bona fide* was toe hy die voertuig van E bekom het, word as onwaar uitgewys.

Die hof vind dat M deurentyd terdeë bewus was van die feit dat E nie werklik die geregistreerde eienaar van die voertuig was nie. Die voertuig was trouens tydens M se eerste besoek aan E se lokaal nie meer op die perseel nie maar is reeds deur C teruggeneem omdat die termyn van die mandaat wat C aan E verleen het om 'n koper te vind, afgeloop was. Die redelike man in M se posisie moes selfs as hy nie bewus was van die werklike feite nie, minstens reeds op sy hoede gewees het as gevolg van die optrede van E en die feit dat die voertuig nie op die perseel was nie. Binne die estoppel-idioom sou dus tot die gevolgtrekking geraak word dat die redelike persoon in die posisie van M en met sy voorkennis nie deur die optrede van E mislei sou wees nie, wat nog te sê van die optrede van die ware eienaar, C, wat sy voertuig in dié omstandighede in die beheer van E gelaat het.

> "Gous's version, if accepted, means at the very least that Mohamed was at Exclusive's showroom before Motorlink purchased the Mercedes and that he saw that it had been removed, which must have alerted him to the possibility that Exclusive was no longer entitled to dispose of it. Of course, Gous's version goes much further and, if accepted, shows that Mohamed knew about Caldeira and that Exclusive could only regain possession by the use of a stratagem" (522e–f).

Uit M se eedsverklarings was dit ook duidelik dat M reeds in die verlede soveel besigheid met E gedoen het dat hy terdeë bewus was van die feit dat E selde eiendomsreg gehad het van die voertuie wat hy gesmous het. Hy het in die reël juis slegs op 'n kommissie-grondslag 'n koper vir voertuie van die ware eienaars gesoek. Die appèlhof aanvaar dus nie dat M te goeder trou aanvaar het dat E werklik die eienaar van die voertuig was en daaroor kon beskik het nie.

> "It follows from what I have said in regard thereto that Motorlink cannot be regarded as having bought the Mercedes in good faith and that it was not misled into the belief that Exclusive was entitled to dispose of the Mercedes" (522i–j).

Daar word verder uitgewys dat M bewustelik die hof wou mislei deur te beweer dat hy self soos 'n versigtige besigheidsman kwansuis navraag by die invoerders en die inklaringsagente te Walvisbaai gedoen het. Dit blyk dat hy in werklikheid nooit persoonlik met die persone geskakel het om sodanig navraag te doen nie. Nie alleen het M nie opgetree soos die redelike persoon in sy posisie minstens sou gedoen het nie maar hy in was werklikheid bewus van die moontlikheid dat daar 'n slang in die gras kon wees met die beskikkingsbevoegdheid van E ten aansien van die voertuig (523a–c).

Die appèlhof beslis dat die appèl met koste slaag. Die beroep deur die hof *a quo* op die gemeenregtelike reël van die koper te goeder trou was dus weens die feitelike kwade trou aan die kant van M nooit geregverdig nie.

Die beslissing laat die vraag oop of die appèlhof nie maar die knoop liefs moes deurgehak het nie en beslis het dat daardie gemeenregtelike reël intussen deur onbruik verval en eintlik opgegaan het in die erkende norme van die verweer van estoppel (sien Van Heerden (1995) vn 17). Ook die gemeenregtelike reël het nooit as aksiegrond ter sprake gekom nie en die aanwending daarvan *in casu* in die hof van eerste instansie as 'n eisgrond ingevolge waarvan daardie hof om 'n verklarende bevel genader is ter bevestiging van M se beweerde eiendomsreg aldus verkry, was minstens uit pas met die gemeenregtelike aanwending van die verweer. Nie eens gemeenregtelik het die koper te goeder trou inderdaad eiendomsreg op die tersake koopsaak verkry nie. Hy kon slegs tot na vergoeding van die koopsom die *rei vindicatio* van die eienaar afweer. Die werklike eienaar was dus gemeenregtelik deurentyd die enigste eienaar.

Die allengs aanvaarde regsposisie, waarvolgens die suksesvolle opwerp van estoppel teen die *rei vindicatio* van die eienaar sogenaamd geen regsverande-rende gevolge meebring nie, stuit tog teen duidelike kritiek. Van Heerden, soos ook later Louw en Davel, het reeds met oortuiging betoog dat daardie standpunt, met die gevolg dat die suksesvolle estoppelopwerper slegs beskermde besit verkry maar die estoppelontkenner steeds regtens die eienaar van die saak bly, nie alleen onbevredigende resultate vir die betrokkenes meebring nie, maar ook op die lange duur regsonsekerheid in die hand kan werk. (Sien Van Heerden hierbo; Louw "Estoppel en die *rei vindicatio*" 1975 *THRHR* 218 en Davel 1986 *De Jure* 401.)

Die enigste gerapporteerde uitspraak waarin die hof die geleentheid gehad het om te besin oor die moontlike ontwikkeling van die Suid-Afrikaanse reg tot die stadium waar die reg 'n nuwe onafhanklike oorspronklike wyse van eien-domsverkryging gebaseer op die verkryging te goeder trou kon erken, was *Barclays Western Bank Ltd v Fourie* 1979 4 SA 157 (K). Uit daardie saak is dit egter duidelik dat die hof nog nie bereid was om te aanvaar dat die steierwerk van estoppel in die vindiserende gevalle verwyder kan word en dat daar reeds 'n selfstandige nuwe eiendomsverkrygingswyse ontwikkel het nie.

In die lig van die toenemende bewustheid van die rol van die billikheid en redelikheid as nivellerende aspekte binne die materiële privaatreg, is dit waar-skynlik nie te vergesog om te voorspel dat die huidige appèlhofsamestelling potensieel nog die knoop kan deurhak nie. (Vgl bloot die herhaalde verwysings in onlangse gerapporteerde beslissings na die redelikheid en billikheid – sien bv *Eerste Nasionale Bank van Suidelike-Afrika Bpk v Saayman NO* 1997 4 SA 302 (A) – sonder om so ver te gaan as om te beweer dat daar reeds sprake van die derogerende werking van redelikheid en billikheid in die Suid-Afrikaanse reg ook is. Sien in dié verband die uitspraak van die Nederlandse *hoge raad* in HR 7 des 1990, 1991 NJ, 593; Schoordijk "Vermogensverskuiwingen onder een regime van koude uitsluiting van iedere gemeenschap" (1987) 5839 *WPNR* 445; Schoordijk "Derogerende werking van de goede trouw en openbare orde" (1993) 6082 *WPNR* 146-149; Van Hees "Bevrijdende verjaring" 1995 *NJB* 936–938.)

Hierbo is reeds beklemtoon dat daar moontlik ruimte is om te twyfel aan die sinvolheid van 'n voortgesette erkenning naas die verweer van estoppel van die gemeenregtelike uitsonderings op die aanwendbaarheid van die *rei vindicatio* indien dieselfde billike resultaat langs beide weë aangepeil word. 'n Erkenning van die suksesvolle vermenging van die twee weë sou egter myns insiens inhou dat ook die vertrekpunte van die twee benaderings merkbaar versoen word.

Anders as wat meestal uit die handboeke oor die vereistes vir estoppel blyk, sou sodanige vermenging met die *bona fide*-verkryger-reëls behels dat ook bewustelik gevra moet word of die estoppelopwerper inderdaad *bona fide* was ten tyde van die verkryging van die saak. Terwyl die klem dus by estoppel op die skuldige skynverwekkende gedrag van die estoppelontkenner val, is daar bykomstig ruimte om eerstens te vra of die estoppelopwerper inderdaad *bona fide* mislei is en tweedens of die estoppelopwerper self blaamloos opgetree het. In daardie verband is die beklemtoning deur Van Heerden in die aanhaling hierbo van die "onskuldige koper" nie sonder betekenis nie.

In Rabie se uiteensetting van die primêre vereiste van estoppel val die klem myns insiens tereg op die objektiewe normatiewe beoordeling van die beweerde skynverwekkende gedrag deur te vra of dit regtens relevante skynverwekkende gedrag is. By implikasie is daar geen sprake van 'n suksesvolle beroep op die

verweer nie indien objektief tot die gevolgtrekking geraak word dat die redelike persoon in die posisie van die estoppelopwerper nie eweneens mislei sou gewees het nie – of anders gestel – meer op sy hoede sou wees. Die toets het in die eerste plek met die blaamwaardigheid of onagsaamheid van die estoppelopwerper niks te doen nie. Binne die tipiese delikteregterminologie sou gemeld kon word dat die toets steeds met die objektiewe onregmatigheid van die skynverwekkende gedrag van die estoppelontkenner verband hou en nie met die (bydraende) skuld van die estoppelopwerper nie. Selfs al tref geen blaam die onnosel estoppelopwerper nie, is die skynverwekking regtens nie relevant indien die redelike man meer op sy hoede sou wees nie.

Die nuwe Nederlandse Wetboek bevat talle verwysings na die goeie trou (vgl bv a 3:11; 3:25, 3:61.2; 6:34; 6:204 *BW*). Die klem in artikel 3:11 *BW* val onder andere op die "behoren te kennen" wat as 'n suiwer objektiewe normatiewe kriterium tipeer word. Dit plaas in die konjunktief geformuleerde sinsdeel 'n ondersoeksverpligting op die aanspraakmaker op besit te goeder trou om self sodanig ondersoek na die omstandighede van sy potensiële verkryging in te stel dat alle redelike twyfel verwyder word. Indien hy nalaat om voldoende ondersoek in te stel, loop hy self die risiko om remedieloos daar te staan indien hy later uitgewin word. (Sien Reehuis ea *Goederenrecht* (1994) 18; Brahn-Reehuis *Zwaartepunten van het vermogensrecht* (1999) 113.) Daar is talle voorbeelde waar die *hoge raad* die eienaar se *rei vindicatio* erken het nieteenstaande die feit dat die verkryger by wyse van spreke sou sweer dat hy te goeder trou was mits die omringende omstandighede sodanig was dat die redelike man meer op sy hoede moes wees. Tipies is die aanskaffing van 'n nuwe duur kamera vir 'n spotgoedkoopprys op die parkeerterrein van die plaaslike supermark. (Vgl HR 4 april 1986, NJ 1986, 810 met noot van WM Kleijn.)

Van der Walt het reeds oortuigend geargumenteer dat die voormalige bepaling 2014 *BW* vergelykbaar was met die aanwending van die estoppelverweer teen die *rei vindicatio* (sien Van der Walt "Die beskerming van die *bona fide*-besitsverkryger: 'n vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett (red) *JC Noster* (1979) 73). Ook hy het saam met meerdere Suid-Afrikaanse outeurs gemeen dat die Nederlandse reg 'n duidelik navolgingswaardige voorbeeld bied om te stel dat soos die verkryger te goeder trou met eiendomsreg beloon word, die suksesvolle estoppelopwerper na afweer van die *rei vindicatio* eweneens regtens as nuwe eienaar erken moet word (sien ook Van Heerden (1995)).

In die nuwe *BW* is daardie artikel grootliks vervang deur artikel 3:86 *BW*. Die belangrike toevoeging vervat in artikel 3:86.3 toon egter ook die grense van die beskerming van die verkryger te goeder trou in daardie regstelsel. Daar word uitdruklik bepaal dat die verkryger te goeder trou en om baat vergeefs op die gemelde omstandighede van sy besitsverkryging gaan probeer steun indien die besteelde eienaar sy saak by hom vindiseer. In daardie omstandighede speel die feit dat die bestolene moontlik self nalatig met sy saak omgegaan het geen rol hoegenaamd nie. Hy kan tydens die statutêre termyn van drie jaar sy saak vindiseer ook van die derde verkryger te goeder trou sonder om hoegenaamd enige vergoedingsplig jeens die verkryger op te doen om laasgenoemde vir die aanskaffingsom te vergoed. Die klem val dus nie ongekwalifiseerd op die beskerming van die goeie trou van die verkryger nie maar op die onderliggende ordenende funksie van die reg wat by 'n afweging van die botsende belange van enersyds die verkyger te goeder trou en andersyds die slagoffer van diefstal

steeds die voorkeur laat uitgaan aan laasgenoemde wat minstens die reghebbende is. Dit beklemtoon dat selfs in die nuwe Nederlandse reg die voorkeur nie in alle omstandighede bloot in belang van die beskerming van die goeie trou na die huidige besitter uitgaan nie. Die verkryger te goeder trou word dus nie in alle omstandighede beloon met die eiendomsreg op die saak in sy beheer nie.

Daar moet tog daarteen gewaak word dat die bril waardeur na estoppel gekyk word nie só deur 'n voorliefde vir die onregmatige dadereg gekleur word dat alles in die lig van die bekende aanspreeklikheidsvestigende elemente en ook bydraende nalatigheid beoordeel word nie. Hoewel daar sekerlik raakpunte is, sou dit 'n wesenlike verskraling van die Suid-Afrikaanse reg wees indien ons plotseling sou poog om van alle remedies, en dus ook estoppel, deliktuele remedies te maak.

JC SONNEKUS
Randse Afrikaanse Universiteit

DIE ROL VAN DIE SPELGANG BY BEPALING VAN AANSPREEKLIKHEID VIR 'N BESERING IN 'N HOKKIEWEDSTRYD OPGEDOEN

Hof's-Hertogenbosch 5 November 1997, NJ 1998, 720

1 Inleiding

In dié saak was die feite kortliks soos volg: Terwyl 'n hokkiewedstryd onderbreek is – "op een moment dat de hockey-wedstrijd stillag" – het een van die spelers, Van Kraaij, 'n ander speler, Adriaansens, opsetlik met sy hokkiestok teen sy arm (elmboog) geslaan. In die hofverslag word vermeld dat Adriaansens 'n tandarts van beroep is, maar ongelukkig word geen inligting oor die aard van die besering verskaf nie. Dit blyk egter dat hy die veld later verlaat het. Wat inderdaad wel vermeld word, is dat die eis om vergoeding wat Adriaansens teen Van Kraaij ingestel het 10 000 gulden vir materiële skade en 5000 gulden vir immateriële skade beloop het. Die hof maak self nie hieroor 'n bevinding nie, maar verwys dit na die hof *a quo* terug vir die kwantifisering van die skadevergoedings- en die genoegdoeningsbedrag.

Wat vir onderhawige doeleindes van wesenlike belang is, is dat die besering in 'n hokkiewedstryd opgedoen is, maar nie gedurende die gang van die spel nie. In hierdie kommentaar word die effek van die antwoord op die vraag of 'n besering gedurende die aktiewe spel of gedurende 'n onderbreking daarvan opgedoen is, onder die loep geneem. Wat die hokkiesport aanbetref, moet duidelik onderskei word tussen yshokkie en veldhokkie, dit wil sê gewone hokkie. Die belangrikste verskil tussen die twee vorms van hokkie is dat die spoed waarmee yshokkie binne 'n baie kleiner ruimte gespeel word, aansienlik hoër is as dié van gewone hokkie. Die risiko van beserings, en veral ernstige beserings, by sportsoorte wat teen 'n vinniger tempo gespeel word, is in die reël groter as by ander sportsoorte (sien Midgley "Sporting injuries. Liability of sportsmen" 1986 *Businessman's*

Law 115 116; Prinsloo "Liability in sport and recreation" 1991 *TSAR* 42 44). Hoewel die begrip "hokkie" in beide ys- en veldhokkie voorkom, is die verskille, wat aanspreeklikheid vir sportbeserings aanbetref, myns insiens groter as die ooreenkomste (sien Labuschagne "Straf- en delikregtelike aanspreeklikheid vir sportbeserings" 1998 *Stell LR* 72 89). Die aard van 'n spel waarvan die tempo daarvan 'n wesenlike rol speel, is 'n belangrike faktor by die bepaling van aanspreeklikheid vir 'n besering opgedoen deur 'n deelnemer aan so 'n spel (sien die Duitse saak *OLG Karlsruhe (Senat Freiburg) Urt* v 1/12/1977, NJW 1978, 705 706; Teichmann "Art 823 BGB und Verletzung eines anderen im Sport" 1979 *JA* 293–294).

2 Die algemene reëls ten aansien van aanspreeklikheid vir sportbeserings

Die algemene benadering in sowel die Anglo-Amerikaanse as die kontinentale (Europese) regstelsels, is dat skending van die reëls van 'n spel nie as sodanig deliktuele en strafregtelike aanspreeklikheid vestig nie (Parmanand *Sport injuries in civil law* (1987) 305; Eser "Zur strafrechtlichen Verantwortlichkeit des Sportlers, inbesondere des Fussballspielers" 1978 *JZ* 368 374; Anoniem "Consent in criminal law: Violence in sports" 1976 *Mich LR* 148 158). Reeds in 1961 het 'n Duitse hof beslis dat nalatige reëlskending uit byvoorbeeld oorywer of opgewondenheid nie aanspreeklikheid tot gevolg het nie (Bay OLG Urt v 3/8/1961, NJW 1961, 2072 2073; Schönke-Schröder-Stree *Strafgesetzbuch. Kommentar* (1997) 1644). Wat yshokkie betref, het 'n hof in Zürich (Switserland) beslis dat om 'n teenstander opsetlik met 'n hokkiestok in die gesig te slaan op ernstige skending van die spelreëls neerkom en strafregtelike aanspreeklikheid tot gevolg kan hê (*Obergericht* 4/9/1990, SchwJZ 90, 425).

Wat in iedere geval duidelik blyk, is dat nóg opsetlike nóg roekelose besering van 'n mededeelnemer aan 'n sportkompetisie regtens geduld word. Dit geld vir sowel die Anglo-Amerikaanse as die kontinentale regstelsels (Schild "Das strafrechtliche Problem der Sportverletzung (vorwiegend im Fussballkampfspiel)" 1982 *Jura* 464 en 523; Van den Wyngaert *Strafrecht en Strafprosesrecht Band 1* (1991) 216; Grayson "Medicine, sport and the law" 1965 *New LJ* 528; Robson "When sport becomes a crime" 1995 *Criminal Lawyer* 3 4–5).

3 Aanspreeklikheid vir beserings buite die spelgang opgedoen

Die Kanadese howe, wat hoofsaaklik gekonfronteer word met probleme tipies aan yshokkie, het drie toetse geartikuleer ten aansien van geweld (liggaamskontak) wat met die spel verband hou: Een groep howe het beslis dat deelnemers die risiko's aanvaar van liggaamskontak wat insidenteel tot die spel is. Ander het weer beslis dat die risiko's wat inherent aan en redelikerwys insidenteel tot die spel is, in koop geneem word. Nog ander het van die standpunt uitgegaan dat deelnemers die risiko aanvaar vir gedrag wat intiem met die spel verband hou (White "Sport violence as criminal assault: Development of the doctrine of consent by the Canadian courts" 1986 *Duke LJ* 1030 1039). White (1043) wys daarop dat fisieke kontak in die reël nie teen 'n spesifieke persoon gerig word nie, maar teen die opponent van die betrokke oomblik en voeg by:

> "The contact involves no sudden, violently aggressive outburst. The contact is to some extent justified by the competitive goals of the game, since trying to get near the puck is strategically crucial. Criminal conviction becomes more likely as the facts diverge from this pattern. If violence involves deliberate forceful blows in a one-on-one confrontation unrelated to the main focus of the game, courts are more likely to find that an assault has been committed."

Risiko's wat deelnemers aan sport in koop neem, geld slegs vir die tydperk van die wedstryd, met ander woorde beserings voor die aanvang van die westryd of na die beëindiging daarvan kom as algemene reël nie ter sprake nie. Rigiede en matematiese tydsgrense deug egter nie altyd nie, aangesien die momentum van 'n speler of die tempo van die spel tot "toelaatbare" beserings na beëindiging van die wedstryd kan lei (Schönke-Schröder-Stree 1644). Dieselfde geld vir onderbrekings van die spel om byvoorbeeld aandag te gee aan 'n besering van 'n deelnemer of om 'n sanksie by vuilspel of reëloortreding in werking te stel, soos om 'n strafstoot toe te ken.

In die saak onder bespreking beslis die hof (par 4 5) soos volg:

> "Het Hof deelt het oordeel van de rechtbank dat indien zich een handelen als hiervoor zou hebben voorgedaan, dit onrechtmatig jegens Adriaansens moet worden geacht. De situatie waarin een hockey-speler tijdens een stilliggende hockeywedstrijd een medespeler opzettelijk met een hockey-stick slaat verschilt wezenlijk van de situatie die aan de orde was in het arrest van de HR van 19 Oktober 1990 (NJ 1992 621)."

In laasgenoemde saak het die eiser en verweerder 'n tennisdubbelspel saam met twee ander persone gespeel. Na afloop van 'n spel het die verweerder 'n aantal balle na die ander helfte van die baan geslaan. Die eiser, wat hom toe aan daardie helfte van die baan bevind het, is deur 'n bal in die regteroog getref. Hy het die gesigsvermoë in sy oog verloor en eis vervolgens meer as 40 000 gulden van die verweerder. Die voorafgaande hof het die eis afgewys, en die Hoge Raad (HR) bevestig hierdie beslissing. Die HR wys daarop dat by die oordeel of

> "een deelnemer aan een partij tennis onrechtmatig heeft gehandeld door een gedraging waardoor aan een andere deelnemer letsel is toegebracht, voor het aannemen van onrechtmatigheid zwaardere eisen moeten worden gesteld dan wanneer die gedraging niet in het kader van de voormelde spelsituatie zou hebben plaatsgevonden" (par 3 3).

Die HR beslis egter dat by 'n wisselperiode, soos in dié betrokke saak, die risiko dat mens deur 'n bal getref kan word dieselfde is as tydens die spel. Hierdie problematiek word vir doeleindes van die onderhawige bespreking daargelaat.

4 Konklusie

Die beslissing van die hof in die saak onder bespreking kan onderskryf word. Beserings wat buite die spelgang, dit wil sê by 'n (teoretiese) nultempo, opgedoen word, behoort myns insiens volgens die gewone beginsels van deliktuele en strafregtelike aanspreeklikheid beoordeel te word, tensy die momemtum van 'n speler, of die ("natuurlike") dinamiek van 'n reeds bestaande konfrontasie, redelikerwys 'n ander benadering verg.

JMT LABUSCHAGNE
Universiteit van Pretoria

BOEKE

HISTORICAL FOUNDATIONS OF SOUTH AFRICAN PRIVATE LAW

by PhJ THOMAS, CG VAN DER MERWE AND BC STOOP

Butterworths Durban 1998; xxv and 39 pp

Price R178,98 (soft cover)

This book will be heartily welcomed by students. It is attractively bound and the text is enhanced by the comic illustrations contributed by Professor Marinus Wiechers. Unfortunately the quality of the paper used in the book is not as good as the reader might wish – however, the increased cost of producing the book on superior paper may well have priced it beyond the reach of the average law student who is the target market for the work.

The book was specifically designed to meet the needs of the learner and lecturer within the context of the new four-year LLB degree curriculum. It was intended to be reader-friendly, and to this end is written in plain English.

The book is characterised by an absence of footnotes, which make the information readily available to the reader with a minimum of effort. The text is divided into three parts: History of South African private law; The law of things; and The law of obligations. The law of obligations is further divided into the law of contract and the law of delict. Each part is then divided into chapters, paragraphs and sub-paragraphs. This has the effect of breaking the material down into manageable segments for study purposes.

The book has 23 chapters in all; each of these comes complete with a list of stated objectives, the inclusion of activities designed to make the book as interactive as possible, and an evaluation. In this way, the student is afforded an ongoing opportunity to assess his or her progress against the stated objectives.

The layout of the book allows wide margins alongside the text. These have been used by the authors for the inclusion of keywords and phrases in bold print. Using these marginal annotations the student may, at a glance, identify the nature of the contents of a particular portion of the text, thus allowing easy reference without necessitating an index at the back of the book.

A special effort has been made by the authors to identify and include case discussions which direct the student to modern applications of Roman law principles. This inclusion is extremely exciting, since the study of Roman law remains an important component of the new LLB, which has specifically been

designed to meet the practical needs of the South African legal profession. That the authors have taken considerable trouble to emphasise the relevance of the historical foundations of South African law to modern legal practice is to be applauded.

Unfortunately the technical editing of the book failed to eliminate a number of typographical and grammatical errors. Despite this, the authors are to be commended upon the quality of the book. The book covers a vast spectrum of the work in a manner that simplifies the content. Unfortunately the work comprises a total of three hunderd and ninety five pages, a lengthy text for any student. This is, however, unavoidable, given the scope of the work.

The authors of this book must be congratulated on producing a textbook that will effectively help students to understand, contextualise and apply the roots of the South African legal system. The book is also an effective handbook for the lecturer and may well prove to be a worthwhile addition to the law library of any person who wishes to have a quick reference to South African legal foundations.

CAROLINE NICHOLSON
University of Pretoria

It is the lack of understanding of the role of interpretive norms ~ and an emphasis on the inevitably value-laden or political character of those norms – that drive some commentators to the pretence that words have plain meanings before interpretation and outside of their context; others to the demonstrably false claim that statutes are generally indeterminate in meaning; and still others to the uniformative view that meaning is a function of authority.

Sunstein 7.

BRIEWE

BEKENDSTELLING EN UITNODIGING

POTCHEFSTROOMSE ELEKTRONIESE REGSBLAD (PER)

Dit is met genoeë dat ek 'n nuwe Suid-Afrikaanse regspublikasie onder u en u lesers se aandag bring. Graag nooi ek u ook uit om die publikasieruimte van *PER* op die internet by http://www.puk.ac.za/lawper/ te besoek.

Een van die redes waarom die tydskrif tot stand gebring is, is om te voorsien aan die groot behoefte wat daar in die Suid-Afrikaanse regskonteks aan publikasieruimte bestaan en dit vir ekonomiese redes nouliks denkbaar is dat die ry van gevestigde regstydskrifte op die konvensionele manier aangevul kan word.

Dit is die redaksie se voorneme om die tydskrif so spoedig moontlik te laat akkrediteer. Dit is egter nog nie moontlik nie, aangesien die owerheid tans nog 'n moratorium op die akkreditering van nuwe tydskrifte handhaaf. Die moontlikheid van outeursvergoeding as tussentydse maatreël bestaan egter wel.

Met die oog op akkreditering word hoë redaksionele standaarde intussen gehandhaaf. 'n Redaksieraad van gesiene Suid-Afrikaanse en buitelandse juriste is saamgestel (besonderhede kan op die internet gevind word). Ten minste twee van die lede van die redaksieraad word by die keuring van elke bydrae betrek.

PER publiseer bydraes wat vir die fokusarea *Ontwikkeling in die Suid-Afrikaanse Regstaat* van belang is. Regstaatlikheid en ontwikkelingsbehoeftes behoort dus as hooftemas in gedagte gehou te word, wat meebring dat bydraes oor enige aspek of dissipline van die reg verwelkom word indien hierdie temas op die een of ander wyse in die bydrae betrek word.

Sou u u weg oopsien om hierdie brief in *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* te plaas, sal ons dit besonder hoog op prys stel.

Met vriendelike groete,

FRANCOIS VENTER
(*Redakteur*)

The quest for justice in Plato's *Republic*

(*continued*)

Andrew Domanski
Bsc (Ind Chem) LLB HDip Co Law LLM
Associate Professor of Law, University of the Witwatersrand

8 THE OPERATION OF JUSTICE IN THE STATE

In the *Republic*, there are many examples of the practical operation of the Socratic concept of justice in relation to the state. A number of these examples occur in Socrates's description of his ideal state. Taken in their context, most of them are not primarily intended to exemplify Socratic justice, the definition of which occurs only later in the book, although they perform this function very well. They repay close study, for they can deepen our understanding to the point at which we are able to transpose the concept to the context of our own time and place, and so come to appreciate its vital contemporary relevance.

Before we consider these examples, it is necessary to say something about the class structure of society in Socrates's ideal state. He postulates a society composed of three strata or classes. These are, in ascending order, the traders and the two classes mentioned earlier, namely the warriors (or auxiliaries) and the guardians (or legislators). There is a close parallel between this Socratic model, with its apparently rigid class barriers, and the traditional caste system of India. That system has in modern times met with widespread condemnation. Similarly, many today would dismiss the Socratic model of the state as class-conscious and elitist.[1] Be that as it may, my concern here is Socratic justice, and this passing reference to the structure of the ideal state is included only in order to clarify the examples discussed below.

In our first example, Socrates postulates the case of a carpenter who takes on the work of a cobbler (or *vice versa*).[2] This, he says, would not be greatly injurious to the state. But what if the cobbler, who belongs to the class of traders, "attempts to force his way into the class of warriors, or a warrior into that of legislators and guardians, for which he is unfitted, and either to take the implements or the duties of the other"?[3] Or what if "one man is trader, legislator and warrior all in one"?[4] In these cases, a person assumes a function which is alien to his class. There is a crossing, in other words, of the boundary between one class and another. For Socrates, this is not merely inefficient or impractical, as we

1 Yet the class structure in Plato's ideal state is less rigid than it looks, for it does allow for movement of citizens from one class to another in certain cases. See 423d.
2 434a.
3 434b.
4 *Ibid.*

might choose to describe it: it is unjust. This interchange and meddling of one with another is the ruin of the state, argues Socrates.[5] Here, once again, Plato demonstrates his power to surprise: many would hardly see injustice in conduct which appears to be no worse than inefficient. By the same token, says Socrates,[6] when the trader, the auxiliary and the guardian[7] each does his own business, that is justice, and will make the city just.

Here is a second example. Socrates poses the question: "[W]ill you have a work better done when the workman has many occupations, or when he has only one?"[8] The answer is obvious in the light of what has gone before, but in giving it, Socrates brings to the fore an important element of his notion of justice. He says[9] that all things are produced more plentifully and easily, and are of a better quality, when "one man does one thing which is natural to him and does it at the right time, and leaves other things". This formulation which, needless to say, is not confined to the activity of producing goods, imports the crucial element of timing into the definition of justice. It is not enough that a person performs the function to which he is best fitted; the function must be performed at the right time. Take the case of a builder. Plato's definition of justice would require of him, in the first place, an aptitude for and a lifelong dedication to his craft, to the exclusion of every other occupation. Secondly, the builder's skills have to be deployed in the service of his client, at the time when the client has need of them, and at no other time. This may sound trite, but the point here (as before) is that if the builder neglects this principle, his conduct is not merely wasteful or uneconomic, but unjust. For Socrates, such a situation is a most serious one; he describes it[10] as "the ruin of the State".

These first two examples are not intended to suggest that justice, as Socrates conceives it, is confined to the choice and exercise of an occupation. Nor is it confined to activities associated with ongoing relationships, such as those between employer and employee, or between members of a family. It operates equally in relation to single instances. Thus, the action of a pedestrian who prevents a small child from stepping off a sidewalk into heavy traffic would be regarded by Plato as just. By the same token, the enactment of legislation which prohibits people of a particular skin colour from residing in a particular area is unjust. The former case is entirely consonant with the last-quoted formulation of justice,[11] for the action is both natural and timely. In contrast, the latter action is unnatural, and therefore violates both natural law and Socratic justice.[12]

It should by now be clear that the essence of Socratic justice is simply to be in the present and to respond to the need before one, to the exclusion of every other consideration. Meeting the need of the present moment may require one to deviate from, or to abandon, instantly if necessary, one's predetermined course of action, plan or agenda. Thus the hallmarks of Socratic justice are flexibility, openness and responsiveness. This leaves no room for rigid, mechanical behaviour.

---

5 *Ibid*; and see further 421a.
6 434e.
7 Note also the categorieal statement at 397e. See Barker *The political thought of Plato and Aristotle* (1906) 93–94.
8 370b–e.
9 370e.
10 434e.
11 See the text to fn 9 above.
12 See the text to fn 101 in the previous article.

Consider now a third example of the operation of Socratic justice in the state. Early in the *Republic*, Plato holds[13] that the cause of all wars is greed. Where one country covets the wealth of another, the latter will need to have a class of trained warriors in order to defend its territory in the event of an invasion. Would an army of part-time soldiers drawn from the citizenry not suffice for this purpose? No, says Socrates. He states[14] the key principles that one man cannot practise many arts with success, and that every worker ought to be assigned one work for which he is by nature fitted. To this work, and to no other, he is to devote himself throughout his life. Socrates adds:[15]

> "Now nothing can be more important than that the work of a soldier should be well done. But is war an art so easily acquired that a man may be a warrior who is also a husbandman, or shoemaker, or other artisan? . . . [N]o one in the world would be a good dice or draught player who merely took up the game as a recreation, and had not from his earliest years devoted himself to this and nothing else. No tools will . . . be of any use to him who has not learned how to handle them, and has never bestowed any attention upon them. How then will he who takes up a shield or other implement of war become a good fighter all in a day . . . ?"

For Socrates, then, it would be an act of injustice to entrust the defence of the state to a conscripted army composed of part-time soldiers. Did Socrates or Plato (or both) not perhaps have a hidden political agenda here? Were they not warning and chiding their fellow Athenians? Both philosophers were active during and after the ruinous second Peloponnesian war, in which Athens was defeated and destroyed by Sparta. Sparta practised the Socratic teaching on justice to the letter: Spartan society was geared towards, and in a state of constant preparedness for, war. This intense single-mindedness produced a breed of warrior without equal in the ancient Greek world. And what of Athens? There the prevailing idea seems to have been that every citizen ought to participate directly in all aspects of the life of the city-state. This meant that he should willingly lay down the tools of his trade for a period of time each year, in order to participate directly in the lawmaking process of the democratic Athenian *polis*, or in order to take up weapons in its defence. Socrates and Plato, quite rightly, poured scorn on this Athenian jack-of-all-trades. This dabbling in many arts for which the citizen was not qualified may well have been seen by them – although this conclusion is not articulated in the *Republic* – as the prime cause of Athens's crushing defeat at the hands of Sparta in the war. Most modern writers,[16] in contrast, hold that this direct democratic participation in the affairs of state was the very strength of Athenian society. Of course, the fact that Athens has left us the imperishable legacy of its civilization while Sparta has left us very little, is irrelevant: Athenian culture flourished in spite of, not because of, participation by the citizens in all aspects of public life. (It is interesting to note, in passing, that the two brightest beacons of Western civilization, Classical Greece and Renaissance Florence, both shone in the midst of turmoil and political upheaval. Is that what it takes?!) It is hard to escape the conclusion that Athenian society, composed of citizens who dabbled in many arts, was in Platonic terms founded on the quicksands of injustice. One can easily picture Plato at the end of the war, wagging a finger at

13 373d–e.
14 374a–b.
15 374c–d.
16 See eg Kitto *The Greeks* (1951) 128–129.

his fellow Athenians, saying "If only you had listened to Socrates!" Socrates would hardly have advised Athens to devote herself, like Sparta, exclusively to the art of warfare. No, he may simply have been telling Athens that she should have taken steps to safeguard her civilisation – and how much more of it might not have survived for our enrichment and edification had he been heeded? – by creating a specialist professional army to meet the Spartan threat.

Education is a major theme of the *Republic*, and one which is closely related to the principal theme of justice. It is Plato's teaching on education that provides our fourth example. Socrates asks which stories are suitable for children to hear. He is of the view[17] that the founders of a state ought to know the general forms in which authors should cast their tales, and the limits which those authors must observe. To compose the tales, however, is not the founders' business. Violation of this rule would, therefore, be an act of injustice in terms of Socrates's definition.

A case considered earlier affords a fifth example of how justice operates in the state. In his conversation with Thrasymachus, Socrates pointed out that the "art" of payment is a completely autonomous, independent art which ought not to be confused with, or set off against, the arts whose practitioners are being remunerated.[18] One art form, in other words, must not interfere or intermingle with another, for each has its own distinct function. Thus medicine cannot be called the art of receiving pay merely because its practitioners receive fees only when they are engaged in healing. Any such confusion or intermingling of one art with another is a clear case of injustice, and will impact negatively on the fabric of society. In contrast, when the various arts do their own business, justice prevails. On this standard, there is rather more injustice in the workplace today than we may care to admit.

What, in practice, would be the consequence of ignoring the injunction to do one thing only, and not many? Socrates's answer[19] is the obvious one: by trying to do many things, we will do none of them well and will fail to gain a reputation in any of them. This lends a new dimension to our understanding of Socratic justice: its concomitant human qualities are attention, care, dedication and single-mindedness. Socrates gives this answer in the course of considering[20] the subject of imitation, which will usefully serve as our sixth and final example of the operation of justice in the state. This is how Socrates states[21] the rule of just action for guardians entrusted with the care of the state:

> "[O]ur guardians, setting aside every other business, are to dedicate themselves wholly to the maintenance of freedom in the state, making this their craft, and engaging in no work which does not bear on this end, they ought not to practise or imitate anything else; if they imitate at all, they should imitate from youth upward only those characters which are suitable to their profession – the courageous, temperate, holy, free, and the like; but they should not depict or be skilful at imitating any kind of illiberality or baseness, lest from imitation they should come to be what they imitate."

Many modern rulers would do well to heed these fundamental principles. Closely related to this passage is another which deals with the appointment of guardians.

---

17 379a.
18 See 346a–d, and the text to fns 32–33 in the previous article.
19 394e.
20 394e–398a.
21 395c–d.

In that appointment, says Socrates,[22] what matters is not their greatest happiness individually, but rather the greatest happiness of the state as a whole. From this it would follow that guardians, auxiliaries and all others must be "compelled or induced to do their own work in the best way".[23] In other words, in a state which is ordered with a view to the good of the whole we are most likely to find true justice,[24] that is justice in the Socratic sense. Such a state will grow up in a noble order, the several classes within it will enjoy the degree of happiness which nature assigns to them, and the guardians will be the true saviours, not the destroyers of the state.[25] Socrates shows here that justice does not operate in isolation: it is closely linked to the wholeness, order and happiness of the state.[26]

The principle enunciated by Socrates does, however, raise a difficult question: to what extent can true justice prevail in modern constitutional democracies founded on the protection of individual human rights? Such protection is typically enshrined in a bill of rights, in which the emphasis is strongly on the interests of the individual rather than on those of the state as a whole. It would not be easy in this age, and especially in countries which have seen gross violations of human rights,[27] to practise the Socratic teaching on justice, its foundation in truth and natural law notwithstanding. Yet to discard the notion on that ground would be folly. A common – and fallacious – view is that the ideal state and the principle of ideal justice postulated by Socrates have no bearing on, and cannot exist in, the real world in which we find ourselves. The truth of the matter is rather that the Socratic teaching, while it embodies principles of universal validity, must be modified in its application to meet the particular needs of every society. But the principles themselves are immutable; they do not change from place to place or from time to time.[28] The task for us, then, is to strive to ensure that what we call justice in our polity approximates as closely as possible to that standard. It is this striving that matters. It is this striving that will overcome our social ills.

Finally, Socratic justice requires that all the pursuits of men are the pursuits of women also.[29] Differences in strength and in nature notwithstanding, men and women both possess the qualities which make a guardian, a musician, a healer, a

---

22 421b.

23 421c; see also 520e.

24 420b.

25 421b–c.

26 Further on this subject, see 462a–466d.

27 South Africa is a case in point.

28 This is how an eminent modern judge applies the Socratic concept of justice to the work of his own profession (Mr Justice Deon van Zyl in a letter to the author dated 1997-12-29): "[A] judge who is dedicated to, and strives to achieve, justice for all should appropriately apply the relevant law to the facts and circumstances of each case being considered by him. He should do so with perspicuity and wisdom; he should exercise temperance and restraint; he should be fearlessly independent and at all times have the courage of his convictions. In this way he would achieve not only the ideal of justice and fairness, but would also succeed in expressing the truth (*aletheia*) for the general benefit of the community which he serves."

29 451c–457c.

gymnast or a warrior.[30] Women should have the same education and way of life as men;[31] there is to be full equality of the sexes.

There is here an apparent contradiction, which Socrates[32] is quick to spot and defuse: given that justice requires everybody to do the one work suited to his or her own nature, and that the natures of men and women differ greatly, should not the tasks assigned to men and to women be different? Socrates answers this question by showing[33] that

> "there is no special faculty of administration in a state which a woman has because she is a woman, or which a man has by virtue of his sex, but the gifts of nature are alike diffused in both".

Socrates concludes[34] that to enact that men and women should have all their pursuits in common would be in the highest degree beneficial to the state.

9 THE OPERATION OF JUSTICE IN THE INDIVIDUAL

Let us recapitulate: in his quest for justice, Socrates's *modus operandi* is that if justice can be located and observed in the larger picture (that is, within the state), it will more easily be discerned in the individual.[35] Having built up his model of the ideal state, Socrates proceeds to isolate and discover the nature of justice within that context. He now concludes[36] that his concept of justice has been sufficiently verified in the state. It remains to be verified in the individual, and once that is done, its validity will have been placed beyond doubt. Socrates begins this phase of the inquiry by identifying three principles or faculties in the human soul.[37] These are reason (*logismos*), passion or spiritedness (*thymos*), and desire or concupiscence (*epithymia*). Reason, the first and highest of these, is wise,[38] has the care of the whole soul, and ought always to rule the other principles.[39] The term "spiritedness" embraces qualities and feelings ranging from anger to bravery, and resolution to enthusiasm.[40] The examples of desire given by Socrates include the love of money,[41] hunger and thirst,[42] and "the fullness of bodily pleasures".[43] This principle is also described as the "irrational or appetitive, the ally of sundry pleasures and satisfactions".[44] Socrates demonstrates[45]

---

30 455c–456b. Bloom (383) argues that "the women are placed among the guardians not because they possess the same capabilities as the men, but precisely because they are different, because they can bear children and the men cannot. To treat dissimilar persons similarly is unjust and unnatural. Maybe the souls are the same, but the influence of the body is powerful; the necessity of the body makes justice to souls difficult".
31 451d–452a.
32 453b–c.
33 455d.
34 456c–457c.
35 See section 5 of the previous article.
36 434d.
37 435c–e.
38 This is the actual wording of Jowett's translation at 441e.
39 *Ibid.*
40 441a–c. For helpful descriptions, see Bloom 348ff and Guthrie 112–113.
41 436a.
42 437b.
43 442a.
44 439d.
45 436a–441c.

that these principles are discrete and distinct: they are indeed three in number, and not merely different aspects of a single principle.[46] Moreover, these principles, whose origin is in the individual, pass from the individual into the state,[47] for (Socrates asks[48]) how else can they come there? Thus if a nation is composed of individuals in whom one of the three qualities – say reason in the form of love of knowledge, or desire in the form of love of money – is predominant, then that same quality will be a characteristic feature of the nation as a whole. Socrates gives examples.[49] The conclusion thus far is that the same three principles of reason, spiritedness and desire which exist in the state exist also (antecedently) in the individual.[50]

From this conclusion, Socrates infers that the four virtues of wisdom, courage, temperance and justice, which were shown earlier[51] to inhere in the ideal state, exist and operate equally in the individual.[52] Moreover, there is a clear correlation between these virtues and the rational, spirited and appetitive principles presently under discussion. Thus in both state and individual, the rational principle, which is wise, will (with the support of its loyal and courageous ally, the spirited principle) rule over the appetitive principle.[53] When this harmony arises, when the one ruling principle of reason, and the two subject ones of passion and desire, are agreed that reason ought to rule, and do not rebel, then temperance prevails.[54] In this way, three of the four virtues are accounted for.

But what of the fourth virtue, justice? In the same way that justice in the state consists in each class doing its own work, so justice in the individual requires each of the three principles to do its own work.[55] Thus when reason rules over passion and desire, harmony and justice prevail. Conversely, when desire, which "in each of us is the largest part of the soul and by nature most insatiable of gain", waxes great and strong, and, no longer confined to her own sphere, attempts to enslave and rule those (namely reason and spiritedness) who are not her natural-born subjects, then the whole life of man is overturned.[56] This all-too-familiar

---

46 An analogous, if not identical, trinity is to be found in the Vedantic philosophy of India: according to the Bhagavad Gitá (chap 14), nature (*prakriti*) consists of three qualities (*gunas*), namely purity or serenity (*sattva*), restlessness or passion (*rajas*), and ignorance or inertia (*tamas*). See also, on the nature of the three principles, Taylor 281–282.

47 435b–e.

48 435e.

49 435e–436a.

50 441c. Where in the state may these principles be expected to reside? The answer, implicit in all that has gone before, is that reason resides in the guardians (the ruling class), spiritedness in the auxiliaries (the class of warriors), and desire in the traders (the class of businessmen and artisans).

51 See sections 6 and 7 of the previous article.

52 441c–d. Do these virtues reside in *every* individual? Socrates does not directly address this question here, although the tenor of the debate points strongly to an affirmative answer. While they are certainly latent in every individual, the four virtues are not continuously manifest in all: they manifest singly or collectively in an individual, and then only for a limited time.

53 Jowett's use of the term "concupiscence" to denote this principle is probably a mistranslation. "Concupiscence" refers specifically to sexual desire or lust, and is therefore too narrow to embrace the full range of appetites which Plato is considering here. See 439d–e.

54 441d–442d.

55 441d. See Lee's introduction to his translation: *The Republic* (1987) 35–36.

56 442a–b; 587a.

condition is, of course, one of injustice. Socrates establishes here a direct connection between reason and justice: what is reasonable is just, what is unreasonable is not.

The individual who is just, says Socrates,[57] will not easily be corrupted. He is unlikely to commit acts of dishonesty, such as theft or fraud. He will never be guilty of sacrilege, treason, treachery to his friends, or breach of faith. No one will be less likely to commit adultery or to dishonour his parents. And all this because each part of him is doing its own business, whether in ruling or being ruled.[58] The key virtue, then, which is capable of producing people and states of this calibre is justice, and no other.[59] Conversely, the absence of justice in this sense produces the disorder so evident in states and individuals.

Socrates concludes this discussion by putting all that has gone before into proper perspective: justice as it appears in the state, that is, the doing by each of his own business, is no more than a shadow of real justice. In reality, justice is concerned, not with the outward life and activities of man, but with his inner being.[60] Justice originates in the individual, and passes from the individual into the state.[61]

The treatment of the nature and operation of justice in the individual is the core of the teaching in the *Republic*. All that went before, namely the construction of the ideal state and the study of justice in the context of the state, was primarily a means to an end, a device to facilitate the attainment of Socrates's real objective, namely knowledge of the nature of justice in the individual.[62]

This is not to suggest that Socrates undervalues the social fabric. He appreciates only too well the importance of good government and of happiness in society. But he sees that everything begins with the nature and nurture of the individual. If men are just, their society will be just. The state will then be just and will flourish. Thus, "top-down" government initiatives intended to cure our social and political ills can never produce a just and happy society. We have yet to learn this fundamental lesson, for we continue, in the face of the lessons of history, to place our trust in such initiatives. We persist in the belief that our political leaders are somehow to blame for our woes. We deplore the dishonesty and misconduct of those in power, but do not see that only by cultivating justice within ourselves will we promote justice in our state.

How are we to go about this? Socrates, we have seen, teaches that justice rules the individual when each of the three principles of reason, spiritedness and desire performs its proper function and is restrained within its own sphere of operation. Thus, the practical task – no easy one – which Socrates assigns to every one of us is to ensure through constant vigilance that desire is subjected to the dominion of reason, reinforced by its ally, spiritedness[63] (in the form of will or determination).

---

57 443a–b.
58 443b.
59 *Ibid.*
60 443e–444a.
61 435e; and see the text to fn 47 above.
62 See section 5 of the previous article.
63 441e.

This is as far as Socrates goes, for his concept of justice, in so far as words are able to convey it, has now been conveyed in full. We have arrived at the point where spiritual endeavour parts company with academic scholarship: armed with a theoretical grasp of the teaching, the aspirant who seeks to realise justice in his own life must now set aside intellectual debate and engage in direct practical work on his inner being. It is here that the purely intellectual interest of the scholar ends, and the work of the true seeker of justice begins.

What does this practical work entail? The seeker must subject the operation of reason, spiritedness and desire within his own mind to direct and continuous empirical observation – observation, that is, pure and free from analysis, evaluation, commentary, judgment, criticism, comparison, classification, personal opinions, beliefs, theories or any other mental construct. This activity may properly be described as scientific, for it is exactly analogous to the impartial observation practised, say, by a microbiologist in the course of studying a specimen under a microscope. What is required of the seeker after justice, therefore, is sustained, neutral, detached watching of the workings of his mind. This ongoing process of self-examination calls for constant vigilance: it may be simple, but the practice of it is certainly not easy.

In the light of diligent self-observation, the aspirant will soon discover whether reason and its ally, the spirited principle, are indeed holding his desires in check, as Socrates says they ought to do. If at any given moment, reason, aided by the spirited principle, is ruling within him, directing and informing his inner and outer actions, then these actions will be just, and justice will prevail. If, however, desire gains the upper hand, the resulting action will be contrary to reason and, in Socratic terms, unjust.

A rather mundane example, familiar to this author if not to his readers, may help to make this clear. The desire to eat more food than the body needs can be brought under observation at the critical moment (which could be when one is offered a third helping of one's favourite dessert!). This moment is critical, because it is the moment of choice: either reason, supported by the spirited principle in the form of resolution, will prevail over desire, the offer will be declined and justice will prevail, or (more commonly in my experience) desire will overwhelm reason, and unjust action will follow. Only alert detached observation of his inner state at the critical moment will enable the aspirant to act justly in such cases. Persistent self-examination of this nature will, over time, gradually refine his inner and outer actions, bringing them increasingly under the dominion of reason and thus into consonance with justice.

This example shows again how alien Plato's concept of justice is to our modern way of thinking: conduct which we would regard as no worse then overindulgent or unhealthy turns out to be unjust in Platonic terms. Is Plato wrong, or is it rather our thinking that is at fault? This I shall leave to the interested reader to decide.

The example also makes plain the intimate connection between justice and temperance, another of the four cardinal virtues discussed earlier.

Can education do anything to promote this movement from injustice to justice within the individual? Plato's answer to this question is an emphatic "yes". Indeed, education is a major theme of the *Republic*. Not only is Plato's teaching on education of vital contemporary relevance, but it also bears directly on his central theme of justice.

How can education bring the rational and spirited principles of the soul into harmony, and render them capable of ruling the soul? Says Socrates:[64]

> "[T]he united influence of music and gymnastic will bring them into accord, nerving and sustaining the reason with noble words and lessons, and moderating and soothing and civilizing the wildness of passion by harmony and rhythm."

Thus the core elements of an education which promotes justice in the individual, and consequently in the state, are music and physical exercise. Further consideration of this subject is superfluous to our inquiry, but the interested reader is referred to Socrates's treatment of it in the *Republic*.[65]

The discourse on justice in the individual ends with a magnificent passage[66] which lies at the very heart of the Socratic teaching:

> "But in reality, justice . . . [is] concerned, however, not with the outward man, but with the inward, which is the true self and concernment of man: for the just man does not permit the several elements within him to interfere with one another, or any of them to do the work of others – he sets in order his own inner life, and is his own master and his own law, and at peace with himself; and when he has bound together the three principles within him . . ., and is no longer many, but has become one entirely temperate and perfectly adjusted nature, then he proceeds to act, if he has to act, whether in a matter of property, or in the treatment of the body, or in some affair of politics or private business; always thinking and calling that which preserves and co-operates with this harmonious condition, just and good action, and the knowledge which presides over it, wisdom, and that which at any time impairs this condition, he will call unjust action, and the opinion which presides over it ignorance."

This passage points to the ultimate source of justice, which is linked here to the "true self", the spiritual essence of man. Thus the Socratic notion of justice is primarily not political or social or legal or economic. Instead, justice turns out to be primarily and essentially spiritual in its nature, for it is a facet of the true self of every human being.

What, then, is this "true self" of which Plato speaks? Here is one description, taken from the Vedantic scriptures:[67]

> "The intelligent Self is neither born nor does It die. It did not originate from anything, nor did anything originate from It. It is birthless, eternal, undecaying and ancient. It is not injured even when the body is killed.
>
> The Self that is subtler than the subtle and greater than the great, is lodged in the heart of every creature. A desireless man sees the glory of the Self . . . and thereby he becomes free from sorrow."

Having discovered[68] the nature of the just man, of the just state, and of justice itself in each of them, Socrates is now ready to turn to the investigation of injustice.

10 THE NATURE OF INJUSTICE

It follows from what was said in the previous section that the condition in which the three principles in the human soul – the rational, the spirited and the

64 441e–442a.
65 376e ff. See also, in relation to music, Ficino 141–144.
66 443c–444a.
67 *Katha Upanishad* 1 2 18, 20 transl Swami Gambhirananda.
68 444a.

concupiscent – are not in harmony with one another is one of injustice.[69] In the words of Socrates:[70]

> "Must not injustice be a strife which arises among the three principles – a meddlesomeness, and interference, and rising up of a part of the soul against the whole, an assertion of unlawful authority, which is made by a rebellious subject against a true prince, of whom he is the natural vassal, – what is all this confusion and delusion but injustice, and intemperance and cowardice and ignorance, and every form of vice?"

Thus when desire of any kind usurps and overthrows the dominion of reason in man, injustice reigns. This condition is aptly described in the passage just quoted as "an assertion of unlawful authority". Here Socrates reinforces the link, established earlier,[71] between justice and natural law: what is unjust is plainly also unlawful. This important equation provides a universal standard which ought always to be – but seldom is – attained in systems of man-made law. This is how Socrates describes[72] the relationship:

> "[T]he creation of justice [is] the institution of a natural order and government of one by another in the parts of the soul, and the creation of injustice the production of a state of things at variance with the natural order."

At the start of the inquiry,[73] Adeimantus challenged Socrates to show which is more profitable, to be just and act justly and practise virtue, or to be unjust and act unjustly for as long as one is able to avoid detection, punishment and reformation. That question, it is now[74] agreed, has become ridiculous, for the answer is obvious.[75]

11 SOCRATIC JUSTICE AS AN IDEAL

Socrates and Plato do not deal in relatives: truth for them is absolute and immutable. Just as, in the *Symposium*, Socrates posits the notion of absolute beauty, so, in the *Republic* he speaks of the ideal state, of absolute justice, of the perfectly just man and, consistently, of the perfectly unjust man.[76] Thus the question arises: Would the Socratic notion of justice be invalidated if it could be shown that no one is capable of realising it in practice? Not at all, replies Socrates:[77] the notions of justice and the just person serve to provide a standard against which we may measure our own conduct, and our own happiness.[78] Should these ideals prove incapable of existence in practice, this fact would be of no consequence. What matters, and what is required of us, is that, both inwardly and outwardly, we strive always to approximate[79] the Socratic standard as closely as we are able.[80] That is the way to live a meaningful and happy life.

---

69 444b.
70 *Ibid.*
71 See the text to fn 101 in the previous article.
72 444d.
73 367b–d; see also the text to fn 71 in the previous article.
74 445a–b; 354a.
75 See further section 15 below.
76 472c–e.
77 472c.
78 *Ibid.* In the words of Grube (Cantor & Klein 166): "If the whole human race were senseless savages, the eternal form of justice would exist as fully as in any case, though it would be even less perfectly realized in the world."
79 The word used by Jowett 472b–e.
80 All this does not amount to an admission by Socrates that the individual is incapable of realising justice in actual practice.

12 ABSOLUTE JUSTICE AND ITS TRANSIENT MANIFESTATIONS

In the *Symposium*, Plato's great dialogue on beauty, Diotima, the wise woman of Mantineia, explains to Socrates the steps by which the soul ascends to perfection.[81] In the early stages, she says, a person is capable of recognising and admiring manifestations of beauty at the physical and mental levels, for example a rose, a sculpture, a fine leather binding, the human body, a machine, a sunset, the proof of a mathematical theorem, a refined system of laws. But these are no more than expressions, manifestations or embodiments of beauty. They are transient: they have a beginning and an end. They are all subject to decay and dissolution. In short, they belong to the realm of the relative and the changeable. In the great majority of human beings, the appreciation of beauty never evolves beyond these physical and mental levels. But a few rare souls who attain the fullest possible human development are able to see beyond the passing manifestations to the immortal, absolute beauty which informs these manifestations for as long as they last: the beautiful manifestations come and go, but the beauty of which they are expressions is eternal. This rare development is a movement from the relative world of change to the realm of absolute beauty and truth.

In the *Republic*, Socrates pursues[82] this distinction between the relative world of beautiful appearances and the realm of beauty itself, absolute and immutable. He who can appreciate beautiful things, but has no sense of absolute beauty, has an opinion but no knowledge of the nature of beauty.[83] In contrast, he who recognises absolute beauty is awake and truly knows what beauty is; he has knowledge.[84]

By exact analogy, Socrates proceeds to apply this fundamental distinction to justice:[85]

> "[T]hose who see the many beautiful, and who yet neither see absolute beauty, nor can follow any guide who points the way thither; who see the many just, and not absolute justice, and the like, – such persons may be said to have opinion but not knowledge . . . But those who see the absolute and eternal and immutable may be said to know, and not to have opinion only . . ."

The analogy is sound, for as Socrates later[86] points out, justice, like beauty, is but a facet of absolute truth. Indeed, it has been said that justice is truth in action.[87]

The Socratic notion of absolute justice is by no means as rigid as may at first sight appear: the point was made earlier that the notion must be modified in its application to meet the particular needs of every age and every society. Two modern writers who are substantially in sympathy with the Socratic notion of absolute justice are Wild and Hallowell. Two who strongly oppose it are Popper and Crossman.[88]

---

81 Plato *Symposium* 201d–212b.
82 476b–c.
83 476c.
84 476d.
85 479e.
86 506a.
87 Disraeli: Speech (1851-02-11).
88 For a conspectus of the views of these four writers, see Thorson (ed) *Plato: Totalitarian or democrat?* (1963).

13 JUSTICE AND THE IDEA OF THE GOOD

Socrates turns now to the task of locating justice within his larger picture of man. In the course of tracing the thread of justice through the pages of the *Republic*, we have watched that picture as it gradually emerges and takes shape.

Let us briefly recall the main features of the picture. The individual has within him three principles, namely the rational, the spirited and the concupiscent. Latent in the individual, if not always manifest, are the four virtues of wisdom, courage, temperance and justice.[89] Justice, being the cause of the existence of the other three, is the supreme virtue. When the spirited and concupiscent principles are subject to the dominion of reason, each of them fulfils its proper, natural function. Justice, as defined by Socrates, then prevails and the inner being is in a state of harmony, happiness and order. From the individual, this condition passes into the state. This transfer is of paramount importance, for it plainly indicates that if we seek peace, harmony and stability in human society, we have to start (although we cannot stop) with the individual; we must, in short, begin by bringing order to our own inner being. Socrates rounds off his picture of man up to this point by showing that those who are able to recognise a just person, but not justice itself, are trapped in the domain of the relative and confined to the world of opinion; they cannot, unlike the rare perceivers of justice itself, aspire to absolute knowledge.[90]

Now Socrates goes further: he asks[91] whether justice and the other virtues represent the highest knowledge available to man, or whether there is a knowledge still higher than this. His answer is that knowledge of justice is not the highest attainment for man. The idea of the good (*agathon*) is the highest knowledge,[92] and all other things become useful and advantageous only by reference to this. He adds[93] that no one who is ignorant of the good will have a true knowledge of the beautiful and the just. So there is a close relationship between justice and the good. There is also an important difference between them, says Socrates:[94]

> "[M]any are willing to do or to have or to seem to be what is just and honourable without the reality; but no one is satisfied with the appearance of good – the reality is what they seek; in the case of the good, appearance is despised by every one."

But what is this supreme principle of "the good"? Glaucon[95] asks Socrates for an explanation. While an exploration of this all-important topic is beyond the scope of our inquiry, the question cannot go unanswered. Socrates does not offer a formal definition of the good, nor should we expect to find one in the cut and thrust of a Platonic dialogue. He does, however, give a few pointers which will keep us on track and help to banish fruitless speculation. He says:[96]

> "[T]hat which imparts truth to the known and the power of knowing to the knower is what I would have you term the idea of good."

---

89 See the text to fn 52 above.
90 476c–d. For a different perspective, see Niebuhr *Moral man and immoral society*.
91 504d.
92 505a.
93 *Ibid*; 506a.
94 505d.
95 506d.
96 508e.

Furthermore,[97]

> "the good may be said to be not only the author of knowledge to all things known, but of their being and essence, and yet the good is not essence, but far exceeds essence in dignity and power".

In the famous allegory of the Cave, we find this statement:[98]

> "[W]hether true or false, my opinion is that in the world of knowledge the idea of good appears last of all, and is seen only with an effort; and, when seen, is also inferred to be the universal author of all things beautiful and right, parent of light and of the lord of light in this visible world, and the immediate source of reason and truth in the intellectual; and that this is the power upon which he who would act rationally either in public or private life must have his eye fixed".

In the first and third of these passages, the good is described as the immediate source of truth, of which, in turn, justice and beauty are but facets. And, as we have seen,[99] without knowledge of the good, true knowledge of justice is not attainable.

Does all this mean that Socrates is making impossible demands of us? Is he postulating a perfection which the ordinary person is simply not capable of attaining? Not at all: in the first place, we will recall,[100] notions of absolute justice and of the perfectly just person provide a standard against which we may measure ourselves. What matters is the constant striving of the individual towards truth and justice.

Secondly, it is arguable that there is nothing for us to attain, that the perfection of which Socrates speaks is already present within each of us, waiting only to be discovered and made manifest. There is ample authority for this proposition in the *Republic* (to say nothing of other Platonic dialogues, such as the *Phaedo*, in which there occurs a great debate on the immortality of the soul). Socrates shows,[101] for example, that the human soul is immortal. And earlier, as we have seen,[102] Socrates referred to the soul as the "true self"[103] of man, and described it in very similar terms. Again, he says[104] that everyone ought to be ruled by the divine wisdom dwelling within him. In any event, Socrates nowhere suggests that the good, the source of truth and justice, is incapable of being realised by human beings in practice. On the contrary, he says:[105]

> "[T]he business of us who are the founders of the State will be to compel the best minds to attain that knowledge which we have already shown to be the greatest of all – they must continue to ascend until they arrive at the good."

---

97 509b.

98 517b–c. Socrates also describes the good as the "brightest and the best of being" (518d). According to Rouse (*The complete texts of great dialogues of Plato* (1961) 169): "[T]he Idea of the Good, the guiding star of the soul, is the end of the philosopher's study. As the sun is to the world of sight, the Idea of the Good is to the world of mind."

99 505a; 506a; and see the text to fn 204 above.

100 See section 11 above.

101 608d–612a.

102 See the text to fn 66 above.

103 443d.

104 590d.

105 519d. See also fn 80 above. According to Edman (xx): "[I]f logic was the method, ethics was the central interest of Socrates, and it is this dominant concern with the good, and the good life that seems most forcibly to have impressed Plato and permanently to have given a stamp to his philosophy."

14 THE DUTY OF ONE WHO HAS REALISED JUSTICE

Is he who has succeeded in ascending to the good, the source of justice, at liberty to enjoy that exalted state and to play no further part in the mundane affairs of men?

No, says Socrates.[106] Such a person must forgo his blissful condition and place his knowledge at the service of his society; in the language of the allegory of the Cave, he must be made to descend again among the prisoners in the cave and partake of their labours and honours, whether they are worth having or not.[107] In short, he will be required to play the part of guardian or ruler of the state.[108] Is this not unfair? No, for the intention of the legislator in Socrates's ideal state is not to make a few happy above the rest; his concern is the happiness and well-being of the whole state.[109] Moreover, such a just person is indebted to the ideal state for the education he has received, an education which is superior to any available in other states. He repays this debt with his service to others.[110]

People of this kind can hardly refuse to assume the burden of office,[111] for

> "they are just men, and the commands which we impose on them are just; there can be no doubt that every one of them will take office as a stern necessity, and not after the fashion of our present rulers of State".

The reluctance of the just man to assume office and the need to compel him to do so, arise because he is well aware of the onerous burdens and the sacrifices that go with a position of leadership. Those burdens, of course, need be borne only if the ruler is prepared to discharge his functions diligently and honestly. Where the ruler is a just man, anything less would be unthinkable. Compare such a person with the great majority of political leaders, past and present: their eagerness to assume office is often fuelled by personal ambition or avarice.[112] There is little regard or care for the needs of the country and its people. Service is then forgotten. The results are all around for us to see.[113] Socrates held that the only person fit to rule is the one who does not want the job.[114] This principle, well over two thousand years old, is probably still far ahead of its time.

15 IS NOT A REPUTATION FOR JUSTICE WORTH MORE THAN THE REALITY?

In his opening argument, Adeimantus, building on the words of Glaucon, challenged Socrates to refute this popular view:[115]

> "[W]hat men say is that, if I am really just and am not also thought just, profit there is none, but the pain and loss on the other hand are unmistakable. But if, though unjust, I acquire the reputation of justice, a heavenly life is promised to me. Since then, as philosophers prove, appearance tyrannizes over truth and is lord of happiness, to appearance I must devote myself."

---

106 519d.
107 *Ibid.*
108 521b.
109 519e; 421b; and see the text to fn 21 above.
110 520a–c.
111 520d–e.
112 There are rare exceptions. Marcus Aurelius, Alfred the Great and Mahatma Gandhi come readily to mind, but there are others.
113 520e–521a.
114 520d.
115 365b–c; and see, generally, section 4 of the previous article.

Now that the respective natures of justice and injustice have been identified, and the location of justice within the picture of man has been indicated, it is not difficult for Socrates to refute this opinion.[116] As noted earlier,[117] he states[118] that "every one had better be ruled by the divine wisdom dwelling within him". From this it follows that a man can never be profited by injustice, intemperance or other baseness. These can only make him a worse man, even though he may acquire money or power by his injustice.[119]

Does the fact that his injustice goes undetected and unpunished alter this conclusion in any way? Here is Socrates's reply, which speaks for itself:[120]

> "He who is undetected only gets worse, whereas he who is detected and punished has the brutal part of his nature silenced and humanized; the gentler element in him is liberated, and his whole soul is perfected and ennobled by the acquirement of justice and temperance and wisdom ... To this noble purpose the man of understanding will devote the energies of his life."

In short, the appearance of justice can never be a substitute for the reality. In the *Republic*, we find express condemnation of the person who practises injustice under the guise of justice. Thus, Socrates holds[121] that an involuntary killing is a lesser crime than to be a deceiver about beauty or goodness or principles of justice or law. He concludes[122] that "justice in her own nature has been shown to be best for the soul in her own nature".

16 THE REWARDS OF JUSTICE AND INJUSTICE

Only one matter remains to be dealt with in order to complete our picture of Socratic justice: the respective rewards that lie in store for the just and the unjust, in this life and after death. These rewards, whether sought or unsought, will inevitably accrue to the practitioners of justice and injustice. First, then, the just man. According to Socrates,[123]

> "even when he is in poverty or sickness, or any other seeming misfortune, all things will in the end work together for good to him in life and death: for the gods have a care of any one whose desire is to become just and to be like God, as far as man can attain the divine likeness, by the pursuit of virtue".

The care and protection spoken of here are afforded not only to him who has already attained justice, but equally to the sincere aspirant. Moreover,[124]

> "the true runner comes to the finish and receives the prize and is crowned. And this is the way with the just; he who endures to the end of every action and occasion of his entire life has a good report and carries off the prize which men have to bestow".

---

116 This he does at 588b–592b.
117 See the text to fn 106 above.
118 590d.
119 591a. Kraut 311 finds astonishing the Socratic argument that justice is so great a good that anyone who fully possesses it is better off, even in the midst of severe misfortune, than a consummately unjust person who enjoys the social rewards usually received by the just. Many today would, no doubt, share this astonishment.
120 591b–c. Few today would agree that punishment, in particular imprisonment, has the ameliorative effect described by Socrates: his notion of punishment evidently differs from modern views on the subject.
121 451a.
122 612b.
123 613a–b.
124 613c.

What of the unjust man? Not surprisingly, his lot is altogether different:[125] Socrates[126] turns on its head the comparison that was drawn earlier[127] by Glaucon between the respective rewards that await the just and the unjust. Their fates are now rightly reversed, and the apparent triumph of the unjust man is nullified. Instead, he now receives the punishment that he deserves.

These, says Socrates,[128] are the rewards of the just and the unjust in this present life. They are as nothing, however, either in number or greatness, in comparison with the rewards which await both the just and the unjust after death. In order to explain these, Socrates narrates[129] the myth of Er, which describes the journey of man's soul after the death of the physical body. I shall not follow Socrates here, save to quote his conclusion:[130]

> "[F]or every wrong which [the unjust] had done to any one, they suffered tenfold; . . . If, for example, there were any who had been the cause of many deaths, or had betrayed or enslaved cities or armies, or been guilty of any other evil behaviour, for each and all of their offences they received punishment ten times over, and the rewards of beneficence and justice and holiness were in the same proportion."

The *Republic* closes with Socrates's memorable words of advice:[131]

> "[M]y counsel is that we hold fast ever to the heavenly way and follow after justice and virtue always, considering that the soul is immortal and able to endure every sort of good and every sort of evil. Thus shall we live dear to one another and to the gods . . ."

On this note of triumph ends the quest for justice in the *Republic*. But in the private and public life of man the quest is never-ending: it has to be faced anew, age after age.

17 A SYNOPSIS OF THE SOCRATIC TEACHING ON JUSTICE

This section serves to bring together in short compass the essential features of Socratic justice as we have encountered it in the preceding pages. To recapitulate:

1 The injuring of another can never be just.[132]

2 No science or art considers or enjoins the interest of the stronger or superior, but only the interest of the subject or weaker.[133] Thus a just ruler never considers or seeks what is in his own interest, but always what is in the interest of his subject or suitable to his art; to that he looks, and that alone he considers in everything he says and does.[134] To practise the opposite is always unjust.

---

125 613b.
126 613d–e.
127 361d–362c; and see the text to fns 63–66 in the previous article.
128 614a. See Grotius *De jure belli ac pacis* Prol 20.
129 614b–621c.
130 615a–b.
131 621c–d.
132 335e.
133 342d.
134 342e.

3 Justice, which is identified with wisdom and virtue, is stronger than injustice, which is identified with ignorance and vice.[135]

4 Justice imparts harmony and friendship, while injustice creates divisions, hatreds and discord.[136] Thus the wholly unjust would be incapable of concerted, coherent action.[137]

5 Justice is the characteristic quality of the soul which enables it to perform its proper function of superintending, commanding, deliberating, and the like.[138]

6 Injustice can never be more advantageous or profitable than justice.[139]

7 Justice is as much a virtue of the state as of the individual.[140]

8 Justice is one of the four virtues in the ideal state.[141] Moreover, justice is the highest virtue, for it is the ultimate cause of the existence of the other three, namely wisdom, temperance and courage.[142]

9 Socrates defines justice as the principle that one man should do one thing which is natural to him, do it at the right time, and leave other things.[143]

10 Justice, since it is by definition rooted in human nature, is indissolubly linked to natural law: violation of one is violation of the other.[144]

11 An element common to the several formulations of justice given by Socrates in the *Republic* is human activity, whether of mind or of body.[145]

12 At the root of both the Roman and the English law lies the notion that justice means giving to every person his or her due.[146] This definition, which derives from Simonides, turns out to be no more than one aspect of Socrates's far broader notion.[147]

13 We are most likely to find Socratic justice in a state which is ordered with a view to the good of the whole, rather than of any particular class or person.[148]

14 Socratic justice requires that all the pursuits of men are the pursuits of women also.[149]

15 Just as justice in the state consists in everyone doing his own work, so justice in the individual requires each of the three faculties of reason, spiritedness and desire to do its own work, without interfering in the operation of the others. Conversely, any discord between these faculties produces injustice.[150]

---

135 351a.
136 351d.
137 352c.
138 353d.
139 354a; 367b–e; 445a–b.
140 368e.
141 427d.
142 433b.
143 433a; 370c.
144 444d. See also the text to fn 101 in the previous article and the text to fns 71–72 above.
145 See section 7 of the previous article.
146 See the text to fns 14–15 in the previous article.
147 See the text to fns 107–110 in the previous article.
148 420b; 421b–c; 462a–466d.
149 451c–457c.
150 441d; 442a–b; 587a; 444b.

16 Justice is the key virtue, capable of producing people and states of incorruptible character.[151]

17 Justice originates in the individual and passes from the individual into the state.[152] Thus at the most fundamental level, justice is concerned, not with a man's outward life and activities, but with his inner being, his spiritual essence, his true self.[153]

18 Education in music and physical exercise promotes the movement from injustice to justice within the individual.[154]

19 The Socratic notions of justice and the just person provide a standard by which we may measure our own conduct. This would hold true even if these ideals were incapable of being realised in practice.[155]

20 Justice, like beauty, is but one facet of absolute truth.[156]

21 Those who are able to recognise a just person, but not absolute justice itself, are trapped in the domain of the relative and the transient; they are confined to the world of opinion and cannot, unlike the rare perceiver of justice itself, aspire to absolute knowledge.[157]

22 Knowledge of justice is not the highest attainment for man. The idea of the good is the highest knowledge. No one ignorant of the good will have a true knowledge of justice.[158]

23 The just man – that is, one who has realised justice in the Socratic sense – must use his knowledge in the service of his society by assuming the role of guardian or ruler of the state.[159]

24 A person can never be profited by injustice, even if the injustice goes undetected and unpunished. Thus the appearance of justice can never be a substitute for the reality.[160]

25 The respective rewards that await the just and the unjust man, both in this life and after death, differ greatly.[161]

18 CONCLUSION

The study of the *Republic* ought not to be confined to academic courses in philosophy, classical civilisation, and political science. The needs of our age require us to look at the book with fresh eyes, to treat it rather as a user's manual for personal and, ultimately, political transformation.[162] According to one writer,[163]

---

151 443b.
152 435e.
153 443c–444a.
154 441e–442a.
155 472c.
156 506a.
157 479e.
158 504d–506a.
159 519d–521b.
160 591a–c.
161 613a–615b.
162 The nature of the practical work necessary to effect such transformation in the individual was outlined earlier: see the text to fns 64–66 above.
163 Fox *Plato for pleasure* (1944) 9.

"the works of Plato have generally been in the hands of philosophers and scholars when they ought to have been in the hands of the people".

But is the Socratic teaching really practical? Is Socrates's vision of the ideal state and of absolute justice anything more than a Utopian dream? When Glaucon remarks[164] that such a state exists in theory only and is nowhere to be found on earth, Socrates replies[165] in familiar terms:

> "In heaven . . . there is laid up a pattern of it . . . which he who desires may behold, and beholding, may set his own house in order. But whether such a one exists, or ever will exist in fact, is no matter; for he will live after the manner of that city, having nothing to do with any other."

The Socratic notion of absolute justice is not easy to realise. Yet, for all that, we should make it our goal and strive to attain it, for there is no alternative: relativistic ideas of truth and justice have failed us miserably. They are inherently incapable of bringing peace, unity and happiness to our troubled societies. We have the assurance of Socrates and Plato that the mere striving for absolute truth and justice, with or without actual attainment of that goal, is enough. This quest for perfection is in no sense intended for the personal glorification of the individual: the aim is to nourish, uplift and ennoble society.[166] That is the point.

Across the long centuries, the voices of Socrates and Plato are calling us, inviting us to join them on the road to truth and justice. Are we listening?

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Jackson J in West Virginia State Board of Education v Barnette *quoted by Chaskalson P in* S v Makwanyane *1995 6 BCLR 293 (CC); 1995 3 SA 632 (CC) par 89.*

164 592b.

165 *Ibid.*

166 520a–521b; see section 14 above. Plato would surely have echoed the call of Lord Denning (*The changing law* (1953) 122): "[I]f we seek truth and justice, we cannot find it by argument and debate, nor by reading and thinking, but only by the maintenance of true religion and virtue. Religion concerns the spirit in man whereby he is able to recognize what is truth and what is justice; whereas law is only the application, however imperfectly, of truth and justice in our everyday affairs. If religion perishes in the land, truth and justice will also."

Corporations and the right to equality*

Michele Havenga
BA LLB LLM LLD
Professor of Mercantile Law, University of South Africa

OPSOMMING

Korporasies en die reg op gelykheid

Die reg op gelykheid is 'n kernwaarde van die Suid-Afrikaanse Grondwet, en oortref om historiese redes moontlik selfs dié van vryheid en menslike waardigheid. Ten spyte van die menslike eienskappe wat in artikel 9(3) van die Grondwet gelys word, word die reg op gelykheid nie tot natuurlike persone beperk nie. Die feit dat hierdie reg ook op korporasies (waarmee hier maatskappye en beslote korporasies bedoel word) van toepassing is, hou verskeie implikasies in. Een van die gevolge is dat korporasies nie diskriminerende lidmaatskapsvereistes mag stel nie. Waar dit om 'n oningelyfde vereniging gaan, wat nie die voordele van inkorporasie geniet nie is daar 'n sterker moontlikheid dat suksesvol aanspraak gemaak sal kan word op die reg op vryheid van assosiasie.

Die howe se benadering tot die invloed van die gelykheidsbepalings op korporasies blyk uit verskeie beslissings. Hieruit is dit duidelik dat die reg op gelykheid korporasies in uiteenlopende omstandighede beskerm en ook bind, en dat huidige wetgewing in sommige opsigte nie aan konstitusionele voorskrifte voldoen nie. Klaarblyklik sal nie elke onderskeid wat regtens getref word of verskil in behandeling die reg op gelykheid skend nie. 'n Wet wat tot gevolg het dat korporasies en individue verskillend behandel word, sal ook nie noodwendig teen die grondwetlike beskerming van gelykheid indruis nie. Enige beslissing hieroor behels onvermydelik 'n opweging van belange. Dit is nie vir ons howe 'n vreemde beginsel nie. Die beslissings oor artikel 417–418 toon aan hoe die Grondwet bestaande wette kan beïnvloed. Die evaluasie van statutêre en gemeenregtelike beginsels in die lig van konstitusionele beginsels is nie net onvermydelik nie, maar ook wenslik in 'n politieke bedeling wat so wesenlik van die vorige een verskil. Geen definitiewe voorkeur jeens of teen korporasies kan uit die regspraak afgelei word nie. Dit lyk asof die aanvanklike vrees dat korporasies, as gevolg van hulle rykdom en mag, 'n voordeel sou hê bo individue, nie realiseer het nie.

Daar kan verwag word dat korporasies 'n belangrike rol in konstitusionele litigasie sal speel. Eweneens sal die Handves van Regte aansienlike invloed uitoefen op die ontwikkeling van Suid-Afrikaanse korporatiewe reg.

1 INTRODUCTION – CORPORATIONS AND THE BILL OF RIGHTS

The 1996 Bill of Rights[1] goes beyond the traditional task of protecting individuals against the state, and also safeguards them against abuses of their rights by

* I acknowledge financial support by the University of South Africa, the Centre for Science Development and the Co-ordinating Research Institute for Corporate Law which enabled the research for this article to be undertaken while I was a Visiting Fellow of Clare Hall at the University of Cambridge during 1998–1999. Opinions expressed or conclusions reached are those of the author and not necessarily the point of view of the institutions mentioned.

other individuals.[2] Juristic persons are one of six kinds of entity entitled to the protection of constitutional rights to the extent required by the nature of the rights and of that juristic person.[3] In the *First Certification Judgment*,[4] the objection was raised that the Constitutional Principles[5] only permitted the Constitutional Assembly to confer fundamental rights on natural persons, and that an extension of the rights to juristic persons would diminish the protection they afforded to natural persons. The Constitutional Court rejected this argument, holding that many universally accepted fundamental rights would be fully recognised only if afforded to juristic as well as natural persons.[6] The court pointed out that the Constitution recognises that some rights are not appropriate to enjoyment by juristic persons,[7] and also permits a court to take the nature of a juristic person into account in deciding whether a particular right is available to such person.[8]

Another concern of the objectors in the *First Certification Judgment* was that affording rights to powerful and wealthy corporations would result in detriment to individual rights, given that powerful corporations have greater resources to enforce their rights through litigation. The court indicated that the same was true of powerful and wealthy individuals, and that the objection wrongly equated juristic persons with powerful and wealthy corporations. In South Africa there are countless small companies and close corporations that need and deserve protection no less than natural persons.[9]

---

1 Ch Two (Fundamental Rights) of the Constitution of the Republic of South Africa, Act 108 of 1996 contains the Bill of Rights.

2 S 8(2) of the Constitution provides: "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." See Chaskalson *Constitutional law of South Africa* (1996) 10–57; Cheadle and Davis "The application of the 1996 Constitution in the private sphere" 1997 *SAJHR* 44; *Protea Technology Ltd v Wainer* 1997 9 BCLR 1225 (W) 1238.

3 S 8(4). For a comparison between s 8(4) and s 7(3) of the interim Constitution, see Du Plessis "The genesis of the provisions concerned with the application and interpretation of the chapter on fundamental rights in South Africa's transitional Constitution" 1994 *TSAR* 706 714. The other entities entitled to protection of the rights enshrined in the Constitution are citizens, persons, children, workers, and employers. But not all members of any of these classes are necessarily entitled to the total benefit of each right: Chaskalson *Constitutional law* 10–5.

4 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC).

5 Contained in Sch 4 of the interim Constitution.

6 Freedom of speech (and expression) protected by s 15 of the interim Constitution (now s 16), is, as was mentioned by the court, an obvious example. Newspapers, television stations and other media of communication need substantial capital for their operation and are usually structured as corporations. The protection afforded by s 15 would be meaningless if it did not apply to corporations: *Edmonton Journal v Alberta (Attorney General)* 1989 2 SCR 1326, 1989 64 DLR (4th) 577; *Government of the Republic of South Africa v "Sunday Times" Newspaper* 1995 2 SA 221 (T). And there is no reason to assume that corporations charged with an offence should be excluded from the right to a fair trial (s 35). See Chaskalson *Constitutional law* 10–9; Hogg *Constitutional law of Canada* (1992) 830. See also *AK Entertainment CC v Minister of Safety and Security* 1995 1 SA 783 (E), 1994 4 BCLR 31 (E) where Melunsky J maintained that while it is in the nature of some rights that juristic persons shall have no entitlement to them, many rights must extend to juristic persons if s 7(3) of the interim Constitution is to have any real meaning.

7 In s 8(4).

8 *First Certification Judgment* 792I–793B, par [57].

9 793C–E, par [58].

Corporations can obviously not rely on all the rights entrenched in the Bill.[10] The position is uncertain in respect of a few of the constitutional rights,[11] but clearly corporations may rely on at least some of them. Generally two factors determine whether a juristic person is able to claim the benefit of a right listed in the Bill of Rights: the nature of the fundamental right in question and the nature of the juristic person.[12] The latter factor probably constitutes the greater restriction on the availability of human rights to juristic persons.[13] For example: Organs of state are normally unsuitable as beneficiaries of fundamental rights,[14] because they are not used by individuals for the collective exercise of their fundamental rights but are, instead, used by the state for the exercise of its powers.[15] Corporations acting as state organs are, therefore, not as a rule the bearers of rights entrenched in the Bill of Rights. The position differs where public corporations or corporate entities have been set up by the state partially in order to realise specific fundamental rights. Those public juristic entities can, in certain respects, be the bearers of rights enforceable against the state, even though they are bound by the Bill of Rights with regard to other matters.[16] The

10 A corporation has neither conscience nor religion as contemplated by s 15, is not a citizen in terms of s 19 or 20, nor a child for the purposes of s 28. It does not have life as contemplated in s 11; cannot be protected from torture and detention without trial; nor by the s 13 prohibition of servitude and the s 35 guarantee of having a trial in a language one understands. Denying a corporation a particular constitutional right does not, however, refuse it the privilege of invoking that right as a defence: De Waal *et al Bill of Rights handbook* (1998) 24; *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (SCC), [1985] 1 SCR 295. In *S v Lawrence* 1997 10 BCLR 1348 (CC) employees of a convenience store were charged with contravening the Liquor Act 27 of 1989 for sellling wine on a Sunday. Their defence, that the Act was an unconstitutional violation of the right to freedom of religion, should arguably have been open to the company that owned the store, had it been charged and not the individuals.

11 One of the contentious areas eg is whether a corporation enjoys a constitutionally recognisable right to dignity. See generally *Universiteit van Pretoria v Tommie Meyer Films Edms Bpk* 1979 1 SA 441 (A); Chaskalson *Constitutional law* 17–3; Davis, Cheadle and Haysom *Fundamental rights in the Constitution* (1997) 74.

12 De Waal *Bill of Rights handbook* 20. Larkin "The interim Constitution" 1993 *Annual Survey of South African Law* 425 suggests that the question in respect of South African corporations should always be whether the corporation properly enjoys a particular fundamental right. The author submits that the existence of an adequate theory of the corporation is indispensable to any such enquiry.

13 De Waal *loc cit*.

14 An organ of state is defined in s 239 of the Constitution. See also Du Plessis 1994 *TSAR* 706 709; Pienaar "Konstitusionele voorskrifte rakende regspersone" 1997 *THRHR* 564 571–574; *Baloro v University of Bophuthatswana* 1995 4 SA 197 (B).

15 De Waal *Bill of Rights handbook* 21. See further *Directory Advertising Cost Cutters (Pty) Ltd v Minister for Posts, Telecommunications and Broadcasting* 1996 3 SA 800 (T) (in respect of Telkom Ltd); *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 2 SA 109 (W) 115G and *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 8 BCLR 1024 (W) (Transnet Ltd in these instances) for confirmation that a company may be an organ of the state as envisaged in the Constitution. In *Goodman Bros* the court confirmed that the true test of a state organ is whether the state controls it (1030C–E) and that Transnet Ltd complies with the definition of an organ of state in s 239 of the Constitution in that it performs a public function in terms of the relevant legislation (1031D).

16 De Waal *loc cit*. The authors mention as example that a state-owned corporation like the South African Broadcasting Corporation should be able to invoke the right to freedom of speech and the press when it becomes involved in a dispute with the state or perhaps even

continued on next page

size or activities of private juristic persons are not necessarily decisive. It is the relationship between their activities and the fundamental rights of the natural persons who stand behind them, that is definitive. Thus De Waal explains:[17]

> "[T]he activities of juristic persons are not in and of themselves worthy of protection, but they do become so when they are used by natural persons for the collective exercise of their fundamental rights. What s 8(4) envisages is that the causal link between protecting the activity of the juristic person and protecting the fundamental rights of natural persons behind the juristic person must not become too tenuous."

Section 39(2) of the Constitution obliges every court, tribunal or forum, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights. In the realm of corporate law, this is of specific relevance to company law, where common law principles remain an important source.[18]

2 THE RIGHT TO EQUALITY

2 1 Application to corporations

The commitment to equality is a core value of the South African Constitution, possibly for historical reasons outranking even freedom and human dignity.[19]

Courts as well as commentators have suggested that the equality rights contained in section 9 of the Constitution should not be extended to juristic persons, arguing that only persons or groups with the kind of human qualities identified in section 9(2) should benefit from them. The critics believe that to extend equality protection to corporations threatens to undermine the values underlying section 9 – amelioration of the discriminatory effects of apartheid and ensuring a more egalitarian future society.[20] This point of view is in line with early interpretation of the equality provision of the Canadian Charter of Rights and Freedoms.[21] But it has also since been argued in favour of Canadian corporations that

---

with a natural or another juristic person. So too, universities should be able to exercise the right to academic freedom. See also Rautenbach and Malherbe *Constitutional law* (1996) 295; Burns *Administrative law under the 1996 Constitution* (1998) 13–14.

17 De Waal *loc cit.*

18 The Companies Act 61 of 1973 is not a complete codification of the company law applicable to companies regulated by it, and common law principles should always be seen as the wider backdrop: Cilliers and Benade *Corporate law* 14. Close corporation law, by contrast, is wholly regulated by the Close Corporations Act 69 of 1984.

19 S 7(1) provides: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." See also Corder "Towards a South African constitution" 1994 *Modern LR* 491 511; Carpenter "Motifs inscribed on our social fabric: equality in Brink v Kitshoff" 1997 *SAJHR* 304. For comments on the apartheid history's influence on the interpretation of the equality clauses, see *Brink v Kitshoff NO* 1996 4 SA 197 (CC) 216J–217C, 1996 6 BCLR 752 (CC) par [40]; *Prinsloo v Van der Linde* 1997 3 SA 1012 1023B–E, 1997 6 BCLR 759 (CC) par [20].

20 Chaskalson *Constitutional law* 10–9; Davis, Cheadle and Haysom *Fundamental rights* 39. In *Hallowes v The Yacht Sweet Waters* 1995 2 SA 270 (D) 277–278, 1995 2 BCLR 172 (D), Hurt J suggested that because of their very nature, and the opportunity which they afford to the unscrupulous manipulator, juristic persons must necessarily submit to an array of statutory controls and restrictions which would be contrary to the tenets of the Constitution Act if they were applied to natural persons. See further Devenish *A commentary on the South African Constitution* (1998) 45.

21 See Part I of the Constitution Act 1982, Schedule B to the Canada Act 1982 (UK), 1982 c 11. S 15 of the Charter reads: "Every individual is equal before and under the law and has

continued on next page

to deny them the protection of section 15 creates anomalies.[22] For example, the act of incorporation would deprive a sole proprietor of Charter protection which he or she enjoyed while unincorporated. Moreover, a discrepancy between the French and the English text of the Charter leaves open the possibility that section 15 applies as broadly as the sections which employ the term "everyone" in English.[23]

The Indian Constitution provides that the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.[24] A corporation, which is a juristic person, is also entitled to its benefit,[25]

---

the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The Supreme Court of Canada has generally been adverse to corporate claimants. In *Andrews v Law Society of British Columbia* 1989 1 SCR 143 174, 1989 56 DLR (4th) SC 1 18 the court held that s 15 extends only to those individuals or groups who can establish discrimination based upon a personal characteristic either listed in the section or shown to be analogous to one of those grounds. See also *R v Turpin* 1989 1 SCR 1296 1331–1333; *McKinney v Board of Directors of the University of Guelph* 1991 76 DLR (4th) 545 604–605. In *Surrey Credit Union v Mendonca* 1986 67 BCLR 310 (SC) and *R v Elan Development Ltd* 1998 55 CRR (2d) 341 claims under s 15 were dismissed on the ground that the term "individual" in that section does not include bodies corporate. The courts have, however, been open to invocation of Charter provisions as a shield against criminal or quasi-criminal prosecutions: Schneiderman and Sutherland "Conclusion: towards an understanding of the impact of the Charter of rights on Canadian law and politics" in *Charting the consequences* by Schneiderman and Sutherland (eds) 347; *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (SCC), [1985] 1 SCR 295 (fn 10 above); *Hy and Zel's Inc v Ontario (Attorney General)*; *Paul Magder Furs Ltd v Ontario (Attorney General)* [1993] 3 SCR 675 (although not granting public interest standing to the corporation in this particular case, the court indicated that it would have been prepared to do so, had the criteria been met. See Bakan, Ryder, Schneiderman and Young "Developments in constitutional law" 1995 *Supreme Court LR* 105–108 for a critique of this case).

22 Chipeur "Section 15 of the Charter protects people and corporations – equally" 1986 *Canadian Business LJ* 304. See also Gertner "Are corporations entitled to equality: some preliminary thoughts" 1996 (19) *CRR* 288 290; Hutchinson *Waiting for Coraf: a critique of law and rights* (1995) 123–153 for the interesting argument that corporations should fall within the Charter's ambit in order to be democratically accountable. Moull "Business law implications of the Canadian Charter of Rights and Freedoms" 1983–1984 *Canadian Business LJ* 449 452 argues convincingly that since the Charter is a constitutional instrument and therefore entitled to the respect and broad interpretation accorded to all constitutional documents, a blanket denial of its protections to corporations would be inappropriate.

23 Chipeur (fn 22) 305; Gibson *Charter* 85–86 105. Courts have, in relation to other issues, concluded that the term "everyone" should not be interpreted to deprive corporations of their rights, but should rather be interpreted to provide them with protection from criminal and penal sanctions. See eg *The Pharmaceutical Society v The London & Provincial Supply Association, Limited* 1880 5 AC 857 862. But see also Petter "The politics of the Charter" (1986) 8 *Supreme Court LR* 473 490–493 who opposes the notion that corporations should be granted any protection under the Charter.

24 Article 14 of the Constitution of India 1949.

25 Seervai *Constitutional law of India* vol I (1979) 447–448; *Singh Sluukla's Constitution of India* (1990) 32. In the USA courts have also decided that the word "person" which appears in the 5th and 14th Amendments, includes a corporation: *First National Bank v Bellotti* 435 US 707 (1978). There corporations generally assert equality rights in challenging distinctions drawn by economic regulation. These distinctions are normally upheld provided they conceivably serve a legitimate purpose and are rationally related to achieving that purpose: Albertyn and Kentridge "Introducing the right to equality in the interim Constitution" 1994 *SAJHR* 149 171; Tribe *American constitutional law* (1988)

continued on next page

as is illustrated by the decision in *Charanjit Lal Chawdury v Union of India*.[26] The case concerned the validity of the Sholapur Spinning and Weaving Company (Emergency Provisions) Act 28 of 1950, which was specifically aimed at the management of a particular company. It was alleged on behalf of the petitioner that the Act amounted to discriminatory legislation which offended article 14. The petitioner was a single shareholder of the company. Mukherjea J found that he had as much right to complain as the company itself, since the complaint included the alleged discrimination against the company, as well as alleged discrimination by the impugned legislation against the petitioner and the other shareholders of the company as a group *vis-à-vis* the shareholders of all other companies governed by the Indian Companies Act who had not been treated in a similar way. The judge clearly considered the company to be entitled to seek similar redress.[27] The application failed on the ground that a law may be constitutional even though it applies to a single individual if, on account of some special circumstances or reasons applicable to him and not to others, that single individual may be treated as a class by himself.

As was mentioned above, the South African Constitution provides that juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.[28] In *AK Entertainment CC v Minister of Safety and Security*[29] the court considered whether a corporation could rely on the right to equality. Melunsky J confirmed that there are certain rights that an artificial person is incapable of exercising. In those cases, the nature of the rights are such that a juristic person has no entitlement to them in terms of section 8(3) (of the interim Constitution). The court held that it should not be deduced from the list of human characteristics enunciated in section 8(2),[30] that section 8 includes only those classifications that are analogous to those enumerated.[31] The court suggested that to deny a corporation the right to enforce section 8 where an executive or administrative functionary blatantly treats the corporation unequally to other persons, amounted to disregard of section 7(3).[32] In *Bernstein v Bester*[33] the right to equality was one of the issues

---

1439–1446; *Dandridge v Williams* 397 US 491 (1970); *City of Cleburne v Cleburne Living Center* 473 US 432 (1985) 446.

26 AIR 1951 SC 41.

27 This is confirmed by Das J who held in his minority judgment that if the fundamental right of the company had been infringed, the company would *prima facie* have been the proper person to come forward in vindication of its own rights (64).

28 S 8(4).

29 1995 1 SA 783 (E) 790B. See also par 3 below.

30 This subsection corresponds to s 9(2) of the final Constitution.

31 790C. The court referred to the "enumerated or analogous grounds" approach adopted in the leading Canadian decision in *Law Society of British Columbia v Andrews* 1989 56 DLR (4th) 1 22–23 (see fn 21 above), but suggested that this test might have greater significance where the question of discrimination relates to the content of the law. See Hogg "Canadian law in the Constitutional Court of South Africa" 1998 *SAPL* 1 10–13 for a comparison between the Canadian and South African interpretation of their respective equality provisions.

32 S 7(3) corresponds to s 8(3) of the final Constitution. It provides that when applying a provision of the Bill of Rights to a natural and juristic person in terms of s 8(2), a court, in order to give effect to a right in the Bill, must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right. A court may also develop rules of the common law to limit the right, provided that the limitation is in accordance with the limitations clause in s 36(1).

33 1996 2 SA 751 (CC), 1996 4 BCLR 449.

debated before the Constitutional Court when deliberating the constitutionality of sections 417 and 418 of the Companies Act.[34] There is therefore little doubt that the equality provisions in our final Constitution apply to corporations.

2 2 Content

Section 9 of the Constitution provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."[35]

Equality before the law requires that each person is accorded equal concern and respect both in the formulation and the application of the law.[36] The guarantee of

---

34 Act 61 of 1973. See also 2 2 below.

35 On the equality provision generally, see Chaskalson *Constitutional law* ch 14; Currin and Kruger "The protection of fundamental rights in the Constitution of the Republic of South Africa: a brief contextualization" in *Interpreting a bill of rights* by Kruger and Currin (1994) 132; Davis "Equality and equal protection" in *Rights and constitutionalism: the new South African legal order* by Van Wyk, Dugard, De Villiers and Davis (eds) (1994) 196–211; Davis, Cheadle and Haysom *Fundamental rights* 51–62; De Waal and Erasmus "The constitutional jurisprudence of South African courts on the application, interpretation and limitation of fundamental rights during the transition" 1996 *Stell LR* 179; Loenen "The equality clause in the South African Constitution: some remarks from a comparative perspective" 1997 *SAJHR* 401; Albertyn and Goldblatt "Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality" 1998 *SAJHR* 248; De Waal *Bill of Rights handbook* 152 *et seq*; *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC), 1997 2 BCLR 153 (CC) par [20] and cases cited there; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC), 1997 6 BCLR 708 (CC) (in respect of the interim Constitution). On equality in the law of contract and delict, see Hawthorne "The principle of equality in the law of contract" 1995 *THRHR* 157; Van Aswegen "The implications of a bill of rights for the law of contract and delict" 1995 *SAJHR* 50; on equality in insurance law, Havenga "Equality in insurance law – the impact of the Bill of Rights" 1997 *SA Merc LJ* 275. On the equality clause and juristic persons, see Pienaar 1997 *THRHR* 564.

36 Where natural persons are concerned, this demands equality of representation on all law-making bodies; that the rules of law should in principle apply equally to all persons; and that executive organs of state and administrative bodies should be even-handed in the enforcement and administration of the law, and in the application of policy. See Chaskalson *Constitutional law* 14–13 and fn 1 for the origin of the reference to "equal concern and respect". The "Westen debates" provide an interesting insight into the concept of equality. See Westen "The empty idea of equality" 1982 *Harvard LR* 537; Burton "Comment on 'empty ideas': logical positivist analysis of equality and rules" 1982 *Yale LJ* 1136; Westen "On 'confusing ideas': a reply" 1982 *Yale LJ* 1153; Greenawalt "How

continued on next page

equality also entitles everybody to equal treatment by courts of law.[37] This encompasses the substance and content of the law, including laws that confer benefits as well as laws that prohibit or regulate certain activities. It further opposes subordination and disadvantage in and through the law.[38] The promise of equal protection may require the state to foster equality by protecting vulnerable persons and groups from domination by more powerful individuals and groups.[39] Inequality means differentiation without reason or justification.[40]

Section 9(3) differs from most other constitutive and legislative instruments that suppress discrimination by requiring the discrimination to be unfair. It seems that this requires the specific context to be taken into account.[41]

The Constitutional Court's approach to the equality provisions under section 8 of the interim Constitution was described in *Harksen v Lane*[42] and repeated by O'Regan J in *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council*.[43] Although the formulation of section 9 differs to a degree, this should not bring about a material change in the approach of the courts.[44] These decisions confirm that where an attack on a provision is based on the right to equality, the inquiry should at first deal with the question whether the provision differentiates between people or categories of people. If it does, and there is no rational connection to a legitimate government purpose, section 8(1) (s 9(1) of the final Constitution) has been violated. If there is such a connection, there may still be unfair discrimination. This will be assessed by a two-stage analysis. First it has to be determined whether there has been discrimination and, if there has, whether it has been unfair.[45] If unfair discrimination is found, the last stage of the inquiry is to evaluate whether the provision under attack can be justified under the limitation clause.[46]

---

empty is the idea of equality?" 1983 *Columbia LR* 1167; Westen "To lure the tarantula from its hole: a response" 1983 *Columbia LR* 1186; Chemerinsky "In defence of equality: a reply to Professor Westen" 1983 *Michigan LR* 575; Westen "The meaning of equality in law, math, and morals: a reply" 1983 *Michigan LR* 604; further Bayefsky "The principle of equality or non-discrimination in international law" 1990 *Human Rights LJ* 1; *Mahe v The Queen in Right of Alberta* 1988 42 DLR (4th) 514 545 *et seq*; *Andrews v Law Society of British Columbia* 1989 56 DLR (4th) 1.

37 Chaskalson *Constitutional law* 14-13–14-16 and authorities cited there.

38 Chaskalson *Constitutional law* 14-16.

39 *Ibid*.

40 Differentiation may be illegitimate either because its objective is illegitimate, because it is an unduly onerous means of achieving a legitimate objective, or because it is arbitrary: Chaskalson *Constitutional law* 14-16.

41 *Idem* 14–18. See *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC), 1997 6 BCLR 759 (CC) par [31] for a historical perspective on the formulation of the prohibition. See further *Harksen v Lane* 1998 1 SA 300 (CC), 1997 11 BCLR 1489 (CC) par [45]–[46].

42 1998 1 SA 300 (CC) 324G, 1997 11 BCLR 1489 (CC), discussed by Freedman "Understanding the right to equality" 1998 *SALJ* 243, par [53].

43 1998 2 SA 61 (CC), 1998 1 BCLR 1 (CC).

44 *Van Rensburg v South African Post Office Ltd* 1998 10 BCLR 1307 (E) 1317H.

45 In respect of corporate law, cf eg the Indian decision in *Charanjit Lal Chawdury v Union of India* AIR 1951 SC 41 (see par 2 above).

46 S 7(3) confirms that all the rights in the Bill of Rights are limited in principle: "The rights in the Bill of Right are subject to the limitations contained in or referred to in section 36, or elsewhere in the Bill." S 36 contains the general limitation clause and states:
"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and

continued on next page

2 3 Implications for corporations

The state confers the benefits of incorporation on corporations. Public policy therefore demands that these entities comply fully with the constitutional principles. Discriminatory membership requirements, for example, are intolerable. Corporations' membership requirements and conduct must comply with the equality provisions in the Constitution.

Where an unincorporated association, for example a tennis club, is concerned, it is more likely that the right to freedom of association as expressed in section 18 of the Constitution, may prevail.[47]

Corporations have been involved in various decisions dealing with the right to equality. In *AK Entertainment CC v Minister of Safety and Security*,[48] the applicant was operating a casino in contravention of certain gambling laws. Some of its employees had been arrested and, after search warrants had been obtained, its premises were searched and threats were made to close the business down. There were clearly also other lawbreakers, against whom the police had not taken the same measures. Melunsky J held that transgression of the right to equality further demands that the inequality or discrimination be unfair in the sense that it causes prejudice to the person who is discriminated against.[49] The applicant's allegation of unfair discrimination was based on the manner in which the law had been applied by an organ of the state. The court held that although an organ of state could be restrained from adopting or enforcing a discriminatory practice, a transgression of section 8(1) or (2)[50] would arise only where the application (and not the content) of the law was at issue, if the organ of state intended to apply the law unequally, or if the law was enforced in accordance with a principle which has a discriminatory effect owing to some particular characteristic of the discriminatee.[51] On the facts the applicant had failed to establish a contravention of section 8.[52]

---

democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
(a) the nature of the right
(b) the importance of the purpose of the limitation
(c) the nature and extent of the limitation
(d) the relation between the limitation and its purpose
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights." On this clause, see Woolman "Out of order? Out of balance? The limitation clause of the final Constitution" 1997 *SAHRJ* 102; *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC).

47 Pienaar 1997 *THRHR* 577–587. In *Wittmann v Deutscher Schulverein, Pretoria* 1999 1 BCLR 92 (T) a parent had sued the German School in Pretoria, an association, for unlawful expulsion from the association on the ground that her child did not attend the religious instruction offered by the school. The facts are not important for purposes of this discussion, but the decision confirms that freedom of association includes the right jointly with others to exclude those who are not prepared to conform to the group's requirements.

48 1995 1 SA 783 (E), 1994 4 BCLR 31 (E).

49 789F. For purposes of the application it was assumed that the applicant's unlawful trading under the Gambling Act did not preclude him from relying on the provisions of s 8 of the interim Constitution.

50 Corresponding to s 9(1) and (2) of the final Constitution.

51 789G–J. Melunsky J considered it unnecessary in this instance to make a distinction between the concepts of inequality and unfair discrimination (789C).

52 793B.

In *Van Zyl NO v Commissioner for Inland Revenue*[53] the liquidator of a company opposed a provision of the Income Tax Act because it had the effect that income accrued by a corporation after its liquidation would be taxable, whereas income accrued by an individual after sequestration would not. The applicant maintained that the Act should, as permitted by section 35(3) of the interim Constitution, be construed in such a way that there would be no differentiation between an individual in sequestration and a company in liquidation.[54] Hodes AJ disagreed, holding that the primary purpose of the equality guarantee should be remembered – "the need to prohibit discrimination against people who are members of disfavoured or disadvantaged groups – such as black people in the days of apartheid and women who have suffered from gender discrimination – and to remedy the results of such discrimination".[55] The Income Tax Act distinguishes between individuals. Neither this, nor the distinction between individuals and corporations, was considered objectionable.

The equality clause was investigated in relation to the provision of specialised services to the general public in *Van Rensburg v South African Post Office Ltd.*[56] The appellant applied to have a section of the Post Office Act declared unconstitutional.[57] Jones J accepted the finding in the lower court that the appellant was conducting a postal service in contravention of that Act.[58] With regard to the right to equality, it was again pointed out that it is not the purpose of section 9 to deny constitutional integrity to every rule of law which does not treat persons equally.[59]

The court held that the purpose of section 9 is to protect individuals against unequal treatment which is illegitimate or unfair. The section is not aimed at "the creation of equality between an individual and a public or quasi public organisation designed to provide a specialised service to the public at large".[60] Protection from competition enabled the company to charge uniform affordable rates for the dispatch and delivery of post throughout the country.[61] The Post Office Act therefore gives the respondent company a special right and privilege for a special purpose which is patently for the common good.[62] There was a reasonable and defensible connection between granting the Post Office an exclusive privilege at the expense of operators like the appellant on the one hand, and the legitimate government purpose of providing for a postal service to cater for the needs of the public as a whole on the other.[63] Accordingly, section 7(1) of the Post Office Act

---

53 1997 3 BCLR 404 (CC).

54 S 35(3) of the interim Constitution provided that in the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of the Bill of Rights. The corresponding subsection under the final Constitution is s 39(2).

55 412H. See also fn 19 above.

56 1998 10 BCLR 1307 (E).

57 The application related to s 7(1)(a) of the Post Office Act 44 of 1958 which, read with s 4 of the Act, gives the respondent company the exclusive power to carry on the postal service in South Africa.

58 See the judgment of Lang AJ in *South African Post Office Limited v Van Rensburg* 1998 1 SA 796 (E), 1997 11 BCLR 1608 (E).

59 1315D.

60 1318D.

61 1318F.

62 1320C.

63 1319I. The court referred to the decision in *Société Canadienne des Postes v Postpar Inc and Postpar Montreal Inc* (Case No 500-05-00947-885; 1988-09-09) which deals with

continued on next page

was not constitutionally illegitimate, or unfair, or discriminatory in the constitutional sense, and could not be regarded as inimical to the constitutional principle of equality before the law, or equal protection and benefit under the law.

Legislative and executive acts of government can be declared invalid if they violate the human rights contained in the sovereign Bill of Rights.[64] Sections 417 and 418 of the Companies Act provide a statutory inquiry mechanism in winding-up proceedings. Section 417(2)(b) obliges any examinee to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him or her, and declares that any answer given to such question might thereafter be used in evidence against the examinee. In *Ferreira v Levin; Vryenhoek v Powell*[65] the court declared these provisions invalid to the extent that they allowed the use of an incriminatory answer in criminal proceedings against the examinee.[66] Ackermann J deemed it unnecessary to consider whether the provisions of this subsection were inconsistent with the equality rights.[67] In *Bernstein v Bester*,[68] where a much wider attack was launched on the sections, the court's decision included a reflection on the effect of the right to equality on section 417(2)(b). One of the applicants' submissions was that the section 417 mechanism, and in particular the part of section 417(2)(b) referred to above, violated the Constitution to the extent that it enables the liquidator and creditors of a company in liquidation to gain an unfair advantage over their adversaries in civil litigation in violation of the right to equality in terms of section 8 (of the interim Constitution). Ackermann J agreed with the applicants that sections 417 and 418 of the Companies Act permit the liquidator and creditors of a company in liquidation to invoke the inquiry mechanism with a view to civil litigation which is contemplated or even pending and that they are entitled to do so in order to decide whether to institute or continue with the litigation.[69] The applicants suggested that the impugned sections enable the liquidator and creditors to obtain a complete preview of their opponent's case and to ensnare the latter's witnesses in a procedure devoid of the normal mechanisms designed to identify and define issues, prepare for trial and receive meaningful advice on

---

the postal monopoly granted to the Canadian post office. There the court regarded the exclusive privilege as a requisite, since it rendered the post office invulnerable to competitors who offered services within large metropolitan areas where substantial revenues were available, while avoiding any obligation to provide similar service in sparsely populated areas. A similar view was held by the European Court of Justice in the Belgian reference of *Paul Corbeau* (Case C-320/91) [1995] 4 CMLR 621. Here the court found that competition by other economic operators could be restricted or even excluded in order to allow the holder of an exclusive right to perform its task of general interest and in particular to have the benefit of economically acceptable conditions (643).

64 S 2 of the Constitution provides that the Constitution is the supreme law of the Republic, that law or conduct inconsistent with it is invalid, and that the obligations imposed by the Constitution must be performed. In addition, s 74 entrenches the Constitution and s 172(1)(a) formally vests the courts with the power to test the constitutional validity of any government action.

65 1996 1 SA 984 (CC), 1996 1 BCLR 1, discussed by Currie 1996 *SAJHR* 179.

66 1079D–H, par [157].

67 1062, par [128]. For comments on the extensive attempt at constitutional interpretation by Ackermann J, see Davis *Fundamental rights* 19 *et seq*.

68 1996 2 SA 751 (CC), 1996 4 BCLR 449 (CC).

69 805H par [109].

all stages of the process. In this way, they argued, the liquidator and creditors obtain an overwhelming advantage in civil litigation that they would never have enjoyed but for the company's liquidation, and this inequality transgresses section 8 of the (interim) Constitution. The court pointed out that this part of the submission ignores the supervisory role of the supreme court to ensure that the examination is not conducted oppressively, vexatiously or unfairly.[70] Ackermann J conceded that liquidators are, by means of this inquiry mechanism, entitled to examine their opponents in actual or prospective civil litigation, or their opponents' witnesses or recalcitrant potential witnesses, and to obtain discovery of documents from such persons at a time and in a way not open to their opponents or prospective opponents. The issue, held the court, was whether section 8 of the interim Constitution was compromised by this.[71] A similar approach to the one that had been followed in *S v Ntuli*[72] was adopted.[73] No precedent protecting witnesses from answering questions which might have the effect of exposing them to civil liability, was found in comparative systems.[74] The purpose of sections 417 and 418 of the Companies Act, the court held, is to provide a company with information about itself, its own affairs, claims and liabilities which might, for various reasons, otherwise be difficult to obtain. It is neither the purpose nor the effect of these sections to place the company in a better position than its debtors or creditors.[75] In fact, the purpose is contrary, namely to place the company in liquidation (because of its resulting disabilities) on such a footing that it can litigate on equal terms with its debtors and creditors. The sections were therefore declared not inconsistent with the Constitution, in other respects than as decided in *Vryenhoek. Jeeva v Receiver of Revenue*, Port Elizabeth[76] also concerned section 417. The court held that examinees who are interrogated in terms of section 417 are entitled to prepare themselves properly to deal with the subject matter of the enquiry. Jones J held that the right to equality before the law includes the right of access to information held by the interrogator, especially if the interrrogator is directly or indirectly an organ of state.[77] The court ordered that the applicants were entitled to all information which was not the subject of legal professional privilege or covered by the secrecy provisions in the relevant tax legislation.[78]

---

70 806C, par [111].

71 806E–F, par [113].

72 1996 1 SA 1207 (CC), 1996 1 SACR 94, 1996 1 BCLR 141.

73 The court therefore considered it unnecessary to deliberate issues such as whether s 8(1) and (2) embodies separate rights, to examine the prohibition against unfair discrimination which ss (2) expresses, or to consider whether it is an independent provision or a corollary or concretisation of ss (1). It was also deemed unnecessary to consider the relationship between the right to equality before the law and the right to equal protection of the law in s 8(1).

74 806–808. See too Kriegler J's general warning against too frequent, often facile, recourse to foreign authorities: 811F–812C, par [132]–[133].

75 808G, par [122].

76 1995 2 SA 433 (SE).

77 444A.

78 The appeal which was upheld in *Receiver of Revenue, Port Elizabeth v Jeeva* 1996 2 SA 573 (A) was not against this decision.

3 CONCLUSIONS

Not all constitutional rights can, though some must, apply to corporations in order to give full effect to their underlying purpose. The fundamental right to equality is not restricted to natural persons, despite the human qualities listed in section 9(3). One of its consequences is to prohibit discriminatory requirements for membership of a corporation. Case law on the right to equality confirms that it both protects and binds corporations in a variety of circumstances, and demonstrates that current legislation may, in some respects, fall short of constitutional principles.

To date the equality decisions involving corporations do not show any marked inclination in favour of, or against, corporate entities. It seems that the fear that corporations may, because of their wealth and power, have an advantage over individuals, has not materialised.

It is clear that not every distinction or differentiation in treatment at law transgresses the right to equality.[79] Moreover, a law which results in different treatment of a corporation and an individual or another corporation does not necessarily breach the constitutional protection of equality.[80] The decision whether the equality rights have been breached in a particular case unavoidably demands a balancing of interests. This concept is not new to our courts.

The section 417–418 decisions[81] demonstrate how the Bill of Rights may influence existing law. The evaluation of statutory and common-law rules against constitutional principles is not only inevitable, but also desirable in a political dispensation so different from the previous one.

The Constitution compels juristic persons to respect the fundamental rights of natural persons and of other juristic persons to the extent provided for in the Bill of Rights. It also obliges a court to promote the spirit of the Bill when developing the common law. Corporations will continue to have an important part in constitutional litigation. Likewise, the Bill of Rights will exert considerable influence on the future development of South African corporate law.

---

79 *AK Entertainment CC v Minister of Safety and Security* 1955 1 SA 783 (E), 1994 4 BCLR 31 (E). See also *Law Society of British Columbia v Andrews* 1989 56 DLR (4th) 1 13: "It is, of course, obvious that legislatures may – and to govern effectively – must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society." See also Davis *Fundamental rights* 52 who mentions that it would be difficult to contemplate a law that does not treat subjects differently.

80 *Van Zyl NO v Commissioner for Inland Revenue* 1997 3 BCLR 404 (CC); *Van Rensburg v South African Post Office Ltd* 1998 10 BCLR 1307 (E).

81 See 2 3 above.

'n Oplossing vir die hantering van transnasionale insolvensies?

AL Stander
BIur LLB LLM LLD
Medeprofessor in Handelsreg, Potchefstroomse Universiteit vir CHO

SUMMARY

A solution for the handling of cross-border insolvencies?

As a result of the continuing expansion of international trade and investment there is, unmistakeably, an increasing incidence of cross-border insolvencies. It is, however, a fact that national insolvency laws have not kept pace with the trend, and they are often ill-equipped to deal with cases of a cross-border nature. Cases where the insolvent debtor has assets in more than one state or where some of the creditors of the debtor are not from the state where the insolvency proceeding is taking place, are common. Because there is a lack of communication and coordination among courts and administrators from the jurisdictions concerned, it is more likely that assets would be dissipated or fraudulently concealed, or possibly liquidated without reference to other more advantageous solutions. As a result the ability of the creditors to receive payment is diminished. The UNCITRAL Model Law on Cross-Border Insolvency is designed to assist states to equip their insolvency laws with a modern, harmonised and fair framework to address instances of cross-border insolvency more effectively. A proposed adaptation of the model law for enactment in South Africa was circulated for comment. This proposed legislation offers certain additions and improvements in the national insolvency regime designed to resolve problems arising in cross-border insolvency cases. These solutions include, *inter alia*, access for the person administering a foreign insolvency proceeding to the courts of South Africa; determining when a foreign insolvency proceeding should be accorded recognition and what the consequences of recognition should be; providing a regime for the right of creditors to commence or participate in insolvency proceedings in South Africa; permitting courts in South Africa to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter; authorising courts in South Africa and persons administering insolvency proceedings in South Africa to seek assistance abroad; providing for court jurisdiction and establishing rules for coordination where an insolvency proceeding in South Africa is taking place concurrently with an insolvency proceeding in a foreign state; and establishing rules for coordination of relief granted in South Africa in favour of two or more insolvency proceedings that may take place in foreign states regarding the same debtor.

1 INLEIDING

Om te praat van die poorte van die internasionale handels-, beleggings- en besigheidswêreld wat sedert April 1994 vir die Suid-Afrikaanse besigheidslui oopgegaan het, is inderdaad 'n cliché. Dit is onnodig om te wys op die verhoogde transnasionale verkeer na, en bereikbaarheid van tot nog toe ontoeganklike en daarom vreemde uithoeke van die wêreld op die ekonomiese gebied. Die oorstroming van invoeraktiwiteite na Suid-Afrika en die toenemende uitvoeraktiwiteite wêreldwyd deur ywerige Suid-Afrikaanse entrepreneurs is nou reeds 'n bekende

gegewe. Ekonomiese ontwikkeling en die uitbreiding van internasionale handel en nywerheid is 'n feit. Net so is die toename in transnasionale insolvensies[1] 'n feit. Daarbenewens is die onsekerheid op die gebied van transnasionale insolvensies 'n feit. Basiese geskille in hierdie verband is byvoorbeeld die bevoegdheid om buitelandse[2] regshulp in sekwestrasie-aangeleenthede te versoek, die vereistes waaraan voldoen moet word voor 'n hof 'n bevel sal toestaan wat regshulp van 'n buitelandse hof versoek en die funksies wat die hof in hierdie verband moet uitoefen.

'n Uiters vereenvoudigde probleemstelling word ter illustrasie aangebied: A woon in Londen, Engeland. Daar bedryf hy 'n antieke meubelwinkel asook 'n motorhandelaarsbesigheid. Hy besit 'n huis op die Engelse platteland. Hy het ook bates in Suid-Afrika, naamlik 'n ten volle gemeubeleerde huis op Cape St Francis en twee motors, 'n Duitse motor en 'n vier-by-vier aangedrewe voertuig. Beide motors, die meubels asook 'n luukse seiljag het hy onlangs in Suid-Afrika aangekoop. Sake in Engeland loop skeef en sy boedel word aldaar gesekwestreer.

Die makliker vrae in hierdie verband is: (a) A se skuldeisers in Engeland wil op die bates in Suid-Afrika beslag laat lê sodat dit onder beheer kan kom van die kurator wat deur die Engelse hof oor A se boedel aangestel is. Is dit moontlik? (b) Watter bates sal of kan in gedrang kom? (c) Hoe kan A se skuldeisers in Suid-Afrika beskerm word? (d) Kan A se boedel ook in Suid-Afrika gesekwestreer word en indien wel, wie mag aansoek doen en volgens welke regstelsel sal die sekwestrasie hanteer word?

2 DIE PROBLEEM VAN TRANSNASIONALE INSOLVENSIE

Wat hier ter sprake kom, is die verskynsel van transnasionale insolvensie. Kortliks gebeur dit wanneer die bates en/of die verpligtinge van die insolvent tussen twee of meer jurisdiksies versprei is of waar, weens een of ander rede, sekwestrasieverrigtinge in meer as een jurisdiksie gevoer kan word. Tot baie onlangs nog was die kritieke en praktiese vrae ter hantering of oplossing van hierdie situasie die volgende: Wie bepaal welke land se insolvensieregsreëls moet geld? Kan 'n enkele stel plaaslike insolvensieregsreëls in so 'n geval toegepas word sonder inagneming van die vreemde elemente wat in die saak aangeraak word? Of moet een stel regsreëls bykomend tot die ander gebruik word? Die uitgangspunt kan gegrond wees op die beginsel van "universaliteit" wat behels dat alle bates en verpligtinge van die insolvent oor die hele wêreld tegelykertyd in aanmerking geneem moet word. Die uitgangspunt kan egter ook gegrond wees op die beginsel van "territorialiteit". Dit omvat weer die oortuiging dat daar aparte boedels vir die verskillende jurisdiksies wat betrokke is, moet bestaan. Toepassing van die beginsel van universaliteit is egter onmoontlik as gevolg van die verskillende insolvensieregsreëls wat in die verskillende jurisdiksies geld. 'n Goue middeweg sou wees om bilaterale of multilaterale ooreenkomste met 'n land se handelsvennote te sluit spesifiek vir die geval van insolvensie. Dit kan egter nie ontken word nie dat sulke ooreenkomste nie altyd die gewenste uitwerking verseker óf 'n billike of redelike uitwerking tot gevolg het nie.

---

1 Hierdie term sal gebruik word as sinoniem vir die Engelse term "cross-border insolvencies".

2 Hierdie term sal telkens gebruik word as sinoniem vir die Engelse term "foreign", waar dit bv gebruik word vir "foreign representative", "foreign court", "foreign creditor" of "foreign proceeding".

Die pad vorentoe het duidelik gedui op 'n behoefte vir toepaslike plaaslike wetgewing om, soos in die geval van Engeland, Australië en die Verenigde State van Amerika, sulke gevalle te reguleer.

3 GEVALLE IN DIE SUID-AFRIKAANSE REGSPRAAK

Vir die hantering van transnasionale insolvensies deur die Suid-Afrikaanse howe kan eerstens na *Ex parte Steyn*[3] verwys word. In hierdie saak het die Suid-Afrikaanse hof die aanstelling van 'n kurator deur die Hoë Hof in Lesotho erken sodat hy die bates van die insolvent wat in Suid-Afrika geleë was, kon administreer. Hieruit is dit wel duidelik dat die Suid-Afrikaanse howe die inherente bevoegdheid het om op aansoek van 'n buitelandse kurator 'n bevel toe te staan wat regshulp in hierdie verband aan die applikant verleen. Steyn[4] meen dat hierdie saak ook gesag is vir die bevoegdheid om, waar 'n sekwestrasiebevel gegee is, 'n bevel toe te staan wat regshulp in hierdie verband van 'n buitelandse hof vra.[5] Die praktyk is dus dat 'n aansoek vir regshulp *deur een hof aan 'n ander hof gerig word.*

Steyn wys daarop dat dit ook 'n goedgevestigde internasionale prosedure en redelik algemene gebeurtenis op die gebied van transnasionale insolvensies is dat 'n hof "letters of request" uitreik wanneer aansoek gedoen word vir regshulp of die erkenning van die aanstelling van 'n buitelandse kurator oor die betrokke insolvent se boedel.[6] Die doel van die "letters of request" is bloot om die ander hof te verseker dat die kurator wel behoorlik aangestel is ingevolge die insolvensieregsreëls van die jurisdiksie wat die erkenning aanvra.

> "Then it is for the foreign court to decide whether the insolvency laws of their respective jurisdictions are sufficiently similar, or at least comparable, for it to recognize the appointment of the trustee. In the event of recognition of the appointment of the trustee it is in the discretion of the foreign court to determine the nature of the rights and powers to be extended to the trustee in its area of jurisdiction."[7]

In *Clegg v Priestley*[8] is Clegg se boedel in Engeland gesekwestreer. Priestley is daar as kurator van die boedel aangestel. Hy het vervolgens die erkenning in Suid-Afrika van sy aanstelling aangevra asook bemagtiging om die boedel van Clegg, bestaande uit alle bates van Clegg wat binne die Republiek geleë was, te administreer. Priestley het voorts 'n bevel aangevra dat alle regte soos in die Insolvensiewet omskryf *mutatis mutandis* ook in verband met die administrasie van daardie betrokke bates van toepassing moet wees asof die Insolvensiewet uit hoofde van 'n sekwestrasiebevel daarop van toepassing was. Priestley se aansoek om erkenning van sy aansoek as kurator in Engeland is *ex parte* gebring en sonder kennis aan Clegg (insolvent). Die aansoek is toegestaan. In hoër beroep het die hof daarop gewys dat so 'n prosedure in stryd met reël 6(2) van die Uniforme Hofreëls was asook teen die volgende beginsel:

---

3 1979 2 SA 309 (O).

4 Steyn "A reflection on the need for cross-border insolvency legislation in South Africa" 1997 *SA Merc LJ* 228.

5 Inderdaad het dit in hierdie saak nie gegaan oor 'n aansoek deur 'n Suid-Afrikaanse hof aan 'n buitelandse hof nie.

6 Steyn 1997 *SA Merc LJ* 228.

7 *Idem* 230.

8 1985 3 SA 950 (W). Sien *Priestley v Clegg* 1985 3 SA 955 (T) vir die feite van die betrokke saak.

> "It is an essential principle of South African law that the Court should not make an order that may prejudice the rights of parties not before it. ... The Appellate Division has consistently refused to deal with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests."[9]

Hierdie reël, sê die hof, is egter onderworpe aan die kwalifikasie dat, alhoewel ander persone deur die bevel geraak mag word, die hof onmiddellike regshulp wat tydelik van aard is sal toestaan, waar dit essensieel is "because of the danger in delay or because notice may precipitate the very harm the applicant is trying to forestall". Die hof het bevind dat daar geen gesag is vir 'n afwyking van die gevestigde reël en fundamentele beginsel van ons reg dat die hof nié 'n finale bevel sal maak wat die regte van 'n persoon sal benadeel sonder die nodige kennisgewing aan hom nie. As daar 'n moontlikheid is dat die insolvent sal poog om sy bates te vervreem of weg te voer en daardeur buite die bereik van die *concursus creditorum* en die kurator te plaas, kan tussentydse regshulp toegestaan word. Die hof het vevolgens beslis dat 'n aansoek vir 'n bevel *nisi* tesame met 'n tydelike interdik hangende die finale beslissing van die aansoek en bediening daarvan op Clegg, 'n probleem van hierdie aard hok kon slaan. Die effek van die beslissing is dus dat geen regshulp in daardie stadium aan die buitelandse verteenwoordiger[10] verleen is nie,[11] op grond van die afwesigheid van 'n kennisgewing aan die respondent/insolvent.

'n Uitstekende voorbeeld van die hantering van die probleem van transnasionale insolvensie deur die Suid-Afrikaanse howe is *Ex parte Palmer NO: in re Hahn*.[12] Die feite word nie pertinent in die beslissing vermeld nie, maar in breë trekke kan die volgende afgelei word: H was 'n Suid-Afrikaanse burger (hy was in besit van 'n Suid-Afrikaanse paspoort) maar het in die omgewing van 1987 in die Verenigde Koninkryk gebly. In 1989 is 'n sekwestrasiebevel deur 'n Britse hof teen hom uitgereik. Ten tye van die geding was H weer in Suid-Afrika woonagtig waar hy steeds sekere bates en familiebetrekkinge gehad het. Die applikant in hierdie saak (P) was die kurator, deur die Britse hof aangestel om H se sekwestrasie te behartig. P het vervolgens by die hooggeregshof in Suid-Afrika aansoek gedoen om erkenning van (a) die sekwestrasiebevel deur die buitelandse hof en (b) sy aanstelling as kurator sodat hy as sodanig by magte kon wees om in Suid-Afrika 'n vergadering van skuldeisers te belê en die insolvent te ondervra.

Die regsvraag was derhalwe of 'n Suid-Afrikaanse hof slegs erkenning sal verleen aan die kurator van 'n boedel wat in die buiteland gesekwestreer is deur 'n hof binne wie se jurisdiksie die skuldenaar *ten tye van die sekwestrasiebevel* gedomisilieer was. Of sal 'n Suid-Afrikaanse hof daarby ook so 'n kurator erken waar die bevel op grond waarvan hy aangestel is, uitgereik is deur 'n hof wat, ooreenkomstig die buitelandse reg, jurisdiksie gehad het om die bevel te gee op

---

9 953.

10 Hiermee word daardie persoon bedoel wat in die buiteland as administrateur oor die boedel van die skuldenaar aangestel is. In Suid-Afrikaanse terme gewoonlik 'n kurator of likwidateur.

11 In 'n latere saak (*Priestley v Clegg* 1985 3 SA 955 (T)) was P die applikant en C die respondent. Weer het P aansoek gedoen om presies dit wat hy in die eerste saak aangevra het, maar hierdie keer met die nodige kennisgewing aan C.

12 1993 3 SA 359 (K).

'n *ander grond* as dat die skuldenaar in die regsgebied van daardie hof gedomisilieer was? So 'n ander grond kan byvoorbeeld wees dat die skuldenaar ten tye van die bevel in die regsgebied van die buitelandse hof woonagtig was.

Die hof beslis dat *tensy* die insolvent gedomisilieer was in die jurisdiksiegebied van die buitelandse hof wat die sekwestrasiebevel gemaak het, 'n plaaslike hof nie die kurator wat ingevolge daardie bevel aangestel is, sal erken nie. Die hof het vervolgens gekyk na die bates wat wel in die buitelandse kurator sou vestig. Met betrekking tot *roerende eiendom* verklaar die hof die volgende: Sekwestrasiebevele gemaak in die land van domisilie van die insolvent het in 'n beperkte mate ekstra-territoriale werking. Dit is so as gevolg van 'n fiksie dat geag word dat al die roerende bates van die insolvent in die domisiliegebied van die insolvent teenwoordig is.[13] Sekwestrasie aldaar het die effek dat daardie roerendes, waar die goed ookal geleë is, onmiddellik met die aanstelling van die kurator van daardie gesekwestreerde boedel aan hom oorgedra word. Roerende eiendom in Suid-Afrika ten tye van die sekwestrasiebevel deur die buitelandse hof (van domisilie) sal dus in die kurator vestig. Hierdie beginsel geld volgens die hof ook ten opsigte van aangeleenthede wat betrekking het op die administrasie van die insolvente boedel, met inbegrip van die bevoegdheid van die buitelandse kurator om 'n vergadering in terme van die Insolvensiewet te hou. Bogemelde bevoegdheid van die buitelandse kurator en erkenning daarvan deur Suid-Afrikaanse howe is slegs toelaatbaar waar die insolvent *gedomisilieer was binne die jurisdiksiegebied van die buitelandse hof wat die sekwestrasiebevel gemaak het.* Indien die insolvent nie binne die buitelandse hof se regsgebied gedomisilieer was nie, sal die buitelandse kurator wat in terme van die sekwestrasiebevel van daardie buitelandse hof optree, nie deur die Suid-Afrikaanse howe erken word nie.[14] As dit inderdaad die hof van die skuldenaar se domisilie was wat die sekwestrasiebevel gemaak het, sal 'n Suid-Afrikaanse hof derhalwe sy diskresie ten gunste van die erkenning van die buitelandse sekwestrasiebevel uitoefen om 'n gekonsolideerde administrasieproses toe te laat. 'n Gekonsolideerde administrasieproses tydens sekwestrasie is geriefliker of makliker uitvoerbaar. Sodanige erkenning sal egter slegs geskied indien die belange van die plaaslike skuldeisers van die insolvent beskerm is.[15] Interessant en belangrik is die volgende punt wat deur die hof gemaak word: Die hof wys daarop dat alhoewel die buitelandse kurator[16] streng gesproke nie erkenning van plaaslike howe nodig het om met die insolvent se roerende bates te werk nie,[17] dit praktyk geword het dat daar wel vir formele erkenning aansoek gedoen word. *In die praktyk is die aansoek tot 'n beginsel verhef.*

Met betrekking tot *onroerende eiendom* verklaar die hof die volgende: Ten einde regshandelinge met betrekking tot die insolvent se onroerende bates te verrig, het die buitelandse kurator wel erkenning van die Suid-Afrikaanse howe nodig. Dit is so aangesien onroerende eiendom deur die *lex situs* beheer word.[18] Suid-Afrikaanse howe het 'n absolute diskresie om erkenning aan 'n buitelandse kurator te verleen ten opsigte van regshandelinge met betrekking tot die

13 362C–E.
14 365D–H.
15 365E–F.
16 Aangestel uit hoofde van 'n sekwestrasiebevel deur die hof van domisilie.
17 Soos reeds verduidelik, word sodanige bates deur die *lex loci domicilii* beheer.
18 362F–I

insolvent se onroerende bates. Hierdie diskresie sal slegs in spesiale omstandighede ten gunste van die kurator uitgeoefen word en wel op die basis van hoflikheid en gerief.[19] Dit alleen is egter nie voldoende nie. Die beginsels van gerief en hoflikheid kom ter sprake as die domisilie van die buitelandse hof vasstaan. Die hof het 'n absolute en alleendiskresie én moet ook veiligheidsmaatreëls vir die plaaslike skuldeisers van die insolvent in sy bevel inbou. Maar omdat hier met die beginsel van "spesiale omstandighede" gewerk word, is ek van mening dat onsekerheid noodwendig teenwoordig sal wees.

Nog 'n voorbeeld waar 'n transnasionale insolvensie voorgekom het is *Ex parte Wessels en Venter NNO: in re Pyke-Nott's Estate*.[20] In hierdie saak was die applikante die kurators van X se gesekwestreerde boedel. X was in Suid-Afrika gedomisilieer. 'n Familielid (Y) van X in Engeland het 'n bedrag geld nagelaat aan óf die pa van X óf die seun van X. Dit was nie seker wie van die twee die werklike erfgenaam was nie, want oupa en kleinseun het presies dieselfde name gehad. Sou dit die oupa wees, sou die insolvent die bedrag geërf het omdat die oupa reeds voor die testatrise gesterf het. Die Z Bank in Engeland is as eksekuteur van Y se boedel aangestel. Na navrae deur die applikante het Z beweer dat hy, in die afwesigheid van 'n "suitable worded disclosure order, issued through English Courts or, alternatively, the validation of the existing order by English Courts", nie in staat was om enige inligting aan die applikant te verskaf nie, as gevolg van die "Banking Code of Practice" in Engeland. A het vervolgens by die Vrystaatse Provinsiale Afdeling van die Hooggeregshof aansoek gedoen om (a) 'n bevel wat die erkenning van sy aanstelling as kurator van X se boedel by die hof in Engeland aanvra; (b) daarbenewens ook die regshulp van die Engelse hof in die erkenning van die kurator se titel om die bates van die insolvent wat in Engeland geleë is, te administreer; (c) en verder om in die algemeen dieselfde jurisdiksie uit te oefen as wat die plaaslike hof in soortgelyke gevalle sou kon uitoefen, in besonder om die applikante in staat te stel om sodanige getuienis te ondersoek en sodanige dokumente te inspekteer wat nodig is om te bepaal welke bates, indien enige, in die boedel van die insolvent vestig. Waarskynlik is dit dan 'n aansoek om die toepassing van die Suid-Afrikaanse insolvensiereg ten opsigte van die genoemde aspekte. Weer eens is dit opmerklik dat die aansoek om erkenning en regshulp deur 'n Suid-Afrikaanse hof aan 'n buitelandse hof gerig word en nie direk deur die verteenwoordiger aan die buitelandse hof nie.

Die regsvraag was derhalwe of die hof die inherente jurisdiksie het om die gevraagde bevel toe te staan en indien wel, wanneer die hof dit behoort te doen. Die Vrystaatse Provinsiale Afdeling het beslis dat, indien aangeneem word dat die hof wel die jurisdiksie het om so 'n bevel te maak, die hof dit alleen behoort te doen as die applikante 'n *prima facie* saak uitgemaak het of 'n redelike vooruitsig van sukses bewys het dat 'n ondersoek van getuienis en dokumente in Engeland tot die ontdekking van verdere bates in die insolvente boedel kon lei. Dit sou volgens die hof afhang van die waarskynlikheid dat die insolvent 'n erfgenaam van die boedel van Y was. Daaromtrent beslis die hof (a) dat die testament omtrent vyf jaar na die oupa se dood gemaak is, en die waarskynlikheid dat Y bedoel het dat omtrent die helfte van haar boedel na iemand moet

19 "Comity and convenience".
20 1996 2 SA 677 (O).

gaan wat vir bykans vyf jaar reeds dood is, prakties nul was; (b) dat die testament verwys het na die bank waar die kleinseun gewoon het; (c) dat die insolvent se prokureurs reeds aan die applikante se prokureurs geskryf het dat die insolvent ontken het dat hy die geld geërf het en verseker het dat sy seun die erfgenaam is. Die hof het beslis dat in die omstandighede, die applikante se vooruitsig om enige verdere bates te ontdek prakties nul was en dat die hof nie die Engelse hof moes belas met die versoek soos in die aansoek uiteengesit is nie. Daar is al ernstige kritiek teen hierdie uitspraak gelewer.[21] As die praktyk was dat die kurator die buitelandse hof direk kon nader om erkenning en die gevraagde regshulp, sou daar myns insiens geen oordeel of evaluering deur die Suid-Afrikaanse hof oor die feite en omstandighede van die betrokke geval nodig gewees het nie. Die genoemde kritiek is juis teen hierdie aspek van die uitspraak gerig.

In *Bekker NO v Kotze*[22] het regter Teek beslis dat dit logies is dat die hof nie 'n buitelandse vonnis kan afdwing nie, tensy dit 'n finale bevel is. Dit is so omdat 'n voorlopige bevel op die keerdatum bevestig óf opgehef kan word. Die regter het wel erken dat in hierdie geval gevra is om die erkenning in Namibië van die aanstelling van die kurator in Suid-Afrika en die toestaan aan die applikant van die magte wat deur artikel 18(3) van die Insolvensiewet aan hom gegee is. Om dit te doen, is volgens die hof nie 'n afdwinging van 'n voorlopige sekwestrasiebevel wat in die Republiek toegestaan is nie. Die hof staan die voorlopige kurator bloot die bevoegdheid toe om regstappe te doen om die insolvent se bates wat deur hom na Namibië geneem is, in die Republiek terug te kry. Dit kom neer op 'n bevestiging van magte wat alreeds in 'n voorlopige kurator gevestig is ingevolge artikel 18(3) van die Insolvensiewet. Hy kan daardie bevoegdheid tog nie in Namibië uitoefen sonder dat die hof van Namibië sy aanstelling erken en hom die nodige toestemming ingevolge die Wet toestaan nie. Sodanige erkenning gee die voorlopige kurator *locus standi* om voor die buitelandse hof te verskyn en die nodige aansoek en regstappe te doen. Dit is nie duidelik of die kurator in Suid-Afrika om erkenning aansoek gedoen het nie en indien wel, in watter hof.

In *Bekker NO v Kotze*[23] verklaar regter Strydom egter:

> "I myself have serious doubts whether this Court can at this stage, bearing in mind that the applicant was appointed as a provisional trustee on a provisional sequestration order, recognize such appointment. It seems to me that the previous recognition which was based on a provisional sequestration order clearly demonstrated why a Court would only recognize final orders by a foreign court."[24]

Volgens die regter was die vraag of die respondente (insolvent) binne die jurisdiksie van die hof wat die voorlopige bevel gemaak het, gedomisilieer was. As die hof van die skuldenaar se domisilie 'n sekwestrasiebevel gegee het, vestig die roerende goed, waar ook al geleë, outomaties in die kurator en ook in die voorlopige kurator.[25] Met betrekking tot onroerende goed is die posisie dat die

21 Sien Steyn 1997 *SA Merc LJ* 229–230.
22 1996 4 SA 1287 (Nm).
23 1293.
24 1295. Die voorlopige bevel waarop die eersgenoemde saak gegrond was, is later opgehef. Na verloop van tyd is egter weer 'n aansoek vir sekwestrasie gebring, op grond waarvan die tweede saak aanhangig gemaak is.
25 1296.

sekwestrasiebevel geen effek daarop het as die onroerende goed in 'n ander land geleë is nie. Die eiendom bly in die insolvent gevestig en die insolvent word nie *ipso facto* ontvestig nie. Regter Strydom verklaar verder dat 'n sekwestrasiebevel deur enige ander hof toegestaan *per se* geen uitwerking op die skuldenaar se bates het nie, ongeag of dit roerende of onroerende goed is, *as* die goed buite daardie hof se jurisdiksie geleë is. Die vestiging van roerende goed in die kurator volg deur regswerking en dit is nie nodig vir die hof van Namibië om die voorlopige kurator as sodanig te erken nie. Hy haal Mars[26] aan wat verklaar dat die noodsaaklikheid van erkenning altyd sal bestaan as die insolvent onroerende goed in 'n buitelandse jurisdiksie het. In die geval van roerende goed sal dit egter net bestaan as die sekwestrasiebevel toegestaan is deur 'n ander hof as die hof van die skuldenaar se domisilie. Hier is dus geen sprake van die praktyksreël in die bogenoemde *Ex parte Palmer NO: in re Hahn*-saak dat formele aansoek om erkenning tot beginsel verhef is nie.

Dit is duidelik dat aansoeke soos in die genoemde sake nie altyd gemaklik hanteer is nie. Die probleme in talle sake soos hierdie hierbo bespreek, dui op 'n formele rompslomp vir erkenning, die traagheid van state om ander se kurators of likwidateurs te erken en 'n vrees dat die plaaslike skuldeisers benadeel sal word. Samewerking tussen die howe en owerhede van die Republiek van Suid-Afrika[27] en buitelandse state kan egter bewerkstelling word met die daarstelling van wetgewing, geskoei op die model vir wetgewing wat onlangs gepubliseer is. Volgens hierdie model is groter regsekerheid vir handel en belegging en die daarstelling van 'n billike en effektiewe administrasie wat die belange van alle skuldeisers en ander belanghebbendes beskerm, 'n prioriteit. Daarbenewens word die beskerming en maksimalisering van die waarde van die skuldenaar se bates as doel nagestreef.[28]

4 "MODEL LAW"[29]

As gevolg van die feit dat die nasionale insolvensiereg van state nie tred gehou het met die voortdurende uitbreiding van handel en belegging nie, het UNCITRAL[30] 'n model vir wetgewing deur deskundiges op die gebied van die insolvensiereg wêreldwyd vir die geval van transnasionale insolvensies[31] ontwerp omdat daar 'n dringende en noodsaaklike behoefte bestaan aan internasionaal-harmoniserende wetgewing in hierdie verband. Die doel was spesifiek dat die model vir wetgewing deur die verskillende state oorweeg sal word om, met die

26 De la Rey *Mars' Insolvency law in South Africa* 178.

27 Hierna "die RSA".

28 Die lang titel meld ook as doelwit die fasilitering van die bestendiging of beveiliging van besighede met finansiële probleme en sodoende die beskerming en bewaring van werksgeleenthede. Inderdaad sal hierdie oogmerk indirek bereik word. Die voorgestelde wetgewing bevat na my mening geen direkte maatreëls wat die herwinning van finansieel onstabiele besighede beoog nie.

29 Hiermee word bedoel 'n modelreg vir transnasionale insolvensies oftewel 'n model vir transnasionale insolvensiereg. Dit sal gerieflikheidshalwe in hierdie aantekening vertaal word met "model vir wetgewing" en daarmee moet verstaan word 'n model vir wetgewing ivm transnasionale insolvensies.

30 United Nations Commission on International Trade Law.

31 *UNCITRAL Model Law on Cross-border Insolvency.*

nodige aanpassing daarvan, moontlik as wetgewing in die state aanvaar te word. Vanselfsprekend behoort so min moontlik daaraan verander te word om die hoogste of selfs net 'n bevredigende graad van sekerheid en harmonisering te bewerkstellig. 'n Voorgestelde aanpassing van die model vir wetgewing is reeds in Suid-Afrika vir kommentaar gesirkuleer.[32] Met die omvang beperk tot 'n paar prosedurele aspekte van transnasionale insolvensies, is die bedoeling dat die model vir wetgewing as 'n integrale deel van die bestaande insolvensiereg toepassing vind.[33] 'n Model vir wetgewing bied die moontlikheid om die regshulp wat erkenning van 'n buitelandse prosedure meebring, in lyn te bring met die regshulp wat in 'n vergelykbare prosedure van die nasionale reg beskikbaar is. Wat steeds in gedagte gehou moet word, is dat erkenning van 'n buitelandse prosedure nie plaaslike skuldeisers verhoed om 'n kollektiewe insolvensieprosedure in Suid-Afrika te inisieer of in stand te hou nie.[34] Die regshulp wat aan die buitelandse verteenwoordiger beskikbaar is, is onderworpe aan die beskerming van die plaaslike skuldeisers en ander belanghebbende persone, insluitend die skuldenaar, teen onbehoorlike benadeling. Die regshulp is ook onderworpe aan nakoming van die prosedurele vereistes van die Suid-Afrikaanse reg asook vereistes vir kennisgewing.[35] Verder behou die model vir wetgewing die moontlikheid dat enige aksie ten gunste van die buitelandse prosedure beperk of uitgesluit word, en dat erkenning van die buitelandse verteenwoordiger geweier word. Die grondslag vir sodanige beperking, uitsluiting of weiering word in artikel 6 van die voorgestelde wetgewing vergestalt, naamlik oorheersende openbare beleidsoorwegings. 'n Omskrywing van openbare beleidsoorwegings ("public policy") word nie gegee nie. Die toepassing van so 'n maatstaf om uitsonderings te kwalifiseer, kan probleme veroorsaak.

Die groot voordeel van eenvormigheid is dat aanvaarding van die model vir wetgewing dit vir Suid-Afrikaanse howe makliker sal maak om koördinering en samewerking van ander state in insolvensie-aangeleenthede te verkry. 'n Kort bespreking van die voorgestelde aanpassing is vervolgens aan die orde.

5 ALGEMENE BEPALINGS

Die algemene bepalings word in artikel 1 tot 8 van die voorgestelde wet uiteengesit. Die model vir wetgewing ten aansien van transnasionale insolvensies maak voorsiening vir vier gevalle.[36] In die eerste plek handel dit met die geval waar 'n buitelandse hof of verteenwoordiger regshulp[37] in die RSA sou wou aanvra. Tweedens voorsien dit die geval waar regshulp[38] in die buiteland aangevra sou

32 SA Regskommissie *UNCITRAL Model Law on Cross-Border Insolvency adapted for enactment in South Africa* 1 (hierna "die voorgestelde wet").

33 *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* (United Nations Deeember 1997) 9.

34 Sien a 28 voorgestelde wetgewing.

35 Sien a 22 en 19(2) voorgestelde wetgewing.

36 A 1 voorgestelde wetgewing.

37 Gewoonlik 'n versoek om die erkenning van 'n buitelandse prosedure of om 'n maatreël te neem wat in die model vir wetgewing vervat word. Sien a 19(1)(a), (b); 21(1)(a)–(f), (2); 27(a)–(e); 21(1)(g).

38 Gewoonlik 'n versoek deur 'n Suid-Afrikaanse hof of verteenwoordiger om erkenning deur 'n buitelandse staat van 'n prosedure wat alhier aanhangig gemaak is, of ander maatreël soos in die model vir wetgewing voorsien.

word. In die derde plek word voorsiening gemaak vir die koördinering van konkurrente prosedures indien nodig.[39] Ten slotte word ook reëlings getref vir die versoek vir of deelname aan 'n Suid-Afrikaanse prosedure deur buitelandse skuldeisers.

Die tipe prosedure wat hier ter sprake is, is enige judisiële of administratiewe prosedure ingevolge *die insolvensiereg*.[40] Baie belangrik is dat 'n voorlopige prosedure hierby ingesluit word. "Prosedure" behels dus enige prosedure met kollektiewe betrokkenheid van skuldeisers. Dit sluit ook die gevalle in waar die hof of 'n amptelike liggaam die bates en sake van die insolvent beheer of waar die doel van die prosedure die reorganisasie of likwidasie van die skuldenaar is.[41]

In die hantering van transnasionale insolvensie moet volgens die model vir wetgewing tussen 'n "foreign main proceeding"[42] en 'n "foreign non-main proceeding"[43] onderskei word. Eersgenoemde term word gebruik vir die prosedure wat plaasvind in die staat waar die skuldenaar se *sentrum van sy hoofbesigheid of primêre belange* geleë is of bedryf word.[44] Laasgenoemde term word gebruik in die geval van 'n buitelandse prosedure anders as 'n buitelandse hoofprosedure, wat plaasvind in 'n staat waar die skuldenaar bloot 'n "establishment"[45] het. Die begrip "buitelandse hof" moet ook verstaan word om nie-judisiële owerhede in te sluit.[46] 'n Buitelandse prosedure wat voldoen aan die vereistes in die vorige paragraaf gestel, moet dus dieselfde behandeling ontvang ongeag of die betrokke prosedure deur sodanige judisiële of administratiewe liggaam begin is en of 'n judisiële of administratiewe liggaam daaroor toesig hou. 'n "Buitelandse verteenwoordiger" is 'n persoon of liggaam wat in 'n buitelandse prosedure gemagtig is om die reorganisasie of die likwidasie van die skuldenaar se sake of bates te administreer of om as 'n verteenwoordiger[47] van die buitelandse prosedure op te tree. Dit sluit verder ook so 'n verteenwoordiger in wat op 'n interim-basis aangestel is.[48]

Een van die belangrikste kenmerke van die voorgestelde wetgewing is dat magtiging verleen word[49] aan 'n kurator, likwidateur, geregtelike bestuurder, curator[50] of ontvanger[51] om erkenning en/of regshulp te versoek vir 'n insolvensieprosedure

---

39 Dit is die geval waar prosedures mbt dieselfde skuldenaar tegelykertyd in verskillende state plaasvind.

40 Hierna sal gerieflikerwys verwys word as 'n plaaslike of buitelandse insolvensieprosedure of bloot 'n plaaslike of buitelandse prosedure.

41 A 2(a) voorgestelde wetgewing.

42 Vertaal met "buitelandse hoofprosedure".

43 Vertaal met "buitelandse nie-hoofprosedure".

44 Daar kan gerieflikerwys ook hierna verwys word as die senupunt of hartklop van sy hoofbesigheid of primêre belange.

45 Vertaal met "onderneming of bedryf". Dit is optrede op enige plek waar die skuldenaar 'n nie-kortstondige ekonomiese aktiwiteit met menslike bronne en goedere of dienste beoefen.

46 Maw 'n amptelike liggaam.

47 In SA terme gewoonlik 'n kurator, likwidateur, ens.

48 In SA terme gewoonlik 'n voorlopige kurator, voorlopige likwidateur, ens.

49 A 5 voorgestelde wetgewing.

50 Curator aangestel itv a 6 Wet op Finansiële Instellings 39 van 1984, a 69 Bankwet 94 van 1990 of a 81 Gesamentlike Bankwet 124 van 1993.

51 Ontvanger of ander persoon wat deur die Hoë Hof aangestel is om 'n skikking of reëling ingevolge a 311 Maatskappywet 61 van 1973 te administreer. Voorts sal slegs na "kurator,

continued on next page

ingevolge die plaaslike insolvensiereg. Dit is met ander woorde om in 'n buitelandse staat op te tree op grond van 'n prosedure ingevolge Suid-Afrikaanse insolvensiereg. Dit kan byvoorbeeld gebeur dat A, woonagtig in Suid-Afrika, insolvent raak en sy boedel gesekwestreer word. In werklikheid is A skatryk met waardevolle besittings in Engeland. Die kurator van sy gesekwestreerde boedel kan nou met meer sekerheid, deur middel van 'n eenvoudiger proses en vinniger by die hof in Engeland vir regshulp in hierdie verband aanklop. *Die omvang van bevoegdheid* wat in die buiteland deur die kurator, likwidateur, ensovoorts[52] uitgeoefen kan word, *sal egter van die buitelandse reg en howe afhang*. Desnieteenstaande sal die aksies of optrede wat die kurator, likwidateur, ensovoorts in die buitelandse staat wil uitvoer slegs daardie soort aksies of optrede behels wat in die model vir wetgewing aangespreek word. Nietemin is die bevoegdheid om in 'n buitelandse staat op te tree *nie* afhanklik daarvan of die buitelandse staat wetgewing aangeneem het wat op die model vir wetgewing gebaseer is nie.

As 'n beskermingsmaatreël is ingebou die bepaling dat niks in hierdie voorgestelde wet die hof verhoed om te weier om op te tree soos in hierdie wet gereël nie, indien die optrede inderdaad teen die openbare beleid in Suid-Afrika sal wees.[53]

Van belang is die feit dat die bevoegdhede van die hof of kurator, likwidateur, geregtelike bestuurder, curator of ontvanger ingevolge ander Suid-Afrikaanse wette om *addisionele regshulp*[54] aan die buitelandse verteenwoordiger te voorsien, *nie* deur die model vir wetgewing *beperk* word nie.[55]

6 TOEGANG DEUR BUITELANDSE SKULDEISERS EN VERTEENWOORDIGERS TOT RSA HOWE

Artikel 9 tot 14 van die voorgestelde wetgewing reël toegang tot die Suid-Afrikaanse howe deur buitelandse verteenwoordigers en skuldeisers. Die voorgestelde wetgewing verleen aan die buitelandse verteenwoordiger *direkte toegang*[56] tot Suid-Afrikaanse howe.[57] Vanselfsprekend sal die feit dat 'n aansoek ingevolge hierdie wet gemaak word, nie die buitelandse verteenwoordiger of die buitelandse bates en sake van die insolvent aan die jurisdiksie van die RSA-howe vir enige ander doel as die betrokke aansoek onderwerp nie.[58] Nietemin sal die

---

likwidateur, ensovoorts" verwys word en die buitelandse ekwivalente hiervan as "verteenwoordiger".

52 In die RSA aangestel.

53 A 6 voorgestelde wetgewing.

54 Bv deur sekere prosedureëls.

55 A 7 voorgestelde wetgewing. Wanneer 'n interpretasieprobleem ter sprake is, moet volgens a 8 ook ag geslaan word op die oorsprong van die wet en die motivering daarvoor, nl die noodsaak om eenvormigheid in sy aanwending te bevorder sowel as die handhawing van goeie trou.

56 Maw sonder enige vooraf toestemming of goedkeuring van enige instansie, spesiale lisensie of enige konsulêre optrede.

57 Sien a 9 en 10 voorgestelde wetgewing. Dit sluit ook 'n verteenwoordiger in wat op 'n interim-basis aangestel is.

58 Afhangende van wat deur die buitelandse verteenwoordiger gevra word, het die SA howe slegs jurisdiksie vir doeleindes van die administrasieproses tov die betrokke bates of die betrokke aangeleentheid. Dit sluit maw die algemene administrasie in wat uit die betrokke aansoek voortvloei. Die aansoek deur die buitelandse verteenwoordiger moet daarom 'n

continued on next page

buitelandse verteenwoordiger ter beskerming van die skuldeisers en ander belanghebbendes onderworpe wees aan die spesifieke voorwaardes wat die Suid-Afrikaanse hof ingevolge artikel 22(2)[59] stel in verband met die regshulp wat toegestaan word.

Die aansoek van die buitelandse verteenwoordiger moet geskied by wyse van 'n kennisgewing van mosie, gerig aan die Hoë Hof met kompetente jurisdiksie in die betrokke geval.

Ingevolge artikel 11 van die voorgestelde wetgewing kan 'n buitelandse verteenwoordiger[60] ook by 'n Suid-Afrikaanse hof aansoek doen om 'n persoon se boedel alhier te laat sekwestreer. Dit kan gedoen word indien aan al die voorwaardes in terme van die Suid-Afrikaanse reg vir so 'n aansoek voldoen word. Weer eens moet die aansoek geskied by wyse van 'n kennisgewing van mosie, gerig aan die Hoë Hof met kompetente jurisdiksie in die betrokke geval. In dringende gevalle waar dit noodsaaklik is om die bates van die skuldenaar te bewaar, kan dit selfs gebeur voor erkenning van die buitelandse verteenwoordiger. *Die Suid-Afrikaanse reg is dan van toepassing*. Sodoende sal daar voldoende beskerming teen kwelsugtige aansoeke of die misbruik van die prosedure wees. Die Insolvensiewet self meld egter nie die verteenwoordiger in 'n buitelandse prosedure as 'n applikant in sekwestrasie-aansoeke nie. Hierdie leemte word nou deur die voorgestelde wetgewing gevul.

Ingevolge artikel 12 van die voorgestelde wetgewing is die buitelandse verteenwoordiger geregtig om na erkenning, aan die sekwestrasieproses alhier deel te neem. Vanselfsprekend is die Suid-Afrikaanse insolvensiereg in so 'n geval van toepassing. Die betrokke verteenwoordiger sal geregtig wees om op 'n vergadering van skuldeisers aansoeke, versoeke of erkennings te maak aangaande sake soos die beskerming, realisering of verdeling van die bates van die insolvent of met betrekking tot samewerking met die buitelandse prosedure. Die soorte mosies wat die buitelandse verteenwoordiger mag rig, word nie gespesifiseer nie. Oor al hierdie aansoeke en versoeke sal uit die aard van die saak op 'n vergadering gestem word. Die buitelandse verteenwoordiger verkry egter nie spesiale bevoegdhede of regte nie. Hierdie bepaling affekteer derhalwe nie die Suid-Afrikaanse insolvensiereg nie.

Deur artikel 13 van die voorgestelde wetgewing verkry die buitelandse skuldeisers van die insolvent dieselfde regte met betrekking tot die aanvang van en deelname aan die sekwestrasieproses ingevolge die Suid-Afrikaanse insolvensiereg as Suid-Afrikaanse skuldeisers, onderworpe aan ander vereistes van die Suid-Afrikaanse reg. Net so word die volgorde van skuldeisers soos dit in die Suid-Afrikaanse reg geld, nie deur deelname van buitelandse skuldeisers geraak nie, behalwe in die sin dat die buitelandse skuldeisers nie in 'n laer rangorde as die konkurrente skuldeisers geklassifiseer kan word nie. 'n Buitelandse skuldeiser se eis sal aan die Insolvensiewet getoets word om te bepaal welke rangorde dit beklee of welke tipe skuldeiser hy is, ongeag watter posisie sy eis in sy eie staat beklee.

---

gespesifiseerde aansoek wees. Mbt die vraag volgens welke regstelsel die buitelandse verteenwoordiger in Suid-Afrika sal optree, sien par 8 hieronder.

59 Word hieronder bespreek.

60 Ongeag of dit 'n verteenwoordiger is vir doeleindes van 'n buitelandse hoofprosedure of van 'n buitelandse nie-hoof-prosedure.

Artikel 14 van die voorgestelde wetgewing vereis dat wanneer kennisgewing ook al aan skuldeisers ingevolge die Suid-Afrikaanse insolvensiereg gegee moet word, individuele kennisgewings ook aan die buitelandse skuldeisers gegee moet word indien dit bekend is dat daar sulke skuldeisers is.[61] Ten opsigte van diegene wie se adresse nie bekend is nie moet die hof die gepaste stappe beveel om kennisgewings aan hulle te bewerkstellig. Dit is vanselfsprekend dat die hof 'n spoedige wyse van kennisgewing moet beveel. Word kennis gegee oor die aanvang van die prosedure, moet 'n redelike tyd vir die indien van eise daarin aangedui word; die plek waar dit moet geskied; of dit nodig is vir die versekerde skuldeisers om hul eise in te dien; asook ander inligting wat ingevolge die Suid-Afrikaanse reg nodig is.

7 KENNISGEWING VAN DIE ERKENNING VAN 'N BUITELANDSE PROSEDURE

Daar is geen uitdruklike verwysing in die model vir wetgewing of voorgestelde wetgewing self na 'n vereiste vir kennisgewing van die liassering van 'n aansoek vir die erkenning van 'n buitelandse prosedure of van 'n bevel om erkenning te verleen nie. In hierdie opsig kan in die eerste plek geargumenteer word dat die fundamentele beginsel van "behoorlike proses"[62] wat in die Grondwet van die RSA[63] vasgelê is, verstaan kan word as sou dit vereis dat 'n beslising so belangrik soos die erkenning van 'n buitelandse insolvensieprosedure alleen gemaak kan word na aanhoor van die partye wat daardeur geraak word. In ander state[64] word egter geag dat aansoeke om die erkenning van buitelandse prosedures spoedige behandeling of hantering vereis, omdat dit dikwels in omstandighede van dreigende gevaar of verkwisting of verdoeseling van bates voorgelê word. Om sake te bespoedig, is die gee van voortydige kennisgewing van enige hofbeslissing met betrekking tot erkenning daarom nie 'n vereiste nie. Artikel 17(3) bepaal ook dat 'n aansoek om die erkenning van 'n buitelandse prosedure so vroeg moontlik beslis moet word.

Omdat dit hier oor die algemene administrasie gaan, is dit my mening dat in die afwesigheid van 'n uitdruklike verwysing na kennisgewing van die liassering van 'n aansoek vir die erkenning van 'n buitelandse prosedure of van 'n bevel om die verlening van erkenning te verhoed, die Suid-Afrikaanse reg sal bepaal of enige sodanige kennisgewing aan die skuldenaar of 'n ander persoon gegee moet word asook die tydperk vir die gee van die kennisgewing. In *Gouws v Scholtz*[65] verklaar die hof dat die algemene reël by kennisgewing deur die applikant wat aansoek wil doen vir die voorlopige sekwestrasie van die respondent se boedel is dat hy altyd kennis van sy aansoek aan respondent moet gee. Die hof meld dat daar wel uitsonderings bestaan. Daarvoor kyk die hof na die praktyk in verskillende afdelings van die hooggeregshof. Daaruit blyk dat in sommige afdelings kennisgewing in die volgende gevalle nie vereis word nie,

61 Daar bestaan natuurlik die moontlikheid dat die verteenwoordiger bloot ontken dat hy met enige ander buitelandse skuldeiser bekend is. Wat die posisie is indien daar slegs 'n *vermoede* bestaan dat daar ook ander buitelandse skuldeisers is (in teenstelling met "bekend is"), is nie seker nie.

62 "Due process".

63 108 van 1996.

64 Sien *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* 42.

65 1989 4 SA 315 (NK).

naamlik waar 'n *nulla bona*-relaas uitgereik is,[66] waar 'n skriftelike erkenning deur die skuldenaar gegee is dat hy nie in staat is om sy skuld te betaal nie,[67] waar dokumentêre bewys bestaan wat applikant se beëdigde verklaring steun en ook in uitsonderlike dringende gevalle. Die hof beslis uiteindelik dat die afwesigheid van kennisgewing slegs in uitsonderlike dringende gevalle geregverdig is. "Dringendheid" bestaan byvoorbeeld in die volgende gevalle: waar dit onmoontlik of ongewens is om respondent te laat weet omdat 'n wesenlike gevaar bestaan dat hy sy goed sal verkwis of sal versteek as hy van die aansoek weet; of om 'n eksekusieverkoping stop te sit. Word op 'n *nulla bona*-relaas gesteun, bestaan die moontlikheid dat die relaas foutief kan wees. Die hof wys ook daarop dat die skriftelike erkenning hierbo gemeld, onder dwang verkry kon gewees het. Ten slotte vereis billikheid en geregtigheid volgens die hof dat die *audi alteram partem*-reël nagekom moet word.

Prosedurele aangeleenthede met betrekking tot sodanige kennisgewing word nie deur die model vir wetgewing opgelos nie en word derhalwe deur die relevante bepalings van die Suid-Afrikaanse reg gereël.

8 ERKENNING VAN BUITELANDSE PROSEDURE EN REGSHULP

Die reëls en beginsels rakende erkenning word in artikel 15 tot 24 aangespreek. Die buitelandse verteenwoordiger het direkte toegang tot die Hoë Hof in Suid-Afrika en kan deur middel van artikel 15 van die voorgestelde wetgewing aansoek doen om erkenning van die buitelandse prosedure. Artikel 15 en 16 voorsien 'n eenvoudige, snelle meganisme om erkenning te verkry. Daarom is dit nie gewens om die proses met addisionele vereistes te belas nie. Al wat vereis word is

- 'n gesertifiseerde afskrif van die hofbevel vir die aanvang van die prosedure en die aanstelling van die buitelandse verteenwoordiger,[68] en
- 'n verklaring[69] waarin alle buitelandse prosedures met betrekking tot die skuldenaar waarvan die verteenwoordiger bewus is, bekend gemaak word.[70]

Die dokumente hoef geensins bekragtig te word nie, veral nie deur die tydrowende proses van legalisering nie. Artikel 16 bevat verskeie *weerlegbare* vermoedens in verband met erkenning. Dit sluit in dat die dokumente wat die aansoek vergesel outentiek is, ongeag of dit gelegaliseer is of nie. In afwesigheid van teenbewys word vermoed dat die skuldenaar se geregistreerde kantoor of gebruiklike woning die sentrum vir sy primêre belange of hoofbesigheid is. Die teenkant hiervan is dat die hof of enige belanghebbende persoon nie verhoed

66 Soos in a 8(b) Insolvensiewet.

67 *Ibid.*

68 Of 'n sertifikaat van die buitelandse hof wat die buitelandse prosedure en aanstelling van die verteenwoordiger bevestig of enige ander getuienis wat vir die hof aanvaarbaar is. Die hof het egter steeds die bevoegdheid om aan te dring op getuienis wat vir die hof aanvaarbaar is (a 15(2)). Sien ook *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* 41.

69 In 'n amptelike taal vertaal.

70 Die buitelandse verteenwoordiger het dus 'n plig om die hof oor laasgenoemde in te lig. Hy sal waarskynlik meer inligting omtrent die skuldenaar se sake hê as die hof. Dit is ook nodig om so 'n plig op hom te lê want dit kan gebeur dat hy meer geïnteresseerd is om regshulp tgv sy eie prosedure te kry en minder begaan is oor koördinering met 'n ander buitelandse prosedure. Sien *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* 41.

word om hierdie dokumente te bevraagteken nie en verdere getuienis kan aanvra of beoordeel.

Die voorwaarde vir die erkenning van 'n buitelandse prosedure word in artikel 17 van die voorgestelde wetgewing uiteengesit. Daar is reeds in paragraaf 5 verwys na die tipe prosedure wat hier ter sprake is.[71] Verder moet die dokumente soos in artikel 15(2) genoem die aansoek vergesel. 'n Aansoek om erkenning veroorloof nie die hof om die meriete van die beslissing van die buitelandse hof te evalueer nie.

Die hof kan in die eerste plek *tussentydse regshulp* aan die buitelandse verteenwoordiger verleen.[72] Dit is regshulp vir die tydperk vanaf die oomblik van die liassering van die aansoek om erkenning tot die oomblik wanneer die bevel gemaak word. Dit sal slegs geskied waar die hulp *dringend benodig* word om die bates van die skuldenaar in die RSA en die belange van skuldeisers te beskerm of in die geval van *bederfbare goed* of *goedere vatbaar vir waardevermindering*. Die regshulp ter sprake sluit in:

- die opskorting van eksekusie van die skuldenaar se bates;
- die toevertrou van al of 'n deel van die skuldenaar se bates in die RSA wat bederfbaar of vatbaar is vir waardevermindering aan die buitelandse verteenwoordiger of 'n ander persoon deur die hof aangewys;
- die opskorting van die reg om bates oor te dra, te beswaar of andersins te vervreem;
- die ondervraging van getuies en insameling van getuienis aangaande die skuldenaar se bates, sake, regte, pligte en verpligtinge;
- enige addisionele regshulp wat ingevolge die Suid-Afrikaanse insolvensiereg aan die kurator, likwidateur, ensovoorts, beskikbaar is.

Hierdie regshulp mag volgens die *diskresie* van die hof verleen word.[73] Die bevel wat die hof in hierdie opsig maak, word dan ooreenkomstig artikel 17 van die Insolvensiewet hanteer. Die regshulp is onderworpe aan die beskerming van die plaaslike skuldeisers en ander belanghebbendes, insluitende die skuldenaar, teen onbehoorlike benadeling. *Verder is die verleende hulp onderworpe aan die nakoming van die prosedurele vereistes asook toepaslike kennisgewingvereistes soos deur die Suid-Afrikaanse reg voorgeskryf.* Omdat die regshulp tydelik van aard is, kom dit tot 'n einde wanneer die aansoek vir erkenning beslis word, behoudens die geleentheid wat in artikel 21(1)(f) gebied word om die maatreëls te verleng.

As daar 'n buitelandse hoofprosedure hangende is, moet enige regshulp wat ten gunste van 'n buitelandse nie-hoofprosedure toegestaan word, met die buitelandse hoofprosedure versoenbaar wees en nie daarmee inmeng nie.[74] Dit is dan

---

71 Daar is ook reeds gemeld dat die verteenwoordiger die persoon of liggaam is wat in 'n buitelandse prosedure gemagtig is om die reorganisasie of die likwidasie van die skuldenaar se sake of bates te administreer of om as 'n verteenwoordiger van die buitelandse prosedure op te tree en dat dit ook so 'n verteenwoordiger insluit wat op 'n interim-basis aangestel is.

72 A 19 voorgestelde wetgewing.

73 Dws die hof kan ook weier om regshulp te verleen indien dit sou inmeng met die administrasie van 'n buitelandse hoofprosedure.

74 Sien ook a 30(a).

stellig ook die rede waarom die buitelandse verteenwoordiger wat om erkenning aansoek doen, verplig is om 'n verklaring aan te heg waarin alle buitelandse prosedures met betrekking tot die betrokke skuldenaar waarvan hy kennis het, geïdentifiseer word.[75]

In teenstelling met die regshulp ingevolge artikel 19[76] vloei die gevolge, soos bepaal deur artikel 20 van die voorgestelde wetgewing, van 'n erkenning van 'n buitelandse hoofprosedure *outomaties* voort en vind die gevolge slegs aanwending ten opsigte van die *hoofprosedure*.[77] Die betrokke regshulp is:

- opskorting van die aanvang of voortsetting van individuele regsaksies met betrekking tot die skuldenaar se bates, regte, pligte en verpligtinge;[78]
- opskorting van eksekusie teen die skuldenaar se bates;[79]
- opskorting van die reg om bates oor te dra, te beswaar of andersins te vervreem.[80]

Die aansprake van 'n belanghebbende persoon word beskerm deur te bepaal dat die omvang, uitsonderings en die beperking van die omvang van die opskorting aan die bepalings van artikel 20, 23 en 75 van die Insolvensiewet onderworpe is. Hierdie bepaling raak nie die reg om individuele aksies of prosedures van stapel te stuur om 'n eis teen die skuldenaar te handhaaf nie.[81]

Die outomatiese gevolge is noodsaaklik sodat stappe gedoen kan word vir die organisering van 'n ordelike en billike transnasionale insolvensieprosedure. Die implikasie van erkenning is dus nie om die gevolge van die buitelandse regstelsel in die RSA-stelsel in te voer nie. As erkenning in 'n gegewe geval die regmatige aansprake van 'n belanghebbende persoon (insluitende die skuldenaar) raak, behoort die Suid-Afrikaanse reg moontlikhede te voorsien om daardie belange te beskerm. Een sodanige beskermingsmaatreël is juis die hierbo genoemde artikel 20(3).[82] Ook in subartikel (4) word bevestig dat artikel 20(1) in geheel nie die reg van enigeen, insluitend die buitelandse verteenwoordiger of die buitelandse hof, ontneem om aansoek te doen vir die sekwestrasie van die skuldenaar se boedel ingevolge die Suid-Afrikaanse insolvensiereg of om aan daardie prosedure deel te neem[83] nie.

Ingevolge artikel 20(1)(c) word die reg van 'n individuele skuldeiser om aksie of eksekusie teen die skuldenaar se bates, regte en verpligtinge te loods outomaties opgeskort[84] en die bates outomaties gevries wanneer 'n *buitelandse hoofprosedure* erken word.[85] Daar moet in gedagte gehou word dat die model vir

75 Sien a 15(3).
76 En ook a 21 wat hierna bespreek word.
77 Diskresionêre regshulp ingevolge a 19 en 21 kan egter uitgereik word ten opsigte van hoof- en nie-hoofprosedures.
78 A 20(1)(a).
79 A 20(1)(b).
80 A 20(1)(c).
81 A 20(3).
82 Dit is dat die bepalings van a 20(1)(a) nie die reg om individuele aksies of prosedures te begin tot die omvang wat nodig is om 'n eis teen die skuldenaar te handhaaf, raak nie. Sodra die eis van die skuldeiser gehandhaaf is, is sy aksie aan die opskorting onderworpe.
83 Bv om 'n eis te bewys.
84 Dit dek ook aksies voor 'n tribunaal vir arbitrasie.
85 Onderworpe aan die uitsonderings in a 20(2).

wetgewing nie 'n prosedure wat in die buiteland begin is waarin die skuldenaar slegs bates het maar geen onderneming of bedryf nie, erken nie.[86]

Op grond van artikel 2(a) raak die effek van erkenning ook buitelandse voorlopige kollektiewe insolvensieprosedures. Hierdie oplossing is nodig want voorlopige prosedures, op voorwaarde dat dit aan die vereistes van artikel 2(a) voldoen, behoort nie van ander insolvensieprosedures onderskei te word bloot omdat dit van 'n voorlopige aard is nie. As die buitelandse voorlopige prosedure na erkenning ophou om 'n genoegsame basis vir die outomatiese gevolge van artikel 20 daar te stel, kan die outomatiese opskorting ooreenkomstig die Suid-Afrikaanse reg beëindig word.[87] Daarom is daar ook 'n verpligting op die buitelandse verteenwoordiger om die hof onmiddellik in te lig oor enige wesenlike verandering in die status van die erkende prosedure of die status van die aanstelling van die buitelandse verteenwoordiger.[88] In hierdie opsig is daar dan 'n wesenlike verskil van die standpunt wat die howe vroeër ingeneem het en waarna hierbo verwys is.[89]

Ingevolge artikel 21 word ook voorsiening gemaak vir *diskresionêre* regshulp *na erkenning* van 'n buitelandse prosedure. In hierdie geval is dit irrelevant of dit 'n hoof- of nie-hoofprosedure is omdat die primêre doel is om die bates van die skuldenaar en die belange van sy skuldeisers te beskerm. Die regshulp sluit byvoorbeeld in:

- die opskorting van individuele aksies en eksekusie ten opsigte van die skuldenaar se bates, regte, pligte, ensovoorts en die uitstel van 'n reg tot oordrag, vervreemding of beswaring van sy bates in die mate waarin dit nie ingevolge artikel 20(1)(a)–(c) opgekort of uitgestel is nie;
- die toevertrou van die administrasie of realisering van al of 'n deel van die skuldenaar se bates wat in die RSA geleë is aan die buitelandse verteenwoordiger of 'n ander persoon deur die hof aangewys;[90]
- die verlenging van die hulp wat ingevolge artikel 19(1) toegestaan is;
- die ondervraging van getuies en insameling van getuienis aangaande die skuldenaar se bates, sake, regte, pligte en verpligtinge;[91]
- enige addisionele regshulp wat ingevolge die Suid-Afrikaanse insolvensiereg aan die kurator, likwidateur, ensovoorts, beskikbaar is.

Hierdie lys is nie volledig nie. Sodoende word die hof se diskresie nie in omstandighede onnodig beperk nie. Ingevolge subartikel (2) kan die hof ook, op aansoek van die buitelandse verteenwoordiger, die *verdeling* van al of 'n deel van die skuldenaar se bates aan die buitelandse verteenwoordiger of 'n ander aangewese persoon toevertrou. Die voorwaarde is egter dat die belange van die Suid-Afrikaanse skuldeisers genoegsaam beskerm is.[92] As die aansoeker die verteenwoordiger van 'n nie-hoofprosedure is, moet die regshulp betrekking hê op

86 Daarom die kwalifikasie van "establishment". Sien a 17(2)(b).

87 A 20(2).

88 Hoe hierdie kennisgewing aan die hof moet geskied en op welke wyse die beëindiging bewerkstellig word, is onduidelik.

89 Sien *Bekker NO v Kotze* 1996 4 SA 1293 (Nm).

90 Met inagneming natuurlik van a 22(1).

91 In hierdie geval sal die beginsels van die Grondwet 108 van 1996 deeglik in aanmerking geneem moet word.

92 Die beskerming van die plaaslike skuldeisers is 'n opvallende kenmerk van die model vir wetgewing. Let veral op na die bepalings van a 22 hiernaas.

bates wat ingevolge die Suid-Afrikaanse reg in die buitelandse nie-hoofprosedure geadministreer moet word. Andersyds moet dit inligting behels wat in daardie prosedure vereis word.[93] Die sinsnede "ingevolge die Suid-Afrikaanse reg" reflekteer die onderliggende beginsel van die model vir wetgewing dat erkenning van 'n buitelandse prosedure nie beteken dat die effek van die buitelandse prosedure uitgebrei moet word soos dit in die reg van die buitelandse staat beskryf word nie. *Die gevolgtrekking is dat erkenning van 'n buitelandse prosedure aan die buitelandse prosedure gevolge heg wat in die Suid-Afrikaanse reg voorsien word.*

Die beskerming van skuldeisers en ander belanghebbende persone, insluitende die skuldenaar, word in artikel 22 van die voorgestelde wetgewing bepaal. In subartikel (1) word 'n algemene beginselstelling van beskerming van plaaslike skuldeisers gemaak. Dit hou in dat die hof geen regshulp soos in artikel 19 en 21 genoem, sal toestaan of weier nie of die regshulp ingevolge subartikel (3) van artikel 22 sal verander of beëindig nie,[94] tensy die hof tevrede is dat die belange van die genoemde persone beskerm is. Ingevolge subartikel (2) mag die hof, uit eie beweging of op versoek, die regshulp onderworpe stel aan voorwaardes wat dit in die omstandighede geskik ag. Weer eens is die implementering van die regshulp onderworpe aan nakoming van die prosedurele vereistes ingevolge die Suid-Afrikaanse reg asook die toepaslike vereistes met betrekking tot die gee van kennis.

Deur artikel 23 word aan die buitelandse verteenwoordiger die bevoegdheid verleen om stappe te doen uit hoofde van die Suid-Afrikaanse reg in gevalle waar die skuldeisers benadeel word om sodoende hul belange te beskerm.[95] So byvoorbeeld sal hy tersydestelling van vernietigbare regshandelinge kan aanvra.[96] Is 'n verteenwoordiger van 'n nie-hoofprosedure betrokke, sal dit net betrekking hê op bates wat in die buitelandse nie-hoofprosedure geadministreer moet word.

Deur artikel 24 word aan die buitelandse verteenwoordiger die bevoegdheid verleen om *na erkenning* van die buitelandse prosedure tussenbeide te tree in enige prosedure waar die skuldenaar 'n party is en die prosedure die skuldenaar

---

93 Die belang en bevoegdheid van 'n verteenwoordiger van 'n buitelandse nie-hoofprosedure is inderdaad enger as die belang en die bevoegdheid van 'n verteenwoordiger van 'n buitelandse hoofprosedure. Die regshulp wat tov die buitelandse nie-hoofprosedure toegestaan moet word, word beperk tot die bates wat in daardie nie-hoofprosedure geadministreer moet word. As die buitelandse verteenwoordiger inligting aangaande die skuldenaar se bates of sake verlang, moet die regshulp wat toegestaan word slegs die inligting behels of raak wat in daardie prosedure vereis word. Regshulp tgv 'n buitelandse nie-hoofprosedure moet nie onnodige wye bevoegdhede en magte aan die buitelandse verteenwoordiger gee nie. Sulke regshulp moet nie met die administrasie van 'n ander insolvensieprosedure inmeng nie, in besonder nie dié van die hoofprosedure nie.

94 Die idee onderliggend aan a 22(3) word ook in a 19(4) (regshulp voor erkenning), a 29(c) (koördinering van 'n buitelandse prosedure met 'n plaaslike prosedure) en a 30 (koördinering van meer as een buitelandse prosedure) gereflekteer. A 22(3) gee uitdruklike bevoegdheid aan die partye wat deur die gevolge van a 19 en 21 geaffekteer word, om by die hof aansoek te doen om wysiging of beëindiging van daardie gevolge. Die artikel pas in die konteks van die prosedurele stelsel van die RSA.

95 Slegs daardie aksies wat vir die kurator, likwidateur, ens, luidens die Suid-Afrikaanse insolvensiereg beskikbaar is.

96 Ing a 26 tot 34 Insolvensiewet 24 van 1936.

se bates sal raak of affekteer. Dit sluit dus ook ekstra-judisiële prosedures in. Ook in hierdie geval sal die Suid-Afrikaanse reg rakende tussenbeidetreding geld. Vanselfsprekend behels hierdie prosedures slegs dié wat nie ingevolge artikel 20(1)(a) of 21(1)(a) opgeskort is nie.

9 SAMEWERKING MET BUITELANDSE HOWE EN BUITELANDSE VERTEENWOORDIGERS

Artikel 25 en 26 voorsien die regsbasis vir samewerking. Hierdeur word samewerking "oor die grense heen" beveel. Voorheen was sodanige samewerking gebaseer op die beginsel van gerief tussen nasies.[97]

Artikel 25 verseker maksimale samewerking en kommunikasie tussen die Suid-Afrikaanse hof en die bogenoemde persone of instansies, direk of deur 'n kurator, likwidateur, ensovoorts. Subartikel (2) gee die Suid-Afrikaanse hof die bevoegdheid om direk te kommunikeer of inligting of bystand direk van die buitelandse hof of buitelandse verteenwoordiger te versoek. Deur artikel 26 word die kurator, likwidateur, ensovoorts, verplig om tot die maksimum moontlike omvang met die buitelandse hof of verteenwoordiger saam te werk en word ook hulle gemagtig om direk met die genoemdes te kommunikeer. Die oogmerk is om die howe en administrateurs van twee of meer state in staat te stel om effektief te funksioneer en optimale resultate te bereik asook om verkwisting van bates te voorkom. Verder is die oogmerk om die waarde van bates te maksimaliseer,[98] of om die beste oplossing vir die reorganisasie van die onderneming te vind.

Die artikels laat die besluit oor die vraag wanneer en hoe om saam te werk aan die howe en aan die insolvensie-administrateurs oor, maar wel onderworpe aan die toesig van die howe.[99] Die bevoegdheid wat artikel 26 verleen, verander nie die reeds bestaande reëls van die insolvensiereg met betrekking tot die toesigfunksie van die howe in verband met die optrede van die betrokke administrateur(s) nie. Nietemin is die standpunt dat die basis van samewerking prakties gesproke in die algemeen 'n sekere graad van speling vir en inisiatief deur die administrateurs binne die breë grense van juridiese toesig toelaat.[100]

10 KONKURRENTE PROSEDURES

Hierdie kwessie word deur artikel 28 tot 32 gereël.

10 1 Die begin van 'n prosedure ingevolge die Suid-Afrikaanse insolvensiereg *na* erkenning van 'n buitelandse prosedure

Solank die betrokke skuldenaar bates in die Republiek het, sal erkenning van 'n buitelandse hoofprosedure nie 'n aansoek om 'n plaaslike insolvensieprosedure verhoed nie.[101] Die effek van die prosedure sal tot daardie spesifieke bates in die

97 Sien bv *Ex parte Palmer: in re Hahn* 1993 3 SA 359 (K).

98 Bv wanneer items van produksietoebehore of gereedskap wat in twee verskillende jurisdiksies geleë is meer werd is as dit as 'n geheel eerder as apart verkoop word.

99 Om ivm 'n buitelandse prosedure sodanig saam te werk vereis nie 'n vorige formele besluit vir erkenning van daardie buitelandse prosedure nie. Tydrowende prosedures tradisioneel in gebruik (soos "letters rogatory") word vermy. So 'n prosedure is noodsaaklik wanneer howe dringend moet optree.

100 Sien *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* 64.

101 A 28 voorgestelde wetgewing.

RSA beperk word. In sommige situasies sal 'n betekenisvolle administrasie van die plaaslike insolvensieprosedure sekere bates in die buiteland moet insluit. Dit is veral die geval waar daar geen buitelandse prosedure noodsaaklik of beskikbaar is in die staat waar die bates geleë is nie.[102] Erkenning van 'n buitelandse prosedure verhoed derhalwe nie die plaaslike skuldeisers om 'n kollektiewe insolvensieprosedure binne die Republiek te inisieer of daarmee voort te gaan nie. Hierdie bepaling word nie geraak deur die vereiste van "establishment" in artikel 2(f) met betrekking tot 'n buitelandse nie-hoofprosedure nie. As die skuldenaar bates in die Republiek het, kan daar met insolvensie-prosedures begin word.

10 2 Koördinering van die prosedure ingevolge die Suid-Afrikaanse reg en buitelandse prosedure

Deur artikel 29 word voorsiening gemaak vir (a) *gelyktydige aansoeke* van 'n insolvensieprosedure in die Republiek en erkenning van 'n buitelandse prosedure, asook (b) die aansoek vir 'n insolvensieprosedure in die Republiek *na* 'n aansoek vir erkenning van 'n buitelandse prosedure. In alle gevalle moet die hof poog om met sy bevele samewerking en koördinering volgens artikel 25 tot 27 te bewerkstellig.[103] Maar die aanvang van 'n plaaslike insolvensieprosedure verhoed of beëindig nie die erkenning van 'n buitelandse prosedure nie. Die Suid-Afrikaanse hof word in alle omstandighede gemagtig om voorsiening te maak vir hulp of bystand ten gunste van die buitelandse prosedure.[104] Hierdie artikel handhaaf egter 'n voorrang ten gunste van die plaaslike prosedure bo die buitelandse prosedure. Dit word op die volgende wyses bewerkstellig:

- Enige bystand wat aan die buitelandse prosedure verleen moet word, moet versoenbaar wees met die plaaslike insolvensieprosedure;
- enige bystand wat reeds verleen is, moet hersien word en verander of beëindig word om konsekwentheid met die plaaslike insolvensieprosedure te verseker;
- as die buitelandse prosedure 'n *hoofprosedure* is, moet die outomatiese gevolge uit hoofde van artikel 20 van die voorgestelde wetgewing verander of beëindig word indien dit teenstrydig is met die plaaslike insolvensieprosedure;[105]
- waar 'n plaaslike insolvensieprosedure *hangende* is ten tye van erkenning van 'n buitelandse prosedure as 'n hoofprosedure, geniet die buitelandse prosedure nie die outomatiese gevolge van artikel 20 nie.

Die artikel verhoed derhalwe 'n onbuigsame hiërargie tussen die prosedures. So 'n benadering sou die bevoegdheid van die hof om saam te werk en sy diskresie ingevolge artikels 19 en 21 uit te oefen onnodig gestrem het.[106]

---

102 Dit is dan tipies waar ander bates van die skuldenaar ter wille van samewerking en koördinering (soos in a 25, 26 en 27) ingevolge die Suid-Afrikaanse reg in die Suid-Afrikaanse prosedure geadministreer behoort te word. 'n Voorbeeld wat gegee word, is waar dit moontlik sal wees om bates van die skuldenaar in die Republiek en die bates oorsee as 'n "going concern" te verkoop of waar die bates op bedrieglike wyse vanuit die Republiek na die ander staat geneem is. Die buitelandse bates sal dan in die Republiek geadministreer word en wel volgens die Suid-Afrikaanse reg. Sien *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* 66.

103 *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* 67.

104 *Idem* 68.

105 Want daardie outomatiese gevolge beëindig nie outomaties nie, omrede dit voordelig kan wees en die hof mag wens om dit in stand te hou.

106 *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* 68. In par 8 is reeds verduidelik dat bystand wat aan 'n buitelandse nie-hoofprosedure verleen word,

continued on next page

10 3 Koördinering van meer as een buitelandse prosedure

Anders as artikel 29 (wat as beginsel voorkeur aan die plaaslike prosedure gee), gee artikel 30 voorkeur aan die buitelandse hoofprosedure, as daar een is. In die geval van meer as een nie-hoofprosedure word geen buitelandse prosedure bevoordeel nie. Prioriteit vir die buitelandse hoofprosedure word gereflekteer in die vereiste dat enige bystand ten gunste van 'n buitelandse nie-hoofprosedure (ongeag reeds gegee of nog toegestaan te word) met die buitelandse hoofprosedure versoenbaar moet wees.

Die kruks in die geval van konkurrente prosedures is om samewerking, koördinasie en konsekwentheid van die regshulp wat in die verskillende prosedures verleen is, te bevorder. Sulke konsekwentheid sal bereik word deur bystand wat verleen moet word, toepaslik te maak, of die bystand wat reeds verleen is te verander of te beëindig. Artikel 30 is van toepassing ongeag 'n insolvensieprosedure in die RSA. *As daar by die twee of meer buitelandse prosedures ook nog 'n prosedure in die RSA aan die gang is, moet die hof in ooreenstemming met beide artikel 29 en 30 optree.*

10 4 Vermoede van insolvensie

Artikel 31 van die voorgestelde wetgewing bepaal dat, in die afwesigheid van getuienis tot die teendeel, die erkenning van 'n buitelandse hoofprosedure vir doeleindes van 'n aansoek vir 'n prosedure ingevolge die Suid-Afrikaanse insolvensiereg 'n bewys is dat die skuldenaar insolvent is. Die vermoede vind nie aanwending as die buitelandse prosedure 'n nie-hoofprosedure is nie.

Die woorde "in the absence of evidence to the contrary" impliseer dat die Suid-Afrikaanse hof nie gebonde is aan die beslissing van die buitelandse hof nie. Die plaaslike kriteria vir bewys van insolvensie bly dus van toepassing.

10 5 Betalingreël

'n Buitelandse skuldeiser wat deels ingevolge die insolvensiereg van die buitelandse staat betaal is kan nie betaling ontvang vir dieselfde eis in 'n Suid-Afrikaanse prosedure ten opsigte van dieselfde skuldenaar, *as* die skuldeisers in die RSA in dieselfde klas minder gekry het nie.[107] Die implikasie van hierdie bepaling is dat so 'n skuldeiser wel ook in die RSA 'n eis ten opsigte van dieselfde skuld kan instel, al het hy reeds deels betaling daarvan verkry. Die voorwaarde is slegs dat hy dit nie kan doen as die Suid-Afrikaanse skuldeisers in dieselfde klas 'n kleiner dividend as hy verkry het nie. Sou die Suid-Afrikaanse skuldeisers byvoorbeeld in Suid-Afrika 12% ontvang, terwyl die buitelandse skuldeiser in die buitelandse staat 8% sou ontvang, kan die buitelandse skuldeiser 4% van sy eis in die RSA ontvang.

Hierdie artikel raak nie die rangorde van eise in die Suid-Afrikaanse insolvensiereg nie. Die bedoeling is om gelyke behandeling van skuldeisers *van dieselfde groep* te bewerkstellig. Die bepaling raak ook nie die eise van versekerde skuldeisers of skuldeisers met saaklike regte wat ten volle betaal is nie.[108] In hierdie geval bepaal die reg van die ander staat welke tipe skuldeiser

---

beperk word tot bates wat in daardie nie-hoofprosedure geadministreer word *of* inligting behels wat in daardie prosedure vereis word.

107 A 32 voorgestelde wetgewing.

108 Dit is 'n aangeleentheid wat afhang van die reg van die staat waar die prosedure aanhangig gemaak is. *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* 70.

die betrokkene is. Sodra dit vasstaan dat die skudleiser óf 'n versekerde óf 'n preferente óf 'n konkurrente skudleiser is, is die Suid-Afrikaanse reg ten opsigte van daardie kategorie van skuldeisers van toepassing.

11 KONKLUSIE

Met hierdie wetgewing kan inderdaad groter samewerking tussen die howe en ander bevoegde liggame van die Republiek en die buiteland bewerkstellig word. Dit is ook my mening dat regsekerheid vir handel en belegging met die inwerkingtreding van sodanige wetgewing bereik kan word. Die feit dat die regshulp wat deur die voorgestelde prosedure vir die buitelandse verteenwoordiger beskikbaar is, onderworpe is aan die beskerming teen onbehoorlike benadeling van die plaaslike skuldeisers en ander belanghebbende persone (insluitend die skuldenaar), is billik en geregverdig. Dit is ook goed dat die model vir wetgewing en daarom ook die voorgestelde wetgewing 'n groot mate van diskresie aan die howe gee asook die moontlikheid behou om enige aksie ten gunste van die buitelandse prosedure te beperk of uit te sluit, ook om erkenning van die buitelandse verteenwoordiger te weier. Die groot voordeel van die voorgestelde wetgewing is myns insiens daarin geleë dat aansoeke in hierdie verband soveel makliker en vinniger sal kan geskied terwyl die prosedure ook heelwat vereenvoudig is, sonder om die gerief en gemak van koördinering met ander state in insolvensie-aangeleenthede in te boet. Ek meen dat die voorgestelde wetgewing in sy doel sal slaag. Die onderskeid tussen hoof- en nie-hoofprosedures is sinvol. Hierdie werkswyse het tot gevolg dat die rigtinggewende onderskeid tussen roerende en onroerende bates van die insolvent en waar dit geleë is, asook die daarop toepaslike reëls aangaande die *lex situs* en *lex loci domicilii*, grootliks op die agtergrond geskuif word. As daar dus 'n sekwestrasiebevel ten opsigte van X se boedel in die RSA toegestaan is terwyl dit nie as 'n hoofprosedure kwalifiseer nie, kan die kurator van die gesekwestreerde boedel steeds erkenning vra in Engeland byvoorbeeld, ook al is daar geen prosedure in Engeland aanhangig nie. As die Engelse hof wel erkenning verleen, beskik dit oor 'n diskresie in die besluit hoe en wanneer om saam te werk, asook 'n diskresie oor die regshulp wat dit wil toestaan met ag op die belange van sy eie skuldeisers.

> *[T]he weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesman for abolition [of the death penalty]. But however one may assess the amorphous ebb and flow of public opinion generally on this volatile issue, this type of enquiry lies at the periphery – not the core – of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, and not a judicial, function.*
>
> *Powell J (dissenting) in* Furman v Georgia *quoted by Chaskalson P in* S v Makwanyane *1995 6 BCLR 293 (CC); 1995 3 SA 632 (CC) par 89.*

Striving towards social responsiveness in private property law: The Dutch functionalist approach*

J Erasmus
BLC LLB LLD
Lecturer in Law, University of South Africa

OPSOMMING

In die meeste Wes-Europese regstelsels word eiendomsreg tradisioneel gekenmerk deur die absolute beskikkingsbevoegdheid van die eienaar. Sedert die Tweede Wêreldoorlog is daar egter 'n groter sosiale bewustheid in hierdie stelsels en as sodanig geniet die sosiale funksie van eiendomsreg en die sosiale konteks waarin dit toegepas word meer aandag. Hierdie klemverskuiwing het gelei tot die tempering van die onbeperkte regte en bevoegdhede van die eienaar en vandag word algemeen aanvaar dat die openbare belang 'n beslissende rol moet speel in die proses om die omvang van die eienaar se regte en bevoegdhede te bepaal.

Die Nederlandse Grondwet bevat nie 'n verskanste eiendomsklousule nie, en om dié rede het 'n groep Nederlanders, algemeen bekend as die Funksionaliste, gepoog om sekere sosialiserende ontwikkelinge binne die privaatreg, eerder as die publiekreg, teweeg te bring tydens die hersiening van die *Burgerlijk Wetboek*. Die Funksionaliste se voorstelle behels hoofsaaklik die implementering van 'n konsep van pluriforme eiendomsreg. Hulle voer aan dat die aard en omvang van eiendomsreg verskil met betrekking tot die verskillende objekte, subjekte en funksies van eiendomsreg, en dat 'n konsep van pluriforme eiendomsreg voorsiening maak vir hierdie verskille. Daar word voorgestel dat die konsep van pluriforme eiendomsreg die tradisionele konsep van absolute en abstrakte eiendomsreg moet vervang ten einde in die behoeftes van die moderne Nederland te voorsien. Alhoewel hierdie voorstelle nie aanvaar is nie, het dit tog die aandag gevestig op die noodsaaklikheid om die openbare belang in ag te neem wanneer die aard en omvang van die eienaar se regte bepaal word.

1 INTRODUCTION

The development of ownership in modern Dutch law provides an interesting example of recent developments in a legal system in which judicial review is not recognised in the constitution.[1] Although a variety of rights, including ownership, are protected by the Dutch Constitution, Parliament has the power to determine the extent of these rights and may limit the rights as it sees fit. The

---

* This article is an extract from the author's LLD thesis *The interaction between property rights and land reform in the new constitutional order in South Africa* Unisa 1998. I would like to thank my promotor Professor AJ van der Walt for his comments and advice. The errors are all my own.

1 S 120 Dutch Constitution: "De rechter treed niet in de beoordeling van de grondwettigheid van wetten en verdragen."

idea of an entrenched constitutional property right is therefore unknown in this system and the private-law concept of ownership dominates the treatment and nature of property rights.

The 1983 Constitution adheres to the principle of the dominant role of legislation in a formal sense. The Netherlands, unlike most other European countries,[2] does not have a constitutional court and judges do not have the authority to test the constitutionality of legislation. It is left to the legislature to test its own legislation against the Constitution.[3] The Constitution authorises the legislature to determine the extent of the basic rights, but prohibits judicial review of these acts.[4] This means that, whereas in most other countries the courts play an integral part in the development and determination of the nature and extent of the fundamental rights, the Dutch courts can play no active role in this regard and therefore section 14 does not provide a constitutional or fundamental property guarantee.[5]

Judicial review does, however, exist regarding the compatibility of statutes or laws to international treaties.[6] The Dutch Constitution stipulates that the state is bound by all international treaties and that it must abide by and implement the provisions of these treaties.[7] Instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms[8] and the Universal Declaration of Human Rights[9] provide an entrenched guarantee of ownership,

2 Such as France, Italy, Spain and Germany.

3 Kortmann *Constitutioneel recht* (1994) 82.

4 Alkema "De reikwijdte van fundamentele rechten – de nationale en internationale dimenties" 1995 *Handelingen Nederlandse Juristen-Vereniging* 5 99; Prakke "Bedenkingen tegen het toetsingsrecht" 1992 *Handelingen Nederlandse Juristen-Vereniging* 3 *et seq.*

5 Jeukens *Grondrechten en rechterlijke toetsing* (1972) 66 *et seq.*

6 S 94 Dutch Constitution: "Binnen het Koninkrijk geldende wettelijke voorschriften vinden geen toepassing, indien deze toepassing niet verenigbaar is met eenieder verbindende bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties." Also see Slagter "Eigendom en pseudo-eigendom" in Hondius *Quod licet: Kleijn-bundel* (1992) 357 365; Slagter "Eigendom en privaatrecht" 1976 *Rechtsgeleerd Magazijn Themis* 276 279; Beekhuis *et al Mr C Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht: Zakenrecht* (1990) 14; Reehuis *et al Pitlo: Het Nederlands burgerlijk recht deel 3 Goederenrecht* (1994) 278. Kortmann *De Grondwetsherziening 1983* (1983) 258 points out that no judicial review exists regarding unwritten public international law.

7 S 93 Dutch Constitution: "Bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties, die naar haar inhoud eenieder kunnen verbinden, hebben verbindende kracht nadat zij zijn bekendgemaakt."

8 Protocol no 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms s 1: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." It was determined by the European Court for Human Rights that "civil right" – as the term is used in s 6 European Convention for the Protection of Human Rights and Fundamental Freedoms – amounts to ownership. See European Court for Human Rights 1982-09-23, *NJ* 1988, 290.

9 S 17: "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property."

and this provides the Dutch citizen with stronger protection than the protection in terms of the Constitution, because these provisions are subject to judicial review.[10] These provisions are, however, formulated widely and are subject to limitations – the entitled person can be deprived of property in the public interest[11] and the protection is subject to the provisions of national and international law.[12] The assertion of international treaties and European Union law rests partly with national and partly with international judges. The result of this judicial control is that the constitutional interpretation by the government and the Dutch parliament competes with and is limited by the judicial interpretation of the said international law.[13]

Owing to the absence of a constitutionally entrenched property guarantee, Dutch theorists tried to accomplish certain socialising developments in private law itself, rather than through constitutional law. During the 1970s and 1980s, while the new Dutch civil code (the *Nieuwe Burgerlijk Wetboek* (NBW)) was being finalised, the nature and role of ownership in society was the topic of a lively debate. It was contended that the nature of ownership should reflect the character and the needs of Dutch society and that, in order to achieve this, a concept of pluriform ownership had to replace the then current concept of absolute, exclusive and individual ownership. The different suggestions as to how ownership should be functionalised and the criticism of these suggestions are discussed below.

2 OWNERSHIP IN DUTCH PRIVATE LAW

According to Dutch theory, ownership can be described as a basic institution of law. This means that the true meaning of ownership cannot be derived from positive law. Positive law can determine who the owner is and it can limit ownership, but it cannot determine the exact meaning of the concept of ownership.[14] The ownership clause in the NBW has been described as very conservative. Ownership is central within the system of law and is characterised by absoluteness, totality and abstractness.[15] The starting point still is that the owner has the freedom to use his property, within the limits of law, as he sees fit.[16] No positive obligation is placed on the owner,[17] no provision has been made for the extension of ownership to incorporeals (or the so-called new property) and no

10 Slagter "Eigendom en privaatrecht" 279; Slagter "Eigendom en pseudo-eigendom" 357 365; Beekhuis 14; Alkema "De reikwijdte van fundamentele rechten" 99; Reehuis 278; Couwenberg *Liberale democratie als eerste emancipatiemodel* (1981) 69 *et seq*.

11 Public interest is interpreted widely by the European Court of Human Rights to provide the national legislature with as much freedom as possible to determine what falls within the ambit of public interest. See Snijders "De toekoms van de eigendom" in *Schoordijkbundel – In het nu, wat worden zal* (1991) 260 *et seq*; Reehuis 278.

12 Kortmann *Constitutioneel recht* 368 and 419.

13 *Idem* 82.

14 Beekhuis 13.

15 Van den Bergh "Schijnbewegingen: Hercodificatie en eigendomsdefinitie in historisch perspectief" 1987 *Recht & Kritiek* 327 337 *et seq*; Grosheide *Eigendom in de overgang?* (1982) 62.

16 Beekhuis 20.

17 Slagter "Eigendom en privaatrecht" 291.

specific social philosophy has been adopted or incorporated by section 5:1:1 NBW.[18]

Ownership is described by Beekhuis *et al*[19]as the most comprehensive right a person can have with regard to a thing, and as such it is said to be the mother right from which all limited real rights – as daughter rights – are derived. It may also be said that all limited real rights are contained within ownership.[20] Rights such as usufruct, quitrent, servitudes and hypothec, are, in a manner of speaking, present within the seed of ownership.

Ownership is described as a relation between a person and a thing on the one hand, and the relation between one person and other persons on the other hand.[21] It is also described as an absolute right in the sense that it is enforceable against all third parties, as opposed to personal or relative rights which are enforceable only against certain third parties.[22]

Ownership is said to be characterised by exclusivity,[23] elasticity,[24] uniformity,[25] abstractness[26] and absoluteness.[27] In principle, it is of undetermined duration, and it normally lasts for an indefinite time, although it can be subjected to a resolutive condition.[28] Ownership can be transferred[29] and vindicated.[30]

Ownership contains all possible entitlements – with regard to the thing that is the object of the right – which are recognised by the existing legal order. The power of the owner to exercise these entitlements is relative in the sense that it is limited by the protected interests of society and others. According to section 5:1:1 NBW ownership can be limited by the rights of others, statutory provisions and the rules of unwritten law.

The owner's free use of his property can be limited by limited real rights[31] and certain personal rights[32] that he grants to third parties. If the owner violates

---

18 Grosheide 55 *et seq*.

19 Beekhuis 16; Reehuis 274.

20 Reehuis *loc cit*.

21 Beekhuis 17.

22 Reehuis 275 281.

23 The power of the owner to exclude all third parties from interfering with his ownership. See Reehuis 282; Grosheide 62; Reehuis and Slob *Parlementaire geschiedenis van het Nieuw Burgerlijk Wetboek* (1990) 1218.

24 With this is meant that as soon as a limited real right expires, that right falls back to the owner and ownership is automatically extended. See Beekhuis 16 who point out that this is not an essential characteristic of ownership, since this phenomenon is inherent to all mother rights.

25 Uniformity entails that there is only one type of ownership. This is also described as the totality of ownership. See Van den Bergh 338; Slagter "Eigendom en pseudo-eigendom" 365; Reehuis 276; Grosheide 62.

26 The entitlements of the owner are not defined, need not be justificd and do not relate to social goals. See Van den Bergh 338.

27 With the absoluteness of ownership is meant that ownership is unlimited in principle and may exercise his entitlements as he sees fit. All limitations are regarded as exceptions. See Van den Bergh *loc cit*.

28 Beekhuis 18.

29 S 3 83 NBW. Also see Reehuis 280.

30 S 5 2 NBW. Also see Reehuis *loc cit* who points out that revindication means that the owner demands the thing – the object of ownership – back, and not the right as such.

31 This can include usufruct, quitrent and servitudes. See Reehuis 283; Nieuwenhuis, Stolker and Valk *Nieuw Burgerlijk Wetboek text en commentaar* (1990) 287; Beekhuis 27.

32 Such as rent and lease. See Reehuis *loc cit*; Nieuwenhuis, Stolker and Valk 289; Beekhuis *loc cit*.

someone else's right and this violation amounts to a wrongful act, this will also result in a limitation of ownership.[33]

Ownership can be limited in different ways by statutory provisions. The Dutch Constitution determines that the owner can be expropriated in the public interest and that ownership can be destroyed or made unusable by an authorised authority, against compensation.[34] It is also possible that property is not expropriated or taken from the owner, but that his rights are violated by a state authority and he is expected to endure this violation of his rights.[35] The owner's freedom to use his property as he sees fit can also be limited.[36] Ownership can furthermore be limited by subordinate legislatures which are authorised by the Constitution. These legislatures do not have the same powers as the national legislature, and since their acts can be tested against the Constitution by the courts, they have only limited authority.[37]

The owner's rights can also be limited by the rules of unwritten law.[38] According to section 3:14 NBW[39] a right that stems from private law can be limited by an unwritten public law principle. Limitations can also result from unwritten private law in terms of section 6:162 NBW.[40]

3 THE ARGUMENT FOR A CONCEPT OF PLURIFORM OWNERSHIP IN THE NETHERLANDS

3 1 Ownership and its social context

As a result of the influence of the work of Grotius and the German Pandectists ownership is traditionally regarded in most western European countries as an absolute, individualistic and abstract right. Ownership is approached conceptually

---

33 Nieuwenhuis, Stolker and Valk *loc cit*.

34 S 14. Property can also be expropriated in terms of the *Onteigeningswet*, the *Deltawet* 1958-05-08, Stb. 246 and the *Landinrichtingswet* 1985.

35 This can be done in accordance with the *Belemmeringenwet* of 1927-05-13, Stb 159, the *Wet Militaire Innundatiën* of 1894-4-15, the *Waterstaatwet* of 1900-11-10, Stb 176, the *Rivierenwet* of 1908-11-09, Stb 339, the *Telegraaf- en Telefoonwet* of 1930-01-31, Stb 342, the *Leegstandwet* of 1981-05-21, Stb 337, the *Wegenwet* of 1930-01-31, Stb 342, and the *Grondwaterwet* of 1981-05-22, Stb 392.

36 See the *Monumentenwet* of 1966-06-22, Stb 200, the *Wet op Ruimtelijke Ordening* of 1962-07-05, Stb 286, the *Boswet* of 1961-07-30, Stb 256 and the *Wet Voorkeursrecht Gemeenten* of 1981-04-22, Stb 236.

37 Beekhuis 25; Reehuis 283; Nieuwenhuis, Stolker and Valk 289; Van Oven "De algemene eigendomstitel van het gewijzigd ontwerp Nieuw Burgerlijk Wetboek" 1975 *WPNR* 85 87.

38 Beekhuis 27; Reehuis 283; Nieuwenhuis, Stolker and Valk 290.

39 S 3:14 NBW: "Een bevoegdheid die iemand krachtens het burgerlijk recht toekomt, mag niet worden uitgeoefend in strijd met geschreven of ongeschreven regels van publiekrecht." (A right which a person has pursuant to private law, may not be exercised contrary to the written or unwritten rules of public law. (Translation according to Haanappel and Mackaay *Nieuw Nederlands Burgerlijk Wetboek – Het vermogensrecht* (1990) 6).)

40 S 6:162 -2 NBW: "Als onrechtmatige daad worden aangemerkt een inbreuk op een recht en een doen of laten in strijd met een wettelijke plicht of met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer beaamt, een en ander behoudens de aanwezigheid van een rechtvaardigingsgrond." (Except where there is a ground of justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct. (Translation according to Haanappel and Mackaay *Nieuw Nederlands Burgerlijk Wetboek – Het vermogensrecht* (1990) 298).)

and little attention is paid to the social context or function of ownership. However, after World War II the whole of western Europe was characterised by a greater social consciousness and as such the social function of ownership and the social context within which it is applied, now enjoys more attention. This tendency to emphasise the social function of property was especially strong in the Netherlands in the first three decades after World War II.

It has been argued in Dutch legal literature that, although the description of ownership has not changed much over the last few centuries, the social order in which ownership functions today is visibly different from that of previous centuries. According to this argument, the modern concept of ownership is subjected to more limitations than was the case in the nineteenth century. This is known as the socialisation or erosion (*vermaatschappelijking* or *uitholling*) of ownership,[41] and is regarded as a reaction against the pretence of political neutrality as a result of the influence of Pandectism and legalism in Dutch private law.[42]

Slagter[43] has shown that the social function of ownership has changed since the beginning of this century. The modern function of ownership is (a) to preserve value, (b) to provide creditworthiness, (c) to act as an instrument for the decentralisation of decision making, (d) to serve as an instrument of power and (e) to protect privacy. According to him, these functions of modern ownership distinguish ownership from limited real rights and from ownership in earlier periods (including Roman-Dutch law of the seventeenth and eighteenth centuries).

No provision has been included in the NBW to compel the owner to exercise his rights in such a way as to promote social interests.[44] It must, however, be kept in mind that the nature and extent of ownership are determined by the legal and social order within which it functions. The Dutch form of government since World War II is based on a *verzorgingstaat* or welfare state. This implies that the state guarantees certain basic material and immaterial benefits to the citizens.[45] In order to achieve this, the state often has to limit the owner's right to use, enjoy and control his property. Thus the Dutch courts found it necessary in the past to place extraordinary limitations on the owner, in the social interest, by balancing the rights of the owner with public interest.[46] Within the context of the

---

41 Valkhoff *Een eeuw rechtsontwikkeling* (1938); Valkhoff "Nieuwe beschouwingen over eigendom en eigendomsrecht" 1957 *Rechtsgeleerd Magazijn Themis* 21 22; Couwenberg "Eigendomsrecht en eigendomsopvattingen in ontwikkeling" 1982 *Economisch statistische berichten* 38; Van Goch "Naar een gedifferentieerd eigendomsbegrip" 1982 *Recht & Kritiek* 82 83; Grosheide 45; Schut "Naar een meer pluriforme regeling van het eigendomsrecht?" 1981 *Rechtsgeleerd Magazijn Themis* 329 330; Van Maanen *Eigendomschijnbewegingen* (1987) 26. But see Derine *Grenzen van het eigendomsrecht in de negentiende eeuw* (1955), who shows that ownership has always been subjected to numerous limitations.

42 See in general Kop *Legisme en Privaatrechtwetenschap* (1992) 5 *et seq* and 29 *et seq*.

43 Slagter "Eigendom en privaatrecht" 282.

44 Van den Bergh 335 *et seq*; Slagter "Eigendom en pseudo-eigendom" 364; Van Maanen "Kraken als onrechtmatige daad, of: De grensoverschrijdende spekulant" 1981 *Recht & Kritiek* 5 16; Van Goch 83.

45 Van Goch 83; Meijs and Jansen "De verzorgingsstaat en het eigendomsrecht: Rawls en Macpherson" 1990 *Recht & Kritiek* 115.

46 See Arrest Rechtbank Amsterdam, 1978-3-9 and Hof Amsterdam 26-10-1978, NJ 1980 no 70 and 71. This is the case of the so-called "Batco-affaire". In this case the court said

continued on next page

verzorgingstaat or welfare state in the Netherlands, ownership is subjected to numerous limitations which are foreign to most other jurisdictions. The *Leegstandwet*[47] provides a good example of the influence of the social interest on the nature and extent of ownership. This act determines that whenever a building is left unused or empty by its owner, the state may use that building to house the homeless. The existing needs of society acts as the incentive to change the owner's entitlements – in this instance the owner's entitlement to use his property as he sees fit. The fact that no positive duty is imposed on the owner in the final text of the NBW to exercise his right in a manner that serves the public interest does not mean that such a duty cannot be implied tacitly. The code does not provide the final word on the nature and extent of ownership or any other right. It is rather determined by the complete legal fabric of the society in which it functions. In the Netherlands, as in numerous other jurisdictions, the legal fabric consists not only of the civil code, but also of case law and statutes. By emphasising the social function of ownership, Dutch private law moves away from Pandectism and legalism.

The concept of absolute, individualistic and abstract ownership was the creation of a society which emphasised individualism and freedom.[48] The rights of the owner were accentuated and the needs and interests of society were hardly ever taken into account when the extent of the owner's rights are determined. This, however, changed in the post-World War II society. Common interest and the needs of society started to play a more important role in the determination of the nature and extent of the concept of ownership. Most modern western constitutions emphasise and value the common interest, equality and democracy. The social function of ownership was increasingly accentuated as a result of a reaction against the emphasis placed on the absolute character of ownership in the nineteenth century. The traditional perception of ownership now has to be balanced with the newly acquired political and social dimension.[49] This is true throughout most of western Europe after World War II, and it is particularly strong in the Netherlands.

A lively debate developed during the 1970s and 1980s in the Netherlands regarding the nature of the concept of ownership in modern Dutch law. This

---

that the business had all the financial reasons to want to close itself down. It nevertheless held that social factors had to be taken into account – such as the fact that many people might lose their jobs – and therefore the business could not close down. The power of disposal of the owner was limited in favour of the public interest. According to the court social factors had to play a definite role in the decision making process of any business. Also see arrest Rechtbank Amsterdam, 1981-7-7. Kort Geding 1981, no 95. In this case Ford-Nederland wanted to retrench 1225 workers because the company was running at a loss. The court held that the company could not do this and had to continue employing the said workers until certain procedures were completed. This decision was overturned on appeal, but not on the ground of the reasoning of the court *a quo*.

47 *Leegstandwet* of 1981-05-21, Stb 337. For a discussion of this act see Balk "De Leegstandwet en haar gebreken" 1980 *Recht & Kritiek* 390; Van der Walt "De onrechtmatige bezetting van leegstaande woningen en het eigendomsbegrip – Een vergelijkende analise van het conflict tussen de privaat eigendom van onroerend goed en dakloosheid" 1991 *Recht & Kritiek* 329; Kleyn *et al Leegstandbestrijding. De Leegstandwet, tijdelijke verhuur, vorderen en kraken* (1982); Van Maanen *Eigendomschijnbewegingen* 148 *et seq*.

48 Because of the influence of the French Revolution and the German Pandectists.

49 Couwenberg "Eigendomsrecht en eigendomsopvattingen" 38.

debate reached a climax shortly before the NBW came into operation in 1992. It was contended by some authors[50] that the concept of ownership – as it existed in the *Burgerlijk Wetboek* (BW) and as it was formulated in the suggestions for the ownership clause in the NBW – does not reflect the needs of modern Dutch society and that the concept of ownership needed to reflect the pluriform nature of ownership to meet these needs.

According to Van Maanen[51] the traditional approach towards ownership as an absolute, individual and abstract right[52] should be replaced by a more refined and differentiated concept of ownership which provides for and reflects the complicated social reality in which ownership functions today. The social purpose of different objects of ownership necessitates a different treatment of these objects. A concept of pluriform ownership would be much more suitable to treat different objects according to their different social functions.

The different suggestions of Dutch authors on how the concept of ownership should be adapted or changed to meet the needs of modern society will now be scrutinised. Although not everyone agrees that ownership needs to be differentiated, there is consensus on two aspects.[53] First of all, there is consensus about the plurality of ownership. Plurality is recognised – although not formally – within the existing ownership construction with reference to the distinction between different subjects,[54] objects[55] and functions[56] of ownership. Secondly, most authors agree that the concept of ownership is flexible or adaptable, and because of this flexibility many authors contend that the current concept of ownership is able to adapt and to accommodate the challenges of modern society.

3 2 Arguments for a concept of pluriform ownership

The arguments for a concept of pluriform ownership are all conceptually based. The first approach regarding the differentiation of the concept of ownership suggests that the definition of ownership must be changed in order to bring it in line with the understanding and application of ownership in practice. This includes a differentiation between different objects of ownership and between limitation of the owner's entitlements with regard to the different objects.

Van Maanen[57] suggests two reasons why there is a need for a concept of pluriform ownership. He argues first of all that there are factual differences in the legal

---

50 Van Maanen *Eigendomschijnbewegingen*; Van Maancn "Kraken als onrechtmatige daad" 5; Schut 329; Van Goch 82; Van Neste "Eigendom morgen" 1983 *Tijdschrift voor privaatrecht* 479; Couwenberg *loc cit*; Grosheide; Meijs and Jansen 115; Valkhoff "Nieuwe beschouwingen over eigendom en eigendomsrecht" 21. See also Van den Bergh *Eigendom* (1988); Van den Bergh "Schijnbewegingen: Hercodificatie en eigendomsdefinitie in historisch perspectief" 1987 *Recht & Kritiek* 327; Slagter "Eigendom en pseudo-eigendom" 357; Feenstra "Historische aspecten van de private eigendom als rechtsinstituut" 1976 *Rechtsgeleerd Magazijn Themis* 248; Van der Ven "Ons thema: Eigendom als rechtsinstituut" 1976 *Rechtsgeleerd Magazijn Themis* 237.

51 Van Maanen "Kraken als onrechtmatige daad" 14; Van Maanen *Eigendomschijnbewegingen* 151.

52 Van den Bergh *Eigendom* 34; Feenstra 248.

53 See Van der Ven 241. Van der Ven makes this statement with reference to the authors that contributed to the 1976 edition of *Rechtsgeleerd Magazijn Themis* with the theme *Eigendom als rechtsinstituut*.

54 Natural and juristic persons.

55 Movable and immovable things; corporeal and incorporeal things.

56 Personal or public benefit.

57 Van Maanen *Eigendomschijnbewegingen* 154.

reality regarding the treatment of different objects of ownership (companies, houses, consumer goods), and to make provision for this in the concept of ownership would lead to legal clarity. A concept of pluriform ownership would contribute to a better and clearer description and analysis of the legal reality. Secondly, a concept of pluriform ownership would contribute to legal reform. Not only would it give recognition to the fact that consumer goods and housing facilities are and should be treated differently from personal property, but it would also stimulate further reform.[58] Van Maanen cannot see how fundamental social reform can take place in the absence of a redefining of ownership. By introducing a concept of pluriform ownership, the courts would be able to adopt a much more flexible approach in decisions regarding *kraken* (squatting), the power of and within big corporations and the use of nature reserves and wildlife areas.

Van Maanen[59] suggests the following definition of ownership:

> "1 Eigendom is de door de rechtsorde erkende bevoegdheid van één of meer persone om, met inachtneming van de wettelijke en maatschappelijke beperkingen, een zaak uit eigen macht te bezitten, te gebruiken en erover te beschikken.
>
> 2 Er zijn drie soorten van eigendom:
>
> - maatschappelijke eigendom, is de eigendom van produktiemiddelen, algemene produktievoorwaarden, kommunikatiemiddelen, grond, lucht en water. Het gebruik hiervan dient in overeenstemming te zijn met de belangen van de gemeenschap.
> - wooneigendom, is de eigendom van woonruimte. Het gebruik hiervan is onderhewig aan de beperkingen die daaraan door het recht en een rechtvaardige verdeling van woonruimte worden gesteld.
> - persoonlijke eigendom, is de eigendom van goederen die gebruikt worden ter bevrediging van materiële en kulturele behoeften. Het gebruik hiervan is in beginsel vrij."[60]

According to Van Goch[61] the traditional concept of ownership is outdated because it does not take cognisance of the interdependence of personal and public interests and no longer provides for the specific needs of society. Ownership cannot be separated from the needs of the community and should always be judged and interpreted in a social context. The absolute power of disposal of the owner should be kept in check and the limits of ownership should be determined according to the damage caused to society – this includes social, economic and

---

58 Also see Meijs and Jansen 115; Meijs and Jansen *Eigendom tussen politiek en economie* (1989) 147.

59 Van Maanen *Eigendomschijnbewegingen* 157.

60 1 Ownership is the power, recognised by the legal order, of one or more persons, with due consideration of statutory and social restrictions, to possess, use and dispose of a thing out of own accord.

2 There are three types of ownership:

- social ownership, is ownership of means of production, general conditions of production, means of communication, land, air and water. The use hereof must be in accordance with the interests of society.
- housing ownership, is ownership of housing facilities. The use hereof is subject to the limitations set out by law and by the equitable distribution of housing facilities.
- personal ownership, is ownership of things that are used to satisfy material and cultural needs. The use hereof is free in principle.

61 Van Goch 82.

ecological damage. According to Van Goch a distinction should be made between (a) ownership of means of production and (b) ownership of the results or products of (a). Means of production would inevitably have a social function. With reference to (b), Van Goch states that this would mainly include consumer goods and the owner of such goods would in principle have absolute power of disposal, subject to the limits mentioned above. Van Goch does not make special or separate provision in his definition for housing facilities, but states that the extent of ownership of housing should be determined socially – the power of disposal of the owner should be limited in order to accommodate the existing demand for housing.

Van Neste[62] states that ownership has two functions: on the one hand it must provide for personal needs, and on the other it has a social function. For this reason he makes a distinction between personal or individual ownership and social ownership. Personal ownership corresponds to the traditional approach to ownership and the owner is able to use, dispose of and control personal property as he sees fit. Personal ownership applies to things such as personal income, other money, one's own house and so on. Social ownership should be expressly limited by statute, and although social ownership ultimately provide for personal needs, it would also have a social function.

Valkhoff[63] also shares the opinion that a distinction should be made between means of production and consumer goods. According to him, this distinction is necessary because the purpose, function and importance of these categories of things differ economically, socially, ethically and psychologically.

Schut[64] advocates a different approach. He voices the opinion that a distinction should be made between ownership of movables and immovables. He bases this argument on the fact that, according to him, this distinction has been made throughout the history of the development of the concept of ownership and stems from the treatment of ownership in primitive societies. Even today a distinction is made between real and personal property in Anglo-American systems. Schut also points out that this distinction is implied by the treatment of ownership in the NBW.[65]

According to Meijs and Jansen[66] ownership has a dual meaning: it includes both the right to exclude and the right not to be excluded. The right to exclude refers to personal property and the right not to be excluded refers to the use of (part of) common property. The right to use a thing (not to be excluded) plays an increasingly important part in modern property relations and it often happens that, when exclusive ownership and the right to use are weighed up against each other, ownership has to make way for the right to use. This happens as a result of state intervention and, because of such intervention, social relations – both ownership and power relations – are interfered with. Thus, according to Meijs and Jansen, the concept of ownership needs to be differentiated in order to

62 Van Neste 479.

63 Valkhoff "Nieuwe beschouwingen" 21.

64 Schut 329. Also see Grosheide 44.

65 Title 1 deals with ownership in general, but titles 2 and 3 deal with ownership of movables and immovables respectively.

66 Meijs and Jansen *Eigendom tussen politiek en economie*; Meijs and Jansen "De verzorgingsstaat en het eigendomsrecht" 115.

reflect the true nature and practical application of the modern concept. A distinction needs to be made between ownership on the one hand and the right to use on the other. Furthermore, Meijs and Jansen suggest that the power of disposal should be defined according to the function of the object.

A further distinction is that between the power to use or control property and the power of disposal. The authors who advocate this distinction do not suggest a definite differentiation of the concept of ownership, but they propose that the way in which the concept of ownership is approached and treated should be changed.[67] They point to the fact that in practice an owner does not always control his own property: in a company the shareholders are the true owners, but the company is controlled by its managers. In principle, the general meeting of shareholders has sovereignty and the executive board of managers are the representatives of the general assembly. But in practice, the policy of the company is determined by management, who have a definite task and responsibility – determined by law or statute – and they are accountable to the general meeting of shareholders for their actions. This situation implies that management has an autonomous economic position of power. Because of its expertise and skill, management is able to manipulate the general assembly.[68] Modern industrial society is increasingly dominated by management instead of the owner. The power and enjoyment aspects of property have become divorced. Ownership is no longer decisive for power – authority is often separated from ownership.[69]

Grosheide[70] states that the modern concept of ownership is as pluriform as it is uniform. Ownership is uniform, because in theory we know only one type of ownership – an absolute, abstract and individual ownership. On the other hand ownership is pluriform because a distinction is made between the power to dispose of and the power to control or manage the property. As was pointed out above, the manager of property can often have a far greater and more direct influence on society as a whole than the owner (who has the power of disposal). This leads to a hierarchy in property relations. The position in the hierarchy is determined by the optimal exercise of all ownership functions in the social sphere. At the top of the hierarchy one finds ownership, which has the greatest impact on society. The private or individual owner of consumer goods is at the bottom of the hierarchy. The way in which the owner is perceived, the extent of the limitations placed on ownership and the extent of the power of disposal are determined by the position of the owner in the hierarchy.

Couwenberg[71] follows more or less the same line of thinking. He points out that the need for a distinction between the power to use and the power of disposal is recognised by neo-marxists, but they have also recognised that this distinction would not have an impact on the capitalist system. Couwenberg alleges that consensus has been reached by supporters of the socialist and liberal property models on the desirability of a plural ownership system. Forms of ownership in this system would include personal ownership, corporate ownership,

---

67 Grosheide 47 *et seq*; Couwenberg "Eigendomsrecht en eigendomsopvattingen" 38 *et seq*; Valkhoff "Nieuwe beschouwingen 34; Schut 331.

68 Couwenberg "Eigendomsrecht en eigendomsopvattingen" 40; Grosheide 48; Valkhoff *loc cit.*

69 Friedmann "Changes in property relations" in International Sociology Association *Transactions of the third world congress of sociology* (1956) 177; Valkhoff "Nieuwe beschouwingen" 35; Couwenberg *loc cit.*

70 Grosheide 47.

71 Couwenberg "Eigendomsrecht en eigendomsopvattingen" 38.

private individual foundations, mixed enterprises with a measure of government participation, and public ownership. Public interest is used as a criterion to determine the mutual relations between the different forms of ownership within the plural ownership system. When this is interpreted in a political sense, it gives rise to different approaches: the socialists place the emphasis on public ownership, while the liberals prefer to emphasise private ownership.

Another approach to the problem at hand is the suggestion that a clear definition and explanation of the different entitlements of the owner should be given.[72] The power to use, control or dispose of property should be defined with reference to the nature of the specific object it concerns. If this were done, many uncertainties concerning the content and extent of ownership would be clarified. Schut[73] points out that the function and purpose of ownership should be kept in mind when the entitlements of ownership are split up. The content of the entitlements differs when a thing is used to provide in personal needs or when it is used as an investment, when it is used for consumption or for commercial purposes, or when it has a personal or a public function, and specific provision should be made for each case. This would help to determine the limits of ownership and its protection.

A theme that runs throughout the discussion of the differentiation of ownership, is that the needs of society and the social context in which ownership functions should always be kept in mind when evaluating the way in which the owner exercises his right and the protection of that right.[74] Public interest determines the extent of the owner's rights, and when the owner exercises these rights, he should always take cognisance of the existing social circumstances and the effect that his actions would have on the community. The purpose of ownership is not only to satisfy personal needs, but also to satisfy the needs of society. Van den Bergh[75] criticises this approach. According to him the public interest never did and never should place a burden on the owner. An owner may exercise his rights as he sees fit within the limits of the law. If someone alleges that the owner has acted to the detriment of society, the onus of proof is on that person.

The arguments for a concept of pluriform ownership are based mainly on suggestions for a new definition of ownership where provision is made for different objects of ownership and a distinction is made with regard to the owner's power to use and enjoy those objects. The arguments are all formulated within the confines of the conceptual approach to property law, and amount to no more that attempts to formulate the definition of the concept of ownership in such a manner that it reflects and accommodates the social context within which ownership functions.

3 3 Balancing of private law interests

Another, related development in modern Dutch property law which also attempted to provide for the social function of ownership, concerns the weighing

---

72 Valkhoff "Nieuwe beschouwingen" 27; Meijs and Jansen *Eigendom tussen politiek en economie* (1989) 147 *et seq*; Schut 331; Van Neste 487.

73 Schut 331. Also see Van Goch 82 *et seq*; Van Neste 479 *et seq*.

74 Van Goch 86; Schut 331; Van der Neste 486; Meijs and Jansen "De verzorgingsstaat en het eigendomsrecht" 134; Couwenberg "Eigendomsrecht en eigendomsopvattingen" 39; Van Maanen *Eigendomschijnbewegingen* 151 *et seq*; Van der Ven 246. Van der Ven, however, states that the owner need not exercise his right exclusively in the public interest, because such an interpretation would frustrate the owner's freedom.

75 Van den Bergh "Schijnbewegingen" 335 and 337.

(balancing) of the rights and/or interests of the different parties concerned (*belangenafweging*).[76] The balancing of interests and rights can occur whenever the interests of other parties concerned are in conflict with the rights of the owner, and when the enforcement of the latter's rights will amount to abuse of law. In the case of the *grensoverschrijdende garage*[77] the court held that the limits to the rights of the owner are determined on the basis of a proportional weighing up of the interests of the owner against the interests of other parties concerned. This is a new development in the approach to ownership. Ownership has always been seen as the most comprehensive right a person could have with regard to a thing and that the whole world (all third parties) must respect this right.

Van Maanen[78] pleads for the implementation of the concept of *belangenafwegingen* in cases where the rights of the owner are in conflict with the interests of the unlawful *kraker* (squatter). He contends that the active use of this concept would lead to the equitable treatment of the *kraker*. This concept can be used to keep the absolute right of the owner in check and would ensure a socially equitable and justifiable concept of ownership.[79]

No provision was made for a *belangenafweging* in the definition of ownership in the NBW.[80] Meijers[81] points out that the owner has the freedom to use his property as he sees fit within the limits of the law. According to section 5:1:1 NBW the freedom of the owner is the rule, and limits to this freedom are seen as exceptions. Snijders,[82] the government commissioner, said during the debate on the new ownership section in the Dutch Parliament, that the limits to the right of the owner cannot be determined by the proportional weighing up of the owner's rights against the rights of others. De Gaay Fortman,[83] however, suggests that it would be in the owner's (and society's) best interest if the owner always keeps the public interest in mind when exercising his rights. This, however, is only a suggestion and there is no legal obligation to do so.

Slagter[84] agrees that the concept of *belangenafweging* cannot be used to determine the extent of the owner's right. According to Slagter, there is no place for a balancing of interest where it is clear that ownership has been infringed and that abuse of the right is out of the question, just as there is no place for a balancing of interests when it is certain that a breach of a competition clause has occurred. A balancing of interests can only occur in the answer to the question whether a claim for prohibition or injunction after an unlawful act can be replaced by a claim for damages, if according to section 6:168 NBW "such a cause of action should be allowed on grounds of important social interests".

---

76 Van den Bergh "Schijnbewegingen" 335 *et seq*; Slagter "Eigendom en pseudo-eigendom" 364; Van Maanen "Kraken als onrechtmatige daad" 16; Van Goch 83.

77 H R 1970-4-17, N J 1971, 89. Also see N J 1952, 114; Arrest Rechtbank Amsterdam, 9-3-1978 and Hof Amsterdam 1978-10-26, N J 1980 no 70 and 71; Arrest Rechtbank Amsterdam, 1981-7-7 Kort Geding 1981, no 95.

78 Van Maanen "Kraken als onrechtmatige daad" 16.

79 Also see Van Goch 84.

80 S 5:1:1 NBW.

81 Meijers *De algemene begrippen van het burgerlijk recht* 73. Also see Van den Bergh "Schijnbewegingen" 337.

82 Quoted by Van Zeben *Parlementaire geschiedenis van het nieuwe Burgerlijk wetboek – Boek 5 Zakelijke rechten* (1981) 30.

83 De Gaay Fortman in *Parl. Hand.*, 2e K., 1976-77, 4001.

84 Slagter "Eigendom en pseudo-eigendom" 364.

There seems to be general agreement in Dutch law that the concept of *belangenafweging* cannot be used to determine the extent of the owner's right. The owner has the freedom to use his property as he deems fit. No legal obligation is placed on the owner by the NBW to take public interest into account when he exercises his right. It does, however, seem strange that the Dutch government has not – in light of the principles governing the welfare state – used the new code to implement a more restricted approach to the concept of ownership.

It is interesting to note that the idea of the weighing up of interests was nevertheless introduced into Dutch private law. This idea is usually part of public law, in the sphere of constitutionally protected fundamental rights. The public interest is taken into account when the extent of the protection afforded by the specific right is determined. Although the application of this principle is criticised by Dutch authors, it is nevertheless interesting that the balancing of interests came into play where private-law rights were concerned. The drive amongst some Dutch authors to introduce a concept of pluriform ownership had some purpose in this regard. It drew attention to the fact that whenever ownership is interpreted, the focus should be on the interpretation within a new (social) context. The idea throughout is to interpret and apply private law in such a way that the same results that are reached via constitutional law in other jurisdictions (for example in Germany) are achieved, namely to create a balance between the private and public interest in the use and limitation of property.

3 4 Criticism against the idea of pluriform ownership

The "new definition" of ownership in the NBW does not provide for a pluriform concept or approach to ownership. The different pleas for a new differentiated concept of ownership were not heeded. Perhaps the reason for this is the fact that the recodification was not seen as a renewal, but as a technical improvement.[85]

The ownership clause in the NBW can be regarded as very conservative. With the confirmation of the Bartolian orthodoxy, any possibility of further development has been stymied. This decision is regarded as commendable by authors such as Slagter and Van den Bergh.[86] Van den Bergh points out that if a concept of pluriform ownership is to be introduced or implemented in Dutch law, this will have to be done by way of statute.

Van den Bergh[87] criticises the idea of pluriform ownership. According to him the idea has no or at least insufficient historical backing. He does not deny the fact that the society in which ownership functions today is different from the society of the nineteenth century, or that there are changes to the way in which

---

85 Van den Bergh "Schijnbewegingen" 338. According to Van Zeben 39 Zeelenberg remarked that "het nieuwe Burgerlijk wetboek [heeft] geen revolterende tendenties. Het gaat uit van dezelfde maatschappijvorm als die van 1838 en waarin wij nog leven, een maatschappijvorm met eigendom en vererving, met contractenrecht en ouderlijke macht. Het zou ook niet van een andere maatschappijvorm kunnen uitgaan, want die heeft zich niet, of nog niet voldoende gemanifesteerd". (The new code has no revolutionary tendencies. It starts out from the same type of society to the one that was in existence in 1838 and in which we still live, the type of society with ownership and inheritance, with the law of contract and parental control. It cannot start out from any other type of society, because that we do not have, or it has not been manifested sufficiently.)

86 Slagter "Eigendom en pseudo-eigendom 363; Van den Bergh "Schijnbewegingen" 327 *et seq.*

87 Van den Bergh *loc cit.*

ownership is perceived, but regards these changes as not of such a magnitude that the definition of ownership needs to be changed. He argues that the first definition of ownership, that of Bartolus de Saxoferrato,[88] and various subsequent definitions,[89] were formulated in such a way that they make provision for changes in society. The qualification that ownership must be exercised subject to the limits and constraints placed on it by law, ensures that the needs of society will always be taken into account when the extent of the ownership is determined. Van den Bergh therefore advocates the retention of the scientific, politically neutral definition of ownership. According to Meijers[90] it is virtually impossible to formulate a definition of ownership that determines the exact content and limits of ownership once and for all. It is better to formulate the definition in such a way that the content and limits, as required by a specific society, can be determined by statute or existing positive law. In this way the content and limits can be changed if society requires this. Van den Bergh[91] points out that the concept of ownership, like the right to use and dispose of property freely within the limits of the law, withstood much bigger challenges than those faced by it in the twentieth century, and there is therefore no need to formulate a different definition. It is possible that the purpose and function of a right can change without changing the form of the right.

Van den Bergh[92] also points out that the majority of proposals for a concept of pluriform ownership are politically inspired. He criticises this approach to law. According to him jurists should not translate political ideologies into law. The law, especially private law, should be and should remain apolitical.

Van Maanen's proposal for a definition of a concept of pluriform ownership is also criticised by Slagter.[93] He points out that Van Maanen's definition does not amount to the differentiation of the concept of ownership, but rather a recognition of the fact that the limitations with respect to ownership are pluriform. According to Kottenhagen[94] the differences in the quantitative limitations on ownership do not and should not influence the qualitative determination of ownership.

The process of scientification of property law[95] had the effect that the social function of property was negated. The movement in the 1970s and 1980s in the Netherlands was inspired by the desire to "reintroduce" the importance of the social function of property, but the different authors of this movement approached this question within the framework of conceptualism. They attempted to redefine ownership to reflect the importance of its social function. In order to effect radical change, a totally different approach is needed. This approach should take cognisance of the social function of property, but should not be dependent on the idea of the concept of ownership within a hierarchical system of rights.

---

88 Bartolus on *D* 41 2 17 1 no 4.

89 S 544 *Code Civil*; s 625 BW; s 439 *Wetboek Napoleon voor het Koningrijk Holland* (1809); s II 1 1 1 *Ontwerp- van der Linden* (1807); s I 8 26 *Pruisische Allegemeine Landrecht* (1794).

90 Meijers *Verzamelde privaatrechtelijke opstellen* (1955) 179 *et seq*.

91 Van den Bergh "Schijnbewegingen" 340.

92 *Idem* 339.

93 Slagter "Eigendom en pseudo-eigendom" 361.

94 Kottenhagen "Bookreview" 1990 *Kwartaalbericht Nieuw BW* 86 *et seq*.

95 Especially by the German Pandectists.

5 CONCLUSION

The concept of ownership within Dutch law is influenced by the strict division between private and public law. Ownership is guaranteed and protected by the Dutch Constitution, but because judicial review is not recognised by the Constitution, this has no bearing or influence on the private-law concept of ownership as set out in the civil code. Within the context of Dutch private law, ownership is limited to corporeal things and is characterised by absoluteness, exclusivity and individualism. The description of ownership in section 5:1:1 NBW does not embody a socially bound concept of ownership and places no positive duty on the owner to exercise his rights in such a way as to promote or serve the public interest. However, although the NBW does not contain any goal or obligation to serve the public interest, certain authors argue that such a goal can be inferred when one considers that the nature and extent of ownership is inevitably determined by the existing social and legal order in which it functions. Thus, although the NBW does not mention any specific social responsibility resting on the owner, the mere fact that the NBW is interpreted and applied within the context of the *verzorgingstaat* is regarded as an indication that ownership has a definite pro-social character.[96] It is said, therefore, that the characteristics of ownership – absoluteness, exclusivity and individualism – must be judged against this background. It is interesting to note that, notwithstanding the absence of a specific social responsibility on the owner in the civil code, ownership is nevertheless interpreted in such a way that a balance is struck between the protection of the individual owner's rights and the interests of the society in which these rights are exercised.

The public-law perception of *eigendom* differs from the private-law perception in that it is interpreted to mean "property", rather than ownership, and it thus includes much more than merely corporeal things, as is the case in private law. Although statutes are not subject to judicial review, the power of the state to determine the extent of the owner's rights is toned down by the fact that statutes are subject to judicial review in terms of international treaties. This provides the individual owner with the necessary protection against unfair interference by the state.

Since the 1970s the treatment and interpretation of ownership in the Dutch legal system has been characterised by continued attempts to subject the private-law tradition to social control. Within private law itself it is contended that ownership should be interpreted in the light of the goals of the welfare state and that the interests of society at large should form an integral part of the interpretation process when the nature and extent of ownership are determined. This view is strengthened by the fact that the code determines that the rules of unwritten law forms part of the *nisi lege prohibeatur* provision in section 5:1:1.

The endeavours of the functionalists to create a concept of pluriform ownership can be described as an attempt to subject the private law traditions to social control. Each and every different model proposed by the functionalists is aimed at incorporating the social interest in the concept of ownership. The very essence of the concept of pluriform ownership is the fact that ownership is differentiated according to the importance of the social interest for different objects of the right. The functionalists attempted to effect these changes by changing the private-law definition of ownership.

---

96 The limitations on ownership in the Netherlands prove that the nature and extent of ownership are determined socially.

The *belangenafweging* or balancing of interests when the extent of ownership is determined is yet another attempt to subject ownership to some form of social control. It was pointed out earlier that the balancing of interests usually forms part of public law and is applied to determine the extent of constitutionally protected fundamental rights, but that it was applied in a private-law context in the Netherlands.

The move towards recognition of a concept of pluriform ownership was not supported by all academics and lawyers in the Netherlands. Van den Bergh and Slagter, amongst others, criticised the functionalists. These authors recognise the fact that society has changed since Bartolus defined ownership as *dominium est ius de re corporali perfecte disponendi nisi lege prohibeatur*,[97] but they hold that Bartolus's definition (as it was received in the *Code Civil*, the BW and the NBW) withstood much bigger changes in the course of its development without having to change. They also hold that the description of ownership in the BW (and NBW) is wide and flexible enough to accommodate current demands. According to these authors the interests of society should be catered for in terms of the *nisi lege prohibeatur* provision, and that there is no need to redefine ownership in order to provide for the public interest.

The reason for the different attempts to subject the private-law tradition to social control lies in the fact that the Dutch Constitution does not provide for judicial review of statutes. Social control therefore cannot be effected through the Constitution, and lawyers had to devise a different method of ensuring that the public interest was served when the extent of different rights was determined. The route chosen by the functionalists to achieve this goal was to subject the private-law tradition to social control. Various attempts were therefore made to redefine ownership to ensure that the owner took cognisance of the public interest whenever he exercised his rights. As should be clear from the above, these attempts were not nearly as successful as they might have been if social control had been effected via the constitutional route, as was done in various other jurisdictions.

Een rechter wijzende jegens wetten dienen behoort te weten, ofte gunnende uitstel jegens recht, een landmeter doende onrechte meetinge, ende een beampte-schrijver maeckende een geschrift jeghens de wetten, alwaer het door onverstand, zijn geheuden in alle schade die iemand daer door komt te lijden.

Hugo de Groot Inleidinge tot de Hollandsche rechts-geleerdheid *3 19 11.*

97 Bartolus on *D* 41 2 17 1 no 4.

Familiar discourses of parenthood

Elsje Bonthuys
BA LLM
Senior Lecturer, University of the Witwatersrand

OPSOMMING

Bekende diskoerse oor ouerskap

In hierdie artikel ondersoek ek die diskoerse rondom geslagsrolle soos geartikuleer in hofsake wat met toesig van kinders by egskeiding handel. Ek identifiseer drie diskoerse wat sekere stereotipiese moeders- en vaderskapsrolle beskryf. Die stereotipes van die "Engel in die Huis" en die "Vader as Broodwinner" verteenwoordig die tradisionele ouerskapsideale wat tans geleidelik verdring word deur ideale van gelyke ouerskap. Alhoewel laasgenoemde op die oog af geslagsneutraal is en op wyd aanvaarde grondwetlike waardes van geslagsgelykheid steun, argumenteer ek dat hulle steeds gefundeer bly op, en uitdrukking gee aan onderliggende tradisionele geslagsrolverwagtinge. Voorts analiseer ek die impak van hierdie diskoerse op vroue as moeders en kom tot die gevolgtrekking dat stereotipiese diskoerse, deur die uitbeelding van goeie ouerskap, alle vroue meet aan standaarde waaraan hulle selde realisties kan voldoen. Deur hierdie proses funksioneer die regstelsel as 'n instrument waardeur samelewingskonsensus aangaande ideale geslagsrolle terselfdertyd geformuleer en gelegitimeer word.

1 INTRODUCTION: GENDERED DISCOURSES

Central to the function of and changes in the legal rules concerning custody, mediation, maintenance and domestic violence, are distinctive legal discourses relating to fathers, mothers, children and families. This article represents a closer examination of their contents and functions.

In post-structuralist terms, law can be conceptualised as a "language"[1]

> "a meaning-constituting system: that is, any system – strictly verbal or other – through which meaning is constructed and cultural practices organized and by which, accordingly, people represent and understand their world, including who they are and how they relate to others".

Ranging across languages we find the concept of "discourse" which[2]

> "is not a language or a text but a historically, socially, and institutionally specific structure of statements, terms, categories, and beliefs ... [M]eanings are locally contested within discursive 'fields of force' ... [T]he power to control a particular field resides in claims to (scientific) knowledge embodied not only in writing, but also in disciplinary and professional organizations, in institutions (hospitals, prisons, schools, factories), and in social relationships (doctor/patient, teacher/-students, employer/worker, parent/child, husband/wife). Discursive fields overlap,

1 Scott "Deconstructing equality-versus-difference: Or, the uses of poststructuralist theory for feminism" in Hirsch and Keller (eds) *Conflicts in feminism* (1990) 134 135.

2 Scott (1990) 135–136.

> influence, and compete with one another; they appeal to one another's 'truths' for authority and legitimation. These truths are assumed to be outside human invention, either already known and self-evident or discoverable through scientific inquiry".

I find these concepts useful in discussing the stereotypical images and ideals of parents which underlie all legal custody rules. Unlike "ideology", they do not suggest the existence of some essential truth about parenthood that is intentionally misrepresented, but acknowledge that "motherhood" and "fatherhood" are social and linguistic constructs.[3] They explain the ways in which constructions of parenthood are contested over time and context and facilitate a view of how multiple competing discourses range across disciplines and emanate from various sources.[4]

Discourses of ideal mothers and fathers claim to depict "innate" biological differences between men and women,[5] but represent instead a classical division on the basis of "gender",[6]

> "the term used to denote the social meaning of sex categorisation. Sex is determined through physical assessment; gender refers to the social consequences for the individual of this assessment. Gender stereotypes embody society's view of appropriate behaviour for women and men. These take the form of gender roles reinforced by law, through which individuals conform to their label and to the community's conventions".

Gender is a "total social fact" which resonates in religious, legal, moral, economic and aesthetic discourses.[7] Discourses of gender and parenthood in law are drawn from, and reflect those of, other academic disciplines and of popular culture. Fineman describes how images of poor, single, black mothers have spread from poverty to legal discourse, structuring legal images of deviant mothers as poor, black and single. This "propensity for rhetorical images associated with being female in our culture which are generated and perpetuated in one context, to spill over and define our understanding of women in other contexts", characterise "cross-over discourses".[8]

Discourses of gender and parenthood transcend the boundaries of legal systems. This explains how developments in custody law in South Africa mirror those in Canada, the United States and Britain. It also sheds light on the adoption, in divergent legal domains like family law, constitutional law and labour law, of the same gendered parental discourses.

Predictably, in the postmodernist context, we find that multiple discourses of motherhood exist alongside one another. Some emerge from and are hardly distinguishable from those of earlier times, while others are in direct competition with one another. Yet they all inform legal thinking about custody of children. We find that even within the same judgment, different and even contradictory

---

3 Scott (1990) 135–136.

4 Boyd "Some postmodernist challenges to feminist analyses of law, family and state: Ideology and discourse in child custody law" 1991 *Canadian Journal of Family Law* 79 93–96.

5 See the discussion of biology in para 4 3 below.

6 O'Donovan *Sexual dvisions in law* (1985) 62.

7 O'Donovan *Family law matters* (1993) 68.

8 Fineman *The neutered mother, the sexual family and other twentieth century tragedies* (1995) 102–103.

stereotypes of parenthood animate the text.[9] They are seldom expressly articulated. Instead, they can often be found by reading between the lines or by following the thread of reasoning to its (il)logical conclusion.

There are stereotypical discourses about working mothers as superwomen, about distant or neglectful mothers, about selfish mothers and caring fathers, lesbian mothers and homosexual fathers.[10] Yet, it is possible to identify certain "master" or dominant discourses of parenthood, which animate legal texts at specific times and in specific locations.

The law, on one hand, draws on "master discourses" to formulate rules which reward or deny custody. Amongst the important influences on legal stereotypes of parenting are psychological theories of child development.[11] For instance, theories like those of Freud and Bowlby influence stereotypes in legal rhetoric.[12] Social science theory also influences legal stereotypes of good parents and results of sociological studies are often used as justification for the formulation of specific legal rules.[13] On the other hand, this encoding in legal rules lends legitimacy to these same stereotypical discourses. People internalise legal norms of parental behaviour and modify their behaviour accordingly. In this way legal stereotypes influence other discourses and popular perceptions of good parenting.[14]

The dialectics are best illustrated by the cases involving the currently contested notion of rights of fathers of illegitimate children. Judges who are sympathetic to extending the rights of these fathers, draw upon psychological discourses of "needs of children for families" while fathers and mental health professionals argue in terms of their quasi-legal "rights" to access and custody.[15] In *Haskins v Wildgoose*,[16] for instance, the family counsellor based her opinion on "the right of the child to know his father". In the sense of both constructing and rewarding the differences between male and female parenting, the law is itself an agent of gender formation, or a "gendering strategy".[17]

The "gendering" function of legal discourse takes place on two levels.[18] Law constructs the ways in which women are different from men and thus, how mothering differs from fathering. It is in this sense that all women are defined as mothers or potential mothers and controlled through stereotypes of maternal femininity.[19] Simultaneously, however, there are also discourses about rogue mothers – the poor, the single, the deviant mothers who, by functioning as contrasts and warnings, illuminate and police conceptions of "good" motherhood:[20]

---

9 Kaplan *Motherhood and representation: The mother in popular culture and melodrama* (1992) 180–219. See the discussion of gendered parenthood in para 4.

10 Kaplan (1992) 209–210.

11 *Idem* 10.

12 *Idem* 27–56. See para 2 1.

13 See Fineman *The illusion of equality: The rhetoric and reality of divorce law reform* (1991) ch 7.

14 O'Donovan (1985) 59; Collier "'The art of living the married life': Representations of male heterosexuality in law" 1992 *Social and Legal Studies* 543.

15 See discussion in para 4 3.

16 1996 3 All SA 446 (T) 561g.

17 Smart "The woman of legal discourse" 1992 *Social and Legal Studies* 29 34–36.

18 *Idem* 34–37.

19 Kaplan (1992) 6.

20 Smart (1992) 39.

> "[T]he (legal) discursive construction of a type of Woman might refer to the female criminal, the prostitute, the unmarried mother, the infanticidal mother and so on. The discursive construction of Woman, on the other hand, invokes the idea of Woman in contradistinction to Man. This move always collapses or ignores differences within categories of Woman and Man in order to give weight to a supposedly prior differentiation – that between the sexes. Thus this prior differentiation acts as a foundationalist move on which other differentiations can be grounded."[21]

From this second "gendering" capacity of law – namely the distinction of various types of motherhood – emerges the "normalising" function of legal parenting discourses. All "types" of mother are not equally acceptable. Legal and other expert discourses construct "rules" which define the meaning of "good" motherhood and which reward those women who conform, by designating them as "good" mothers and, in the case of law, rewarding them with custody of children.[22]

Although the gendering and normalising functions of legal parenting discourses are most visible when judges award or refuse custody, they also structure interactions between lawyers and their clients, negotiations by lawyers on behalf of their clients, the behaviour of court personnel other than judges towards lawyers and litigants, and the reports of welfare officers and family advocates.[23] If lawyers know, for instance, that it is unlikely that homosexual parents would obtain custody of children, they would advise their clients accordingly. Homosexual parents who know of the dominant legal stereotypes would be less likely to claim custody of children.[24]

I will concentrate on the three prominent discourses which inform South African custody decisions. The first is an explicitly gendered discourse of idealised parenthood where motherhood and fatherhood are discrete and antithetical concepts. This conforms to the "gendering" function of law described above. The second "normalising" discourse of bad mothers and fathers represents a cautionary illustration of deviation from the gendered ideals of the angel in the house and the father as breadwinner. The third discourse, that of unisex parenthood, ostensibly erases the concept of gender from parenthood, yet, I argue, remains based on fundamentally gendered divisions of labour.

2 THE ANGEL IN THE HOUSE/THE ABSENT BREADWINNER

This dominant discourse of parenthood originated in early modern and Victorian religious and political thought. Although it is currently contested and being replaced by the discourse of equal parenthood which frequently accompanies it in the same judgments,[25] to a lesser extent it continues to be reflected in contemporary child custody discourse.[26] This discourse defines parenthood in terms

---

21 *Idem* 36.

22 Smart "Deconstructing motherhood" 37 46–47 in Silva (ed) *Good enough mothering? Feminist perspectives on lone mothering* (1996).

23 Shalleck "Child custody and child neglect: Parenthood in legal practice and culture" in Fineman and Karpin (eds) *Mothers in law: Feminist theory and the legal regulation of motherhood* (1995) 308.

24 Brophy *Law, state and the family: The politics of child custody* PhD University of Sheffield (1985) ch 8 found this to be the case for the lesbian mothers in her study.

25 See para 4 1 below.

26 Kaplan (1992) 24.

of a fundamental gendered dichotomy whereby motherhood is distinguished from and sharply opposed to fatherhood. Nevertheless, according to the logic of the discourse these opposite parental roles complement one another to constitute the ideal familial environment. The distinctions between motherhood and fatherhood translate into a gendered division of space, labour and character traits.

2 1 Division of labour

> "There is no one who quite takes the place of a child's mother. There is no person whose presence and natural affection can give a child the sense of security and comfort that a child derives from his own mother – an important factor in the normal psychological development of a healthy child."[27]

Ideally, a mother is responsible for the daily physical care of children – to feed, dress, supervise, clean and put them to bed. The case of *Tromp* describes her duties as encompassing "the companionship, care and ability to satisfy the day to day needs which a mother is able to give".[28] In the last century motherly duties have expanded to include the emotional and psychological welfare, and recently also the intellectual stimulation and development of children.[29]

> "Om te bepaal wie die geskikste ouer is om bewaring uit te oefen, is dit 'n belangrike oorweging welke ouer die kind nie alleen die meeste sekuriteit sal bied nie, maar ook die beste in staat sal wees om sy fisiese versorging te behartig en ook sal toesien dat hy op morele, kulturele en godsdienstige vlak behoorlik ontwikkel."[30]

The work of John Bowlby on the effects of institutionalisation on orphans in the Second World War has been widely used to substantiate the existence in children of "maternal deprivation" and thus the notion that mothers should remain with their children at all times.[31] Separation between mother and child is most often defined as involving an absent mother and an abandoned child. The mother's reasons for separating from the child are regarded as of less importance than the fact of her absence. Thus, mothers are punished for "abandoning" children even where the separation was caused by economic or physical necessity.[32] Together, these expectations make for "a regime of total attention to the child from an early age".[33]

An attribute of the good mother is that she is also a good wife and housekeeper.[34] In *Mohaud* the court remarked that, as a result of her infatuation with another man "the standards of the plaintiff in relation to her home and children sank to a deplorable depth".[35] It was also remarked that "[s]he had shown she

---

27 *Meyers v Leviton* 1949 1 SA 203 (T) 214.

28 1956 4 SA 738 (N) 746B. See also *French* 1971 4 SA 298 (W) 298H–299D; *Tabb* 1909 TPD 1033 1034.

29 Kaplan (1992) 27–56; Smart (1996) 44–47.

30 *Van Pletzen* 1998 4 SA 95 (O) 101B–C.

31 Dally *Inventing motherhood: The consequences of an ideal* (1982) 88; Smart (1996) 52; Bowlby *Attachment and loss: Volume 1: Attachment* ch 15–18; *Volume 2: Separation: Anxiety and anger* ch 2–3.

32 *Calitz* 1939 AD 56; Sanger "Mother from child: Perspectives on separation and abandonment" 27 28–29 in Fineman and Karpin (eds) (1995).

33 Kaplan (1992) 20.

34 Brophy *Law, state and the family* (1985) 230; Boyd "From gender specificity to gender neutrality: Ideologies in Canadian child custody law" in Smart and Sevenhuijsen (eds) *Child custody and the politics of gender* (1989) 126 134. See also *Van der Linde* 1996 3 SA 509 (O) 515E–F. See full quote at para 4 1.

35 *Mohaud* 1964 4 SA 348 (T) 352F–G.

was irked by the marriage bond".[36] Not only was custody of three young children awarded to the father, but the mother was denied access during school holidays because it "too often results in an interference with a custodian parent's rights and duties".[37]

Maternal care should, ideally, be provided personally and this imperative remains valid for women who also work outside the home.[38] Fathers may provide indirect childcare, by remarrying (under the assumption that the second wife will remain at home to care for children), getting relatives to care for their children or paying for childcare. Conversely, a woman who provides/pays another person to take physical care of her child, would not be fulfilling her stereotypical functions and would not be perceived as a good mother.[39]

In *Katzenellenbogen*[40] the father worked and rented two rooms in the house of a Mrs Chapman. Mrs Chapman's sister looked after the child. The mother also worked and occupied "a flat with a single living room". If she were to obtain custody, a nurse, described as "a native woman", would likewise care for the child. The court found, on the basis of superior arrangements for the child, that the father should have custody, despite the facts that the child was not yet a year old and that the character of the father was viewed unfavourably.[41] In *Cook* the court saw no problem with the fact that the father would send children to England, there to be cared for by their step-grandmother. That was regarded as adequate parental care.[42] Similarly, in *Tabb*[43] a child aged three was placed in the custody of her father whose maiden aunt was caring for the child rather than the mother who worked and would not be able to provide personal childcare. The childcare activities of substitutes are more likely to be ascribed to fathers than to mothers.[44]

The result is an intricate interaction between the fact that mothers have primary responsibility for children and the imperative of heterosexual dual-parent families:[45]

> "When a father remarries, judges may presume that, even if his wife is employed, an additional childcare provider will be in the home. When a mother remarries, however, no such assumption is made about the role her new husband will play in relation to the children. Thus, a woman's re-marriage may have little impact on the judicial balancing process."

This is illustrated in *Lourens*[46] and *Shawzin v Laufer*[47] where both parents had remarried. The courts did not compare the virtues of the fathers with those of the

---

36 350H.

37 355A. This runs contrary to the principle that courts should aim at keeping the relationship between the child and the non–custodian parent intact. Normally this would imply access for every second weekend together with one long and one short school vacation. See *Marais* 1960 1 SA 844 (C) 845C–849E and the authorities quoted there.

38 Boyd (1989) 133–135.

39 *Idem* 141. See also para 4 2.

40 1947 2 SA 528 (W).

41 544.

42 1937 AD 154.

43 1036.

44 Also *Märtens* 1991 4 SA 287 (T), *Van Rooyen* 1994 2 SA 325 (W) and *Bethell v Bland* 1996 2 SA 94 (W).

45 Polikoff "Why are mothers losing? A brief analysis of criteria used in child custody determinations" 1992 *Women's Rights Law Reporter* 175 181–182.

46 1946 WLD 309 311.

47 1968 4 SA 657 (A) 669D where the court accepts without criticism that "[b]ecause the stepfather is, during the day, mostly absent from the home, the boys will be mostly with

continued on next page

stepfathers, but instead inquired whether the stepmothers would be better parents than the biological mothers.[48] Where only the father remarries, or lives in a stable relationship with another woman, as in *Märtens*, the preference for dual parent households means that mothers stand a greater chance of losing custody.[49]

Although some courts accept that poor and working class mothers may need to work outside the home to support their children,[50] middle class career women are not regarded as ideal mothers. In *Mayer* the court regarded the mother's commitment to her career as an indication against her obtaining custody.[51] In *Lourens* the decision to award custody to the mother was actuated to a great extent by the fact that her remarriage would enable her to withdraw from the wage market to spend her time at home.[52]

Despite the criticism by the Appellate Division,[53] the attitude of Berman J towards the successful businesswoman in *Kritizinger* may be indicative of a certain strain of judicial opinion about such women. Whereas the husband was described as "a quiet and unassuming personality"[54] the court's animosity towards the wife stemmed not only from her "unfeminine" character,[55] but also from her success in a traditionally male sphere:[56]

> "Plaintiff, on the other hand, was – in the modern idiom – something else. At first sight and initially when examined by her counsel, she came across as an attractive, sweetly smiling, soft-spoken ordinary housewife in her late thirties. Such a description, however, completely belies the truth of the matter. For all the quietness of her demeanour and the sweet answers with which, as the Book of Proverbs has it, she turned away Mr *Viljoen's* wrath, she created – whilst in the witness box (and left when she stood down) – an impression of a formidable and resolute lady, who not for nothing had been chosen as Businesswoman of the Year on her appointment as managing director of Clicks, a very large and enterprising chain of retail stores; she is – in the best sense of the latter-day epithet – thatcheresque, a woman more to be admired than loved. She was certainly not without flaws in her make-up; she displayed that mixture of arrogance and gall best described in that Yiddish word, the admission of which into the English language has been sanctioned by the *Oxford English Dictionary* and which Mr *Viljoen* characterised as 'chutzpah', for she made it quite clear that she proposed going off with her lover and that, if her romance with him proved to be less starry-eyed than she hoped, she would be willing and prepared to return to the 'comfortable rut' of her marriage, sublimely indifferent to her husband's feelings or his response to what can only be described as a humiliating attitude. Nor was she above practising deceit or resorting to lying if by doing so she attained her purpose, for she deceived defendant for some considerable time in maintaining her

---

their mother, if they are allowed to go with her, while if they stay with their father, his absence from the home will cause them to be mostly with their stepmother".

48 See also *Myers v Leviton* 1949 1 SA 203 (T) 214.

49 *Supra*. See also *V v H* 1996 3 All SA 579 (SE) and the discussion in para 2 4 on the necessity of heterosexual marriage.

50 *Stapelberg* 1939 OPD 129 131–132; *Hawthorne* 1950 3 SA 299 (C).

51 7. See the full quote at para 2 3 below.

52 *Supra*.

53 *Kritzinger* 1989 1 SA 67 (A) esp 82E–83C.

54 1987 4 SA 85 (C) 91D.

55 "[P]laintiff with her dominant personality would have had children if she had insisted thereon and defendant would not have denied her her marital privileges had she expressed any real or urgent desire therefor" 92G–I.

56 91E–J.

> adulterous relationship with Mr Green. Plaintiff is no doubt a woman of outstanding ability, but – to resort once more to the Book of Proverbs – not one whose price is far above rubies."

The primary responsibility of fathers is to be breadwinners who support mothers and children financially.[57] Fathers are exempt from taking daily care of children and housekeeping, but they are expected to discipline children and to do household tasks that require traditional "male" characteristics like physical strength and emotional detachment.[58] In *McCall*, for instance, the court described the character of the father with obvious approbation: "Applicant is a man's man. He has a love of the outdoors and participates in manly activities. Rowan loves to join his father and identifies with him. In short, he idolises his father."[59]

2 2 Division of space

> "With his mother Rowan is in an all-female environment, his mother, his sister, his grandmother and to a lesser extent his aunt. The only male person with whom Rowan has come into contact in the maternal milieu is ... Chant, a friend of respondent, who is many years younger than she and who suffers from some form of brain damage. Far from being a male role model for Rowan he is a negative factor."[60]

The classical gendered division of labour for middle class Western families coincides with the liberal dichotomy between private and public spheres.[61] The private (domestic) sphere is governed by communitarian principles of affection and altruism, while the public sphere of business and politics is subject to individualism, competition and the pursuit of self-interest. "Public actors" are rational, neutral individuals and are treated as equals. While legal intrusion into the private sphere is discouraged, law regulates the public sphere.[62]

Women, as physical and emotional nurturers of children and as housekeepers, are associated with the spatial and emotional characteristics that govern the private sphere. Mothers and wives should not act like self-serving, competitive, independent individuals, nor can they look to the law or other "public" institutions to fulfil their needs or protect their rights in the private sphere.[63] Because of her domestic responsibilities, the stereotypical good mother will be confined, together with her children, to the private sphere of domesticity and isolated from the public domain of wage labour or political activity.[64]

Men, as breadwinners, belong primarily in the public sphere. In order to be good providers, "private" virtues like altruism become liabilities. Instead, men are expected to act as rational, unemotional, competitive individuals in the public sphere.[65] When they act as fathers and heads of households, however, the expectation is that they will conform to the principles of altruism of the private sphere

---

57 Collier *Masculinity, law and the family* (1995) 195–100.
58 *Idem* 194.
59 1994 3 SA 201 (C) 206D.
60 *McCall* 208G–H.
61 Brophy "Child care and the growth of power: The status of mothers in child custody disputes" in Brophy and Smart (eds) *Women-in-law* (1985) 97 100 107.
62 O'Donovan (1985) 2–20. At 3 she defines the private sphere as that which is unregulated by law.
63 O'Donovan (1985) 8–15.
64 *Idem* 157; Dally (1982) 106–122.
65 O'Donovan (1993) 65–75.

and act in the interests of the other members of the family, but this expectation is not extended to their functions in the public sphere.[66] Unlike women, whose "private" childrearing responsibilities and characteristics survive their engagement in waged labour, men leave their "private" responsibilities at home when they enter the public sphere.[67]

Their association with the "communal" private realm means that "good" mothers are perceived as adjuncts to their families. Assertions of autonomy or desires to achieve their own goals will be deplored as indications of selfishness. The same does not hold for fathers. Men, in their role as fathers, are expected to act as autonomous individuals, even though their actions are supposed ultimately to benefit other members of their families. This structures an almost impossible position for women. Any insistence on protecting or expanding her "rights" as an individual will clash with the values like altruism and self-sacrifice which are associated with ideal motherhood. Fathers, however, do not labour under such constraints and assertions of the rights of fathers have been met with great sympathy in recent times.[68] While fathers are associated with the concrete domains of power, of the verbal and the intellectual, ideal mothers represent that total emotional concord and devotion of infant and adult fantasy:[69]

> "Women are seen as specialists in the emotional life, whereas men specialise in autonomy and control."

The discursive identification of the mother-child unit with the private domestic sphere justifies and underlies custody rules like the tender years doctrine and the maternal preference.[70] However, in order to satisfy gender imperatives, boys must leave the "private" pre-verbal physical and mental space inhabited by their mothers. Their need to enter the rational, verbal "public" sphere of the father is justified by the Freudian and neo-Freudian psychoanalytic discourse of "individuation" whereby the male child relinquishes the close, emotional maternal attachment, to identify with the powerful, public world of the father. The ideal mother should accept the inevitable oedipal process and release the male child from her control. "Normal" girls should develop from an attachment to the mother to a desire for the father -- ultimately to be fulfilled by having children of their own.[71] This explains why the "normal" woman should devote herself totally to the needs of her child while it is still young, but subsequently sacrifice this strong attachment to allow the child to associate with the realm of the father.[72]

This analysis clarifies the insistence by courts that boys at the age of puberty need the "discipline" and influence of their fathers:[73]

---

66 Collier (1995) 193.
67 O'Donovan (1985) 167–173.
68 Boyd (1989) 142–143; Conover and Gray *Feminism and the new right: Conflict over the American family* (1983) 2–4; Smart "Power and the politics of child custody" in Smart and Sevenhuijsen (eds) *Child custody* (1989) 23.
69 O'Donovan (1993) 76.
70 Kaplan (1992) 46; Sheppard "Unspoken premises in custody litigation" 1987 *Women's Rights Law Reporter* 229 232.
71 Kaplan (1992) 27–56; Freud *On sexuality: Three essays on the theory of sexuality and other works* (Strachey transl) (1977) 116–119 315–340.
72 Kaplan (1992) 46.
73 *McCall* 206I–J.

> "Respondent is a good woman and a good mother . . . What she offers Rowan is the loving, nurturing rearing of a child which is the traditional and natural role of a mother and respondent has done it well. I believe, however, that Rowan has now reached the stage of his development, at the doorstep of puberty, where his need for the discipline of a father is greater than his need for the protectiveness of a mother."

In *Bailey*, where the question was whether a custodian mother should be allowed to remove her children to England, one of the factors which the court took into account was the need of the eleven-year-old boy for male guidance and companionship.[74] In *Märtens* the court acknowledged that pubescent twin girls may need the influence of their mother, but regarded the father's cohabitant as an adequate substitute.[75] In *Van der Linde*, concerning custody of a nine-year-old girl, the need of the daughter for her mother was outweighed by a reluctance to separate siblings from one another and the assurance that a man can be as good a mother as a woman.[76] The need to separate from the private sphere represented by the mother is apparently more urgent for pubescent boys than for girls.

2 3 Personality traits

> "Mothering presupposes the ability to show unconditional love without necessarily expecting anything in return."[77]

Characteristics of the stereotypical mother are endless patience, the ability to repeat boring tasks, warmth, empathy, understanding and a capacity for self-sacrifice.[78] The capacity for motherhood is a central defining characteristic of all women who are encouraged to view themselves in this way:[79]

> "Motherhood is central to the social and legal definition of woman. A woman who does not have children will still, in the context of law and legal institutions, be treated as though she is (or may become) a mother."

The good father's primary function as breadwinner limits the extent of physical and emotional interaction between men and their families.[80] Good "fatherhood" represents material possessions, rationality, competitiveness, and self-seeking behaviour while emotional, dependent and irrational behaviour is discouraged. Fatherhood "is based on an association of masculinity with control; autonomy, mastery of oneself and one's environment".[81] This links fatherhood with the role of family disciplinarian who controls children[82] and wives.[83] As the "private" face of that archetypal legal subject, the reasonable man, the good father is a typical white middle-class man, holding the views and values associated with this group.[84]

---

74 1979 3 SA 128 (A) 132A. See also *Manning* 1975 4 SA 659 (T) 662E–F.
75 293G.
76 514B–515I.
77 *Van der Linde* 515D. See also *McCall supra*.
78 O'Donovan (1993) 75–79.
79 Preface to Fineman and Karpin *Mothers in law* 1995 xii; Richardson *Women, motherhood and childrearing* (1993) 62–87; Kline "Complicating the ideology of motherhood: Child welfare law and first nation women" in Fineman and Karpin *Mothers in law* (1995) 118 119.
80 Collier (1995) 185–195.
81 O'Donovan (1993) 69.
82 See the quote from *McCall* in para 2 2 2 and the other cases discussed there.
83 See Brinig and Buckley's "'Monitoring theory' of joint custody and maintenance" in "Joint custody: Bonding and monitoring theories" 1998 *Indiana LJ* 393.
84 Collier (1995) 224–226.

Aggressive behaviour and domestic violence is excused in fathers, as in *McCall*, where the quick temper of the father was described as follows:[85]

> "Much of applicant's loss of temper was directed at respondent, particularly during the marriage, and was obviously a result of the strife that existed between them. Occasionally this anger has been directed at Rowan ... These did nothing to impair the relationship between Rowan and his father and I do not regard applicant's temper as an impediment to his suitability as Rowan's custodian. The same may be said of his alleged dishonesty ... Applicant was fighting for his child. It is a cause in which he believes passionately. What he did was human and I do not regard this as a blot on his character such as to diminish his claim to acceptability as a custodian parent."

The assertion in *Fletcher* that "the question of innocence comes into account only when it is not clear what is best for the children"[86] may have created the impression that the sexual activities of parents are irrelevant to custody decisions. However, images of good motherhood remained based on the norm of female sexual passivity and extra-marital sexual behaviour was taken to prove the general moral degeneracy or emotional instability of mothers.[87]

In *Mohaud* the mother of young children had committed adultery. The court indicated that the fact of her guilt was not the reason for awarding custody to the father, as much as "the circumstances in which it took place and in particular the fact and nature of the disclosures made to the Bantu maids".[88] Nevertheless, the character traits indicated by her adultery, convinced the court to award custody to the father:[89]

> "The plaintiff is obsessed with sexual desires. One might have considered her pre-marital adventures as resulting from immaturity but the pattern seems to be persisting ... [T]he fact of being highly sexed is not to be considered as a criticism of the plaintiff but it is in her case coupled with a disregard for the *norms of natural morality* ... The inference to be drawn is that the plaintiff is a person so immature in character, so emotionally unstable, so lacking in discretion, so confused in her moral ideas that despite the youthfulness of the children it would not be in their interests to entrust their custody to her if there exists a better choice."

In *Mayer* the court listed the following factors which persuaded it that it would be in the interests of a three-year old to remain in his father's custody:[90]

> "(a) the mother had been married on one previous occasion and had had intimate physical relations with two other men on a permanent or semi-permanent basis, the mother being about 27 years of age;
>
> (b) the father was a perhaps stodgy, unimaginative but steady and stable person;
>
> (c) the mother, on all the evidence, had a basically unstable personality and although she appeared to have become more stable as she grew older she was still, according to the psychiatric evidence, seeking very seriously to find a basically stable emotional life;

85 1994 206E–I. Also *Katzenellenbogen* 544 where the "harsh and vindictive" character of the father was not seen as an impediment to his devotion to his child.

86 1948 1 SA 130 (A) 134. The sexual guilt of the mother was taken into account in this case, because it was not clear to the court which arrangements would be in the best interests of the children. See the discussion in para 3 2 3.

87 Brophy "Child care and the growth of power" 102–105; Brophy *Law, state and the family* 112–114.

88 353A.

89 352H and 353B. My emphasis.

90 1974 1 PH B4 7 (C) 7.

(d) the mother had for a period of three months agreed that the father should have the custody of the child;

(e) the mother was a successful and dedicated career woman;

(f) the father had arranged to have his mother, i.e. the child's grandmother, to come out from Germany to live with him in order to assist in looking after the child."

Clearly, the sexual activities of the mother contributed significantly to the finding that she had an unstable character while in *Slabbert* the fact of the mother's extra-marital relationship and the uncertainty about whether this relationship would end in marriage, were regarded as potentially detrimental to the welfare of her children.[91]

The same does not apply to fathers. In *Märtens*, the father, who was granted custody of two teenage girls, was living with a woman to whom he was not married and with whom he had had a child. This was not mentioned as reflecting negatively on his character.[92] In *Horsford v De Jager*, where the father's adultery caused the court to grant custody to the mother, it was mentioned several times that his sexual activities involved "native women" and took place in the family home.[93] It seems that the race of his sexual partners was regarded as more important than the fact of his adultery.

The sexual double standard is integral to the discourse of male normality, which is founded on (hetero)sexual virility.[94] This is confirmed by the court's assesment in *Habib* of the mother's proposed post-divorced accommodation with her cousin and the cousin's husband:[95]

> "The Petersens are a young couple who have their own lives to live and I agree with Mr *Weinkove*, that having a young, attractive woman like defendant living with them could easily lead to tension."

Apart from decisions dealing with mothers' lesbian sexual activities,[96] contemporary custody cases no longer focus on the extra-marital sexual behaviour of divorcing spouses. However, fault remains relevant to the division of assets upon divorce and a woman's sexual infidelity may indirectly bear upon the conditions under which she must exercise custody of children.[97]

2 4 Heterosexual marriage as necessary context

To be valued, parenting, and especially mothering, should occur within the dual parent, heterosexual, monogamous family. Despite legal reforms and changing images of ideal parents, the fundamental value of the heterosexual, nuclear family is continuously affirmed.[98]

> "One of the central assumptions has been that the concept of family is dependent upon a relationship between man and woman, legally privileged. Formal marriage is presented as the central most important relational component of the traditional definition of family. When this relationship is ended, as through divorce, we speak

91 1977 2 PH B8 13 13.
92 *Supra*.
93 1959 2 SA 152 (N) 152H, 155A, 155H.
94 Collier (1995) 162–168. See quote in para 3 1 below.
95 1978 1 PH B4 7 (C) 9.
96 *Van Rooyen* and the discussion in para 3 2.
97 *Beaumont* 1987 1 SA 967 (A); *Archer* 1989 2 SA 885 (E).
98 Fineman (1995) ch 6.

> of the 'broken' family. An alternative, equally valid perception, such as that the basic family unit is constituted by mother and child, has never effectively emerged. A woman and her children are considered incomplete, a deviant family – one of the 'single parent' families identified as sources of pathology, generators of problems such as poverty or crime."[99]

These assumptions also operate in South African law and were clearly articulated in the early case of *Calitz* where the court refused custody of a toddler to a mother who had deserted her husband. The court bluntly stated:[100]

> "As the learned Judge found that she had no just ground for leaving her husband, her duty is to return to him and look after her child under his roof."

In *Slabbert* the character of the mother's companion and the uncertain prospects of marriage convinced the court to award custody of young children to their father.[101] In *S v S* the court refused access to a father of an illegitimate child, taking into account the need to protect the stability of a newly established family unit,[102] while the refusal of access to the biological father in *V v H* was justified by the fact that the child was already part of a "happy family unit", created by her mother's marriage and would therefore be traumatised by having to establish a relationship with her biological father.[103] The protection of existing and future heterosexual family units also featured strongly in *Van Rooyen*.[104]

3 THE DEVIANT MOTHER/THE INDOLENT FATHER

Discourses of "good" motherhood and fatherhood are fundamentally premised on the exclusion of "other" mothers and fathers who fail to reach the standards set by lawyers and mental health professionals.[105] They are often those mothers and fathers who transgress the firmly established lines between the gendered functions of mothering and fathering. Women who take an active role in the "public" sphere, for instance, would not be considered "good enough" as mothers.[106] Images of bad parents act as cautionary tales to warn and control all parents and to discourage certain "undesirable" groups of people from parenthood.[107]

3 1 Bad fathers

> "What are these errant fathers like? Well, they are not like us."[108]

Since the "family man" is modelled on the idealised masculinities of the bourgeoisie, attributes that cannot be reconciled with white middle-class values of control, self-discipline and rationality will be regarded as detrimental in fathers.[109]

---

99 Fineman (1991) 11.
100 64. See also *Mohaud supra* as discussed in para 2 3 1.
101 13.
102 1993 2 SA 200 (W) 210C.
103 590b–c.
104 *Supra*. See the discussion in para 3 2.
105 Smart (1992) 39; Smart (1996) 47.
106 See the discussion of working women in para 2 2.
107 Kline (1995) 121.
108 Collier (1995) 231.
109 *Idem* 215–251.

> "Ultimately, legal representations of masculinity, male sexuality and fatherhood articulate a male subjectivity which remains premised on the coherent, unified, univocal and rational essence of liberal humanism. It is a masculinity which confines emotion and vulnerability to (heterosexual) familial relations, which valorises calculative rationality and a competitive economic individualism which is in the end – as celebrated in longer working hours, material gain and the striving for economic 'success' – destructive of men's relationships with women, other men and the children they so rarely see."[110]

Contrasting with the good father as an absent, financial provider, bad fathers are those who do not provide financially, but squander the family resources on drinking, gambling, or other unworthy pursuits or who, through their own fault, fail to provide. In *Van Aswegen* sole custody and guardianship was awarded to a woman whose husband had deserted her when she was pregnant while the court in *S v S* obviously disapproved of a man who had abandoned his pregnant[111] girlfriend, who denied paternity and failed to pay maintenance.[112]

"Outlaw fathers" are those who fail to conform with social norms and standards. Thus, in *Potgieter* and *Van den Berg*[113] fathers who abused alcohol, who threatened and attacked their wives, kidnapped their children and who showed disrespect for the law were not only denied custody, but also access until such time as they should mend their ways. In *Van Vuuren* it was held that the family advocate should have investigated a case where the father, who was accused of being drunk every day and of assaulting his wife, was given unsupervised access to children during school vacations.[114] A proselytising Jehovah's Witness was denied access to his children in *Dunscombe v Willies* because his religious beliefs conflicted with established norms in the sector of society in which the children were raised and would cause friction with the authorities in their schools.[115]

Another kind of father who is regarded as deviant is the homosexual father. Fatherhood functions from within the paradigm of virile masculinity, but this masculinity should be directed towards women. Thus, men whose sexuality is directed towards other men are regarded as perverse, dangerous and bad fathers,[116] as were men whose sexuality was directed across "the colour bar".[117]

However, the father in *Märtens*,[118] who had abducted his children despite several court orders, but who was affluent, was not sanctioned for his "kidnapping" by being deprived of custody. Despite his contempt for the law, his bad relationship with his other two children and the fact that he was living with a woman to whom he was not married, the father retained custody because the court was reluctant to disturb the *status quo*. The court regarded with approbation the fact that the father's girlfriend had close emotional ties to the children and the lifestyle with which he provided them. Characteristics consistent with competitive middle-class male values, like his "manipulative behaviour, did not necessarily make him an unsuitable custodian".[119]

---

110 *Idem* 264.
111 1954 2 PH B86 (C).
112 1993 202I–203B.
113 1943 CPD 462 and 1959 4 SA 259 (W) respectively.
114 1993 1 SA 163 (T).
115 1982 3 SA 311 (D).
116 O'Donovan (1993) 82.
117 *Horsford v De Jager supra*.
118 *Supra*. See esp 293E–G.
119 293F.

The discourse of dangerous fathers diverts attention from the ways in which "normal" fathers are violent, absent, emotionally or physically abusive. By concentrating on the bad father, the idea that the "normal" father is necessarily a good father is implicitly accepted, but eliminated from the debate.[120] When dealing with violent behaviour by "normal" fathers, the tendency is to minimise the impact of the violence on the children or the wife, or even, indirectly, to blame the wife or the "stressful relationship" on this kind of behaviour. Aggression towards wives and children in itself seems not to amount to bad fatherhood. It is only when it occurs in the context of alcohol abuse, unemployment or a failure to provide that courts will regard it as an indication of parental unfitness. This confirms the argument that the central defining feature of good fatherhood is the ability and willingness to provide financially for children.

3 2 Bad mothers: The cautionary tale of lesbian mothers

The bad mother is a powerful symbol of danger in psychoanalytical discourse.[121] She either abandons her children,[122] or she "devours" them like the mother in *Kougianos*:[123]

> "It emerged not only from the testimony of the psychologists but from her own evidence that she is dominated by a concern for the children which borders on the obsessive and that this has manifested itself in a fixed and implacable determination to exclude the Respondent from any contact with them at any cost and by any means."

Bad mothers trespass on "male" territory by working and by exhibiting "male" character traits like independence. Bad mothers do not conform to the white, middle-class Western standards, which underlie discourses of good motherhood.[124]

Not many South African cases involving homosexual parents are reported, since they are more likely to settle the matter than to run the risk of losing custody and access. The fact that there are only three reported decisions does therefore not necessarily reflect the percentage of lesbian mothers who get divorced. The cases do, however, reflect the trends identified in legal systems in which such cases are more frequently reported.

Apart from an issue of discrimination on the basis of sexual orientation, conventional discourses about custody by lesbian mothers, reflect and illuminate judicial perceptions of motherhood in general and "outlaw" motherhood in particular.[125] They are "calibrations of good motherhood", acting as a warning of the consequences of deviance to all mothers.[126]

According to Brophy's study, lesbian mothers will be discouraged from seeking custody or access by their legal advisors who assume that their chances of obtaining custody or access are slim, or by their own perceptions of the state of

---

120 Collier (1995) 231–232. See also 242–248 for a discussion of how this obscures the sexual abuse of children.

121 Kaplan (1992) 46; Fineman (1995) 71–75.

122 See the discussion of Bowlby's theories in para 2 2 1 above.

123 1995 1 PH B4 11 (D) 11. The mother's intransigence had the anomalous consequence of causing the court to refuse access to the father.

124 Kaplan (1992) 9; Richardson (1993) 62–87; Kline (1995) 121.

125 Brophy *Law, state and the family* 133.

126 Smart (1996) 46.

the law.[127] If mothers were adamant that they wanted custody, lawyers suggested that they reduce the visible manifestations of their sexuality by moving out, when they were living with partners, or increasing the "motherliness" of their appearance and behaviour.[128] In *Van Rooyen* counsel for the mother volunteered on behalf of his client that there would be no demonstrative sexual behaviour by the mother and her partner in the presence of the children.[129] This, together with the fact that social workers and psychologists concentrate almost exclusively on the sexual behaviour of lesbian mothers,[130] indicates the importance of sexual passivity in the construction of motherhood stereotypes.[131]

Other factors, like the residential *status quo* and the abilities of the two parents to interact with their children, are secondary to an overriding judicial interest in the woman's sexual activity – which borders on the voyeuristic in its detailed imaginings of the mothers' "exotic" sexual activities.[132] In *Van Rooyen* this is expressed in statements which equate homosexuality with transvestism, use of pornography and child molestation:[133]

> "The wrong signals are given when, if that is true, the applicant wears male underclothes, apart from male apparel."
>
> "The applicant is ordered to take all reasonable steps and do all things necessary in order to prevent the children being exposed to lesbianism or to have access to all videos, photographs, articles and personal clothing, including male clothing, which may connote homosexuality or approval of lesbianism."[134]

One of the particularly troublesome aspects of lesbian mothers seems to be the challenge they represent to the "normal" heterosexual family environment.[135] In *Marais* the court mentioned a certain Ms Du Toit who was regarded by the court *a quo* as the real reason why the mother had deserted her husband and who had lived with the mother for some time. This probably indicates a lesbian relationship. The court had the following to say about an objection to access based on her presence in the mother's house: "This objection may have been sound, had it not been for several discounting considerations."[136] The most important consideration was that the relationship between Ms Du Toit and the mother had been ended. The inference is that had Ms Du Toit still been living with the mother, the result may have been similar to that in *Van Rooyen* where the mother's lesbian relationship was used to justify restrictions on her access to her children.[137]

The fear of "confused signals" at the vital period of puberty in *Van Rooyen* is ultimately based on an assumption that the mother's homosexual living arrangements might influence the children to adopt such a sexual orientation – thus

---

127 Brophy *Law, state and the family* ch 8.
128 *Idem* 202.
129 330C–D.
130 See *Van Rooyen* 1994 328B–G where the psychologists focused on the possible impact of lesbian behaviour of the mother on the children and insisted on the court taking "adequate safeguards" against the children's receiving "confusing signals".
131 Brophy *Law, state and the family* 204–215.
132 *Idem* 153. See eg *Mohaud* 352H; *Slabbert* 1977 13.
133 330B.
134 332D.
135 Brophy *Law, state and the family* 170–174. See para 2 4.
136 1960 1 SA 844 (C) 850G.
137 328H–330B.

undermining the nuclear family of the future.[138] The children in this case were a boy aged eleven and a girl aged nine. The court is plainly more concerned about the "normal" development of the boy, even though it could be "argued"[139] that the daughter is more likely to adopt the mother's outlaw sexual orientation. This concern is ostensibly justified by reasoning that the boy is closer to puberty than the girl, but it seems more in keeping with the general imperative to maintain male (hetero)sexual identity and the need to remove pubescent boys from the influence of their mothers.[140]

> "With weekends one may well argue that if the child is with the father who introduces the child to normal sexuality or guides *him in the correct way* for 29 days of the month, a night with their mother, two nights with their mother, will do no harm. In fact the contrasts will serve to underscore what the father's example rightly is."[141]
>
> "The signals are given by the fact that the children know that, contrary to what they should be taught as normal or what they should be guided to as to be correct (that it is male and female who share a bed), one finds two females doing this and not obviously for reasons of lack of space on a particular night but as a matter of preference and a matter of mutual emotional attachment. That signal comes from the fact that they know the bedroom is shared."[142]

Ideal motherhood should be situated within a heterosexual, nuclear family based on sexual relations between two adults of opposite sexes.[143]

> "The fact is that many people, at least as right-thinking as the applicant, would frown upon the idea of calling the relationship created on the basis of two females a 'family'."[144]

The discourse surrounding lesbian mothers acts as a warning to all women of the consequences of motherhood which challenges the heterosexual married, or at least partnered, imperative.[145] It resonates with the depiction of unmarried mothers as selfish, lazy women who have children in order to claim welfare payments or who cannot control their sexuality. They are blamed for diverse social problems from poverty, to joblessness, to drug abuse. Divorced mothers are sometimes viewed as depriving their children of fathers, and thus of putting their own selfish desires before the needs of children. Conversely, a woman who voluntarily gave custody of her illegitimate child to its father was described in

---

138 For a discussion of the different perspectives of courts in this regard see Robson "Mother: The legal domestication of lesbian experience" in Fineman and Karpin (eds) *Mothers in law* (1995) 103 106. See also Brophy *Law, state and the family* ch 7.

139 If the argument that sexual orientation is the result of socialisation is accepted, one could say that the example of the mother's sexuality would have a greater impact on the girl than the boy, who is exposed to the father as heterosexual model.

140 See *Bailey* 132A; *McCall* 206I–J. See also the discussion in para 2 2. This links with the heterosexual imperative in the construction of the ideal man of law in para 3 1.

141 *Van Rooyen* 330J–331B. My emphasis.

142 329I–330A.

143 Fineman (1995) 147 adds that even were lesbian households legally accepted as families, this would not really challenge the established notions about families, but "reflect the dyadic nature of the old (sexual) family story, updating and modifying it to accommodate new family 'alternatives' while retaining the centrality of sexual affiliation to the organisation and understanding of intimacy".

144 *Van Rooyen* 326I–J.

145 Fineman (1995) 101.

Coetzee v Singh as adopting a "particularly responsible attitude".[146] Women who refuse to share custody, or who refuse access are easily branded as liars who fabricate claims of paternal child abuse and who encourage children to fabricate such claims, potentially dangerous and neglectful of the needs of their children.[147] In addition, single mothers have been cast as more likely to abuse their children sexually and physically than mothers in "normal" nuclear families. Single motherhood *per se* is more and more often associated with child abuse or neglect, or, conversely, child abuse is being redefined to include single motherhood as an incidence of abuse.[148] This discourse also emerges in the debate about the rights of unmarried fathers.

Political activity and especially feminist or lesbian-rights political activity is not welcomed in lesbian mothers.[149] It will be viewed as man-hating, unstable, "unfeminine" and ultimately indicating unfitness to raise children.[150] It indicates a reluctance on the part of mothers to sacrifice their own views and political commitments to the "interests of their children", clashing with the image of the ideal mother as self-sacrificing and willing to devote herself totally to her children. This discourse was unsuccessfully utilised by Professor Robbertze in *V v V*.[151]

Another feature of custody cases involving lesbian mothers, which reflects the experiences of "normal" women seeking custody, is the fact that the focus of the legal investigation remains on the mother. The character of the father, his relationship with his children, his sexual activities, remain unscrutinised.[152] In *Van Rooyen*, allegations by the family advocate that the father was aggressive and overly rigid were dismissed while the court did not question his sudden wish to limit the mother's access five years after the divorce but immediately after his second marriage.[153] Instead, mothers as *sexual beings* are in the spotlight. They are viewed as sick, abnormal, and unhappy while lesbian relationships, in contrast with "normal" sexual unions, are seen as inherently unstable.[154] In *Van Rooyen*, the ostensible focus on the "character" of the mother was limited to judicial fantasies about her sexual activity and underwear. It excluded her personality, her work, or her relations with her children as if her sexual orientation conclusively defined the person.[155]

As the discourse of bad fathers obscures the dangers inherent in "normal" fatherhood, stereotypes of bad mothers obscure the ways in which motherhood can be dangerous to women. The focus remains on the effects which mothers can have on children, ignoring the way in which motherhood can render women physically and economically dependent by assigning primary child-care responsibilities to them.[156]

---

146 1996 3 SA 153 (D) 154A.
147 Fineman (1995) ch 5.
148 *Idem* 122–123.
149 Brophy *Law, state and the family* 204–215.
150 *Idem* 181.
151 1998 4 A 169 (C) 182F–G.
152 Brophy *Law, state and the family* 224–227.
153 327A–B.
154 Brophy *Law, state and the family* 178.
155 See quotes at fns 133 and 134. See also *Slabbert supra*.
156 Fineman (1995) 71–75.

4 UNISEX PARENTS

4 1 Erasing gender

An emerging and increasingly important discourse relates to "modern" equal parenthood. This accompanies and justifies the developing legal rules favouring joint custody and increased rights for unmarried fathers whilst drawing on current mental health discourses relating to children. The central feature of this discourse is the ostensible erasure of gender-specific parental roles in favour of a focus on the centrality of the rights of children.[157]

In line with this process, the latest case dealing with custody rights of a lesbian mother, *V v V*, strongly disapproves of the reasoning in *Van Rooyen*. The mother, who was living with a female partner, wanted sole custody, but indicated that she would be prepared to accept joint custody of her children. On the basis that her lifestyle would harm the children, the father applied for custody with severely constrained rights of access to the mother. Influenced by the constitutional prohibition of discrimination on the basis of sexual orientation, the court found:[158]

> "In law, it is therefore wrong to describe a homosexual orientation as abnormal."

Because there is nothing inherently wrong with a lesbian sexual orientation, the risk of harm to the children is outweighed by the harm which they would suffer if their mother were only allowed access to them in their father's home:[159]

> "That image of a mother only being permitted to come to visit them because of her lifestyle would be unfair to her and also to her children. They would grow up with the feeling that their mother was being punished, not for anything which she had done to them, but because of the risk that her lifestyle might influence them in the wrong direction. What better protection against that can there be than continuing to live with both parents and judging for themselves whether the lifestyle of the father or the mother was more or less harmful than the other?"

This decision considerably erodes the imperative of the heterosexual family unit as prerequisite for good parenthood. It is reinforced by decisions in *Langemaat v Minister of Safety and Security* in which the court extended the duty of support from spouses to cohabiting lesbian partners,[160] and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* where the immigration rules relating to spouses were extended also to gay and lesbian partners.[161] These decisions are to be welcomed.

The second element of discourses which erase gender is that they ostensibly dispense with gender-based differentiation between the roles of the parents. Men are seen as taking on as much of the daily physical and emotional care of children as women have traditionally done and as having strong bonds of affection with their children.[162] In the recent case of *Van der Linde* this reasoning, as well as a reluctance to separate siblings,[163] justified the refusal to change an original

---

157 Used eg in *B v S* 1995 3 SA 571 (A) 582A; *Chodree v Vally* 1996 2 SA 28 (W) 32F–H; the family advocate's submission in *Bethell v Bland* 206E.

158 189B.

159 192C–E.

160 1998 4 BCLR 444 (T) 448I–449F.

161 1999 3 SA 173 (C).

162 Brophy *Law, state and the family* 105–107; Smart (1989) 10 17.

163 1996 514B–C. The court remarked that the children did not have much contact with each other and that the bond between them was not obvious, but nevertheless regarded it as being very important.

custody order in favour of the father to award custody of a girl of nine to her mother, despite a longing of the girl to live with her mother.[164]

> "Hedendaags is bemoedering ook deel van die man se wese. Die begrip 'bemoedering' is aanduidend van 'n funksie eerder as 'n *persona* en is hierdie funksie nie noodwendig geleë in die biologiese moeder nie. Dit behels die teergevoelige gehegtheid wat voortvloei uit die aandag wat van dag tot dag bestee word aan die kind se behoeftes aan liefde, fisieke versorging, voeding, vertroosting, gerustheid, geborgenheid, bemoediging en onderskraging . . .
>
> Bemoedering is nie net 'n komponent van die vrou nie, maar ook deel van die man se wese. In die verlede het die gemeenskap van mans verwag om daardie deel van hulle persoonlikheid te onderdruk omdat dit nie by die beeld van die man pas nie. Tradisioneel was die man die heerser en meester, die jagter en wagter, die prediker en verdediger van huis en haard. Hy moes so ver moontlik emosioneel onbetrokke bly. Die vrou daarteenoor se bestemmingsfunksie was om kinders te baar, hulle te versorg en te vertroetel, om moeder en minnares te wees en daarmee saam die algehele huishouding na behore te behartig.
>
> Hedendaags het die man die vrymoedigheid om sy bemoederingsgevoel te openbaar en uit te leef. In die huidige moderne tydvak waarin ons leef, is 'n diepgaande gevoel teen vooroordeel besig om wêreldwyd pos te vat. Verset bestaan teen alle vorms van rassisme, fascisme, chauvinisme, seksisme en is daar 'n strewe na gelyke regte vir die vrou en man. Tans funksioneer al hoe meer moderne egpare al minder volgens die tradisionele geslagsrolle. Die verset teen vooroordeel beïnvloed die wyse waarop die man en vrou hulle rolle sien en uitleef. Al meer mans is bereid om bemoedering as deel van hul persoonlikheid te herken, te erken en uitdrukking daaraan te verleen."[165]

In order for this discourse to convince, it needs to explain the fact that, despite their ostensible equality with men, women continue to take on most of the household and child care responsibilities and have less remunerative and prestigious jobs. The explanation invokes the liberal concepts of autonomy, rationality and freedom of choice. Since the husband usually has the better job, it makes economic sense for the wife to do housework and childcare. Women's lesser earning potential is explained by the fact that, as a result of their domestic responsibilities, women do not spend as much time and energy on paid employment as men, or that they generally choose to spend more time with their families. The assumption is that individual women are rational agents, in equal bargaining positions with their husbands, who are free to make decisions in their own best interests. Where these "choices" turn out to be detrimental to the women, they are blamed for making unwise choices.[166]

The discourse functions on two levels. On the one hand, it operates as an ideal standard for parenthood. The argument is that, if parents are treated as if they are equally involved in the care of children, this will encourage "them" (and by this is meant men) to increase their involvement with children.[167] On the other hand, this "ideal standard" is somehow then conflated with reality, so that it becomes

---

164 512 I–J. See also *Van Pletzen* 101D.

165 *Van der Linde* 515J.

166 Boyd (1989) 137–141.

167 *Chodree v Vally* 1996 32J–33A. Piper "Partnership between parents" in Kaganas, King and Piper (eds) *Legislating for harmony: Partnership under the Children Act 1989* (1995) 35 38; Fineman (1991) 162 points out the irony of the fact that their failure to keep contact with their children is used as justification to extend the rights of fathers over children.

an accurate representation of the "true nature" of mothers and fathers. Fathers not only *should be*, but they are equally involved in all aspects of childcare.[168] From this arises the assumption that, in the event of divorce, fathers are as capable of caring for children as mothers are.[169] These two uses of gender-neutral parental roles contradict one another. If fathers were indeed as involved in childcare as mothers, there would be no need for incentives to encourage such behaviour.

The ostensible erosion of both the need for a heterosexual family environment and gender specific parental roles is, however, in tension with other underlying elements present in the discourse of gender-neutral parents.

4 2 Persistent gender-based discourses

The discourse of "ungendered" parents obscures two fundamental internal contradictions. In the first place, assumptions of identical parental involvement in childcare are at variance with the realities of contemporary family life. Mothers still take on the primary responsibility for homemaking and childcare even when they also work outside the home.[170] To assume that fathers in general do as much or the same as mothers because it is regarded as desirable that they should, is disingenuous.[171] This does not mean that, in cases where there is credible evidence of equal paternal involvement in childcare, such as *Habib*[172] and *Madiehe*,[173] that fathers should not have an equal chance of obtaining custody. However, these exceptional instances should not be elevated to the status of a general rule.

Moreover, arguments which explain women's continued responsibility for childcare as rational choices obscure the way in which women's economic, educational and socially inferior position in the public sphere is reflected in their bargaining power within the private realm of the family.[174] Women's economic dependency on their husbands as a result of their caretaking role makes nonsense of images of parents as autonomous individuals, dividing marital tasks as if they were concluding a business deal.[175]

Secondly, despite rhetoric about parental equality, judges, lawyers and society still have different expectations of male and female parents. Women's social identities continue to depend, to a great extent, on their abilities as wives and mothers, while ideal masculinity is tied to economic achievement. Thus it is still expected of women to do the major share of childcare and to take lower paid, lower status or part-time employment in order to accommodate these responsibilities, lest they be regarded and regard themselves as bad parents.[176] The

---

168 Boyd (1989) 141–142.

169 *Idem* 140 142.

170 *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) 729F–I.

171 See generally Doucet *Gender equality, gender differences and care: Towards understanding gendered labour in British dual earner households* PhD Cambridge (1995); Piper (1995) 39–40; Graycar "Equal rights versus fathers' rights: The child custody debate in Australia" in Smart and Sevenhuijsen (eds) (1989) 158 173.

172 *Supra*.

173 1997 2 All SA 153 (B) .

174 O'Donovan (1985) 134.

175 *Idem* 157; Fineman (1995) 161–166.

176 Boyd (1989) 135; Piper (1995) 43–46.

burdens on mothers have increased to include contributing to the family income. Underlying the ideal of the equal parental partnership, is the ideal of contemporary mothers as superwomen who successfully manage career, household, marriage and children.[177]

Despite the prevalence of legal and popular images of "new men and fathers", the gendered division of labour between parents persists. In *Van der Linde*, although the court argued that these functions could be and are nowadays also performed by men, they were yet described as "mothering", indicating that they remain associated with the maternal, rather than the paternal role.[178] Men are still expected primarily to provide economic security and discipline rather than actual childcare.[179] Sometimes, where "problem children" are involved, it is not only assumed that fathers can care for them equally well as mothers, but that their rational and disciplinarian abilities mean that they will be better parents than mothers who are still seen as more emotional and nurturing.[180]

The tension in this discourse is illustrated by the following quotes which occur on the same page of the judgment in *Van Pletzen*:[181]

> "Dit word nou aanvaar dat 'bemoedering' nie net 'n komponent van 'n vrou is nie, maar ook deel van die man se wese is . . ."
>
> "Die feit dat A slegs vier en 'n half jaar oud is en 'n dogtertjie is, swaai die skaal in die guns van die moeder, synde die persoon wat by uitstek geskik is om as rolmodel vir A te dien en om te sien na haar fisiese en emosionele behoeftes op die lang termyn, insluitende vir die hede en tot oor 'n klompie jare wanneer sy puberteit bereik."

The implicit maintenance of gendered parental labour allocations means that fathers who perform the tasks which mothers are habitually expected to do are often highly praised and regarded as particularly virtuous – the underlying assumption being that they cannot routinely be expected to perform such tasks.[182]

In *Bethell v Bland* custody was awarded to the father, although his parents would be responsible for actual daily care of the child. The mother of the child, whose parents were also willing to care for the child, was not considered a suitable custodian, since she was "not at this stage reliable, consistent or mature enough to retain the custody of her son".[183] Similarly, in *T v M*, the court regarded the father as having "actively participated in caring for Koketso in her early years"[184] while the evidence showed only that "the appellant would collect Koketso every morning and take her to his parents' home where his stepmother would look after her. In the evenings the appellant would take her back to the respondent's home".[185] In *Pinion*, where the parents applied for joint custody, the present arrangement was that the children lived with their mother during the

177 O'Sullivan "Stereotyping and male identification: Keeping women in their place" 1994 *Acta Juridica* 185 187.

178 515B–D.

179 O'Donovan (1993) 73–74; Fineman (1995) 206.

180 *McCall* 206J; Boyd (1989) 143.

181 101D and H.

182 Boyd (1989) 139.

183 201D–F, 206F–G.

184 1997 1 SA 54 (A) 59H–I.

185 56D–E. At 56H it appeared that he also paid her primary school fees.

week and with their father over weekends. The court's objection to joint custody was based on the possibility of future disagreement, not on the fact that joint custody did not accurately reflect the distribution of childcare.[186] Given the extensive nature of mothering,[187] such behaviour would not be sufficient to establish fitness as a mother.

The judicial and popular emphasis on the paying of maintenance as an indicator of a relationship between the father and the child, especially in cases involving unmarried fathers, shows that the primary responsibility of a "good" father remains economic provision:[188]

> "The 'new man' idea is simply part of the liberationist rhetoric, a superficially attractive but deeply misleading image of changing masculinities . . . [E]nforcing a construction of masculinity as an a priori economic resource, whilst at the same time seeking to increase men's involvement in childcare, is a bit like trying to square the circle."

Equating economic provision with the physical and emotional care of children, devalues nurturing.[189] If both parents were to provide economically by working outside the home, while the mother also provides childcare, this argument would mean that the judge would regard both parents as equally competent to have custody, thus completely ignoring the value of the mother's additional work and experience. Furthermore, comparing the parents' relative abilities to provide economically for a child, as advocated in *French*[190] and *McCall*,[191] assumes that both parents had equal opportunities to increase their earning powers and should be judged according to the same standard.

On the one hand, the gender-neutral discourse of parenthood typically represents divorce as a crisis with the child as the innocent victim of parental conflict. After divorce parents, as rational adults, should lay aside their differences and co-operate in the interests of their children. They should disregard their own anger and convenience and should be willing to share parental rights in the interests of the children who need continued contact with both parents.[192]

On the other hand, courts maintain the gender-specific expectations that mothers should sacrifice their own interests for the sake of the children. Women are expected to face the men who have battered or threatened them as rational adults, co-operating in a friendly manner for the sake of their children. In *B v S*[193] and *T v M*[194] allegations of abuse at the time of access by mothers were dismissed and they were required to sacrifice their own interests and bodily safety for the sake of their children. Such levels of selflessness are not required from men. In *Chodree v Vally* the court recognised that the father's desire for access to his child "may to some extent have been influenced by the financial obligation which has been imposed on him with regard to his daughter" but

186 1994 2 SA 725 (D).
187 See the quote at fn 165.
188 Collier (1995) 262.
189 Boyd (1989) 143.
190 299G.
191 205C–D.
192 Fineman (1991) 157.
193 586D–I.
194 56I. She laid a charge of rape against the father, but he was acquitted. His civil action for malicious prosecution succeeded by default. See 57B–D.

nevertheless granted him access.[195] In *Van Erk v Holmer* the court itself remarked:[196]

> "Perhaps one of the strongest motivations for an improvement in the legal position, is what is perceived as the gross injustice which occurs when a father is compelled to pay maintenance for a child whom he may never be able to see or visit, despite his being prepared to commit and devote himself entirely to the interests of the child."

4 3 Biological parents

Simultaneously with the apparent erasure of gender from discourses about unisex parents comes a focus on parenthood as genetic. Gender is regarded as suspect and artificial while "biological" differences (sex) are reified. Genetic characteristics come to define human beings.

The discourse can be traced from the assertion of parenthood as largely social in *September v Karriem*[197] to the use of arguments from biology when comparing biological and stepmothers as caretakers in *Shawzin v Laufer*.[198] However, since 1980 the focus has been increasingly on the bond between the father and the child in cases that involve extending the rights of fathers of illegitimate children and divorced fathers.

In *Bethell v Bland*[199] the custody of an illegitimate child abandoned by its mother was at stake. Both the maternal and the paternal grandparents and also the biological father applied for custody. Although the father of the child still lived with his own parents and was unable to support himself financially, custody was awarded to him and the court remarked that "obviously the biological relationship must favour him over other outsiders".

In *Van Erk v Holmer*, where it was decided that the father of an illegitimate child had an automatic right of access, the court stated:[200]

> "This is not simply a plea for a quid pro quo but a proper recognition of a biological father's need to bind and form a relationship with his own child and the child's interest that he or she should have the unfettered opportunity to develop as normal and happy a relationship as possible with both parents. This is not only in the interest of the child but it is in fact a right which should not be denied unless it is clearly not in the best interests of the child."

In *Chodree v Vally* the father of an illegitimate child applied for an access order. Although the parents had been married according to Islamic law, at that time children from such marriages were regarded as illegitimate.[201] Shortly after the birth of the child, the parents separated and her father had not seen the child for

---

195 35A. The court found his reasons for seeking access unconvincing, but would not believe that his desire for access was driven by ulterior motives.

196 1992 2 SA 636 (W) 649G–H, criticised in *S v S* 1993 209C–F.

197 1959 3 SA 687 (C) 689A–B.

198 669D; also *Lourens supra*. For a more detailed discussion of this development see Bonthuys "Of biological bonds, new fathers and the best interests of children" 1997 *SAJHR* 622.

199 209H.

200 649H–I.

201 *Seedat's Executors v The Master* 1917 AD 302; *Ismail* 1983 1 SA 1006 (A); *Kalla v The Master* 1995 1 SA 261 (T). S 1(b) of the Births and Deaths Registration Act 40 of 1996 now requires that such births be registered as legitimate.

four years. She lived with her mother and grandparents. The father had remarried and had another child. Wunsh J, who emphasised the grandfather's age and the generation gap between him and the child, did not regard the paternal role of the maternal grandfather as sufficient.[202] The primary factor behind the judgment seemed to be the need of a child for affection from both parents:[203]

> "An important part of a child's education and its acquisition of the cultural values developed by the community to which he or she belongs arises from what is called parental mediation . . . It is to a child's benefit to be the recipient of the transfer of these benefits from both its parents. Love and affection from both also enhance the security and stability of a child."

Since the affection and acculturation supplied by the grandfather was inadequate, the inference was that the biological father should meet these needs. The court stated:[204]

> "Where a child is born of a committed relationship, such as a religious marriage not recognized by the law, the father has a preferential position as against non-parents when the grant of access is considered. The biological relationship and genetic factors must favour him as a provider of love and other emotional support."

The suggestion, at the start of the quotation, that it was the existence of a religious marriage between the parents, which persuaded the court of the importance of the father-child bond, is placed in doubt by the ultimate insistence on the importance of biological and genetic factors.[205]

Furthermore, it seems that the importance of biological bonds between father and child is not unrelated to the availability of a substitute parent. In this respect *V v H* forms an interesting contrast to *Haskins v Wildgoose*,[206] *Chodree v Vally*[207] and *Bethell v Bland*.[208] In the first case, the substitute "father figure" was a man who was involved in a heterosexual sexual relationship with the mother. The court emphasised the fact that the child belonged to a family unit which should not be disturbed by renewing contact with the biological parent.[209] Where, however, the substitute father was a grandparent, as in the last three cases, courts extended the rights of biological fathers.

Despite the rhetorical rejection of "old" discourses of gendered parenthood, it is not sufficient that the "role" of father be performed by other adults, or even male family members. A family consisting of a woman, her children and other relatives is not worthy of protection and it could be argued that the only "fathers" who count are those who have or had a sexual relationship with the mother. Fatherhood, even new fatherhood, remains premised on the qualities of heterosexual sexual virility. The argument is extended when we compare these "substitute fathers" to grandmothers as "substitute mothers". Courts often regard

---

202 31I 35A.
203 32F–G.
204 32E–F.
205 On the other hand, in *Douglas v Mayers* 1987 1 SA 910 (ZH), *B v S* 214J and *S v S* 209G–I the courts found that it would not be in the interests of the children to have contact with the fathers, the biological connections between them were regarded as less significant.
206 *Supra*.
207 *Supra*.
208 *Supra*.
209 590b–c.

grandmothers as adequate substitute mothers,[210] thus substantiating the contrast between discourses of sexual fathers and mothers as a-sexual.

This insistence on biological bonds between fathers and children functions in four ways: It re-establishes paternal control over children after and in the absence of marriage; secondly, by devaluing the child-producing and rearing work which women mostly do, it lays the basis for granting fathers rights without increased responsibilities and justifies existing gendered divisions of labour in a "gender-neutral" guise. Finally, it contributes to the demonisation of single mothers, while valorising single fatherhood.

Patriarchal rules about marriage and sexuality have always aimed to control the reproductive capacities of women to ensure that men have a biological link to their offspring. Women's virginity at marriage, the double standard for extra-marital sexual activity and control over women's fertility, are all aimed at maintaining the purity of the male kinship line and ensuring male control over genetic offspring.[211] The discourse of parenthood as genetic, attempts to do the same in a society where single motherhood and divorce increasingly erode the power of men over children. Biology operates as a mechanism for extending the model of the heterosexual family outside of and after marriage:[212]

> "The contemporary modification of traditional patriarchy has been to recognize the genetic parenthood of women as being equivalent to the genetic parenthood of men. Genetic parenthood replaces paternity in determining who a child is, who it belongs to."

This line of thinking accords well with the discourse of equal parenthood as "sameness". Because both parents equally contribute genetic material to the child – the value of their "work" is exactly the same and, therefore, their "rights in the product of their labour" should be the same. The nurturing of the genetic material from conception to birth and from birth to adulthood is disregarded. Pregnancy is no more than the maturation of the genetic material by the mother. She is only a passive container in which the "child" spontaneously matures until it is ready to be born.[213] Consequently,[214]

> "the bodies of mothers are not highly valued. The bodies are just the space in which genetic material matures into babies . . . Women may simply be seen to own the space in which the fetuses are housed . . . The woman can rent out space in her body just as she can rent out the spare back bedroom. And she will have no more ownership rights over the inhabitants of that space in her body than over the boarder in her home".

Such a view resonates with the view which privileges the mind above the body and intellectual above physical labour. The fact that the body of the mother is intimately involved in creating the child is completely ignored, since legal subjects are defined in terms of their mental and intellectual activities, and not primarily by what their bodies do. Therefore, the actions of her body are conceptually

---

210 See eg *Bethell v Bland supra; Habib supra.*

211 Rothman *Recreating motherhood: Ideology and technology in a patriarchal society* (1989) 29–31.

212 *Idem* 39.

213 Kaplan (1992) 209: "Foetal imagery represents the foetus as an entity in its own right, unattached to the mother, or at least rendering her irrelevant to what is going on in the womb."

214 Rothman (1989) 73.

separated from the personhood or subjectivity of the mother and regarded as an automatic process, which does not involve her.[215]

From the fact that two people, a man and a woman, contribute genetic material to children, the reasoning goes that the child biologically, or naturally, has two parents. This implies that children need both parents in order to develop into stable and mature adults. The "parents" in question are obviously the biological mother and father.[216] The value of biology replaces the value of nurture to ensure that fathers maintain a controlling interest in the products of their bodies.[217] If nurturing work is irrelevant to establish fatherhood, it follows that it is not necessary to maintain fatherhood after birth. Fathers can maintain rights based on the "absolute" basis of biological connection while mothers' "natural biological" capacity to nurture should simply continue automatically after birth.

"Biology" in this discourse, is associated with and replaces the appeal to "nature", since whatever is biological, is regarded as natural. In this way statements about "biological realities" share in the discursive power of "the natural" to define what is socially desirable.[218] If children have two biological parents, it is natural and therefore in their interests that this relationship should continue. Women who choose single motherhood or who discourage contact between children and biological fathers are demonised while the attempts of men to assert parental rights are valorised in the name of the interests of children:[219]

> "Women are seen to threaten the stability of children through their desire for autonomous motherhood in the case of unmarried mothers, or by petitioning for divorce and sole custody in the case of married women. It is becoming increasingly rare for the behaviour of mothers who resist male authority or surveillance (as opposed to assistance) to be interpreted as legitimate. Should women adopt this stance, they become defined as vengeful mothers, bitter wives, and selfish women."

Taken at face value, the discourse of unisex parents holds the functions of mothers and fathers to be indistinguishable. This would logically imply that there is no reason why a woman can not adequately raise children on her own or in partnership with another woman. Fathers who make no contribution to child-rearing would therefore be deprived of any rights in relation to children. In order to preclude this outcome, the discursive links between parenthood and biology on the one hand, and biology and nature, on the other, are deployed to stop the gap. Arguments from biology justify the need for two parents of different sexes. They strengthen the position of absent fathers and undermine gay and lesbian claims to family status. Instead, I would suggest that the biological view of parenthood, if it is to carry any weight, should take cognisance of the biological work of mothers in producing children. It was expressed in *Fraser v Children's Court, Pretoria North*:[220]

> "The mother of a child has a biological relationship with the child whom she nurtures during the pregnancy and often breast-feeds after birth. She gives succour and support to the new life which is very direct and not comparable to that of a father."

---

215 Ruddick "Thinking mothers/conceiving birth" in Bassin, Honey and Kaplan (eds) *Representations of motherhood* (1994) 29 37–38.

216 Smart (1989) 9; Graycar (1989) 168–170.

217 Fineman (1991) 128; Rothman (1989) 35.

218 See para 5 below.

219 Smart (1989) 10.

220 1997 2 SA 218 (T) para 25.

5 CONCLUSION: THE FOCUS OF SHIFTING DISCOURSES

> "She may be very affectionate, but I'm not convinced that it is good for the child to have sentimental affection centred on it. Competent unemotional care would be better."[221]
>
> "This lady impressed me as having a sincere and deep affection for Hassiem and a genuine desire to keep him in her house and to care for him."[222]

The quotes above are from two cases in which fathers applied for custody of children and proposed that their own mothers, the paternal grandmothers, take care of the children. Modes of parenting have changed over time: from a preoccupation with the spiritual well-being of children, accompanied by forms of discipline which would today be regarded as abusive, through a concern for the physical survival, to the psychological welfare and the intellectual development of children. Our relations with children depend on changes in environment, the availability of birth control, medical techniques, fashions in childcare and religious and moral values.[223] Advice by "experts" in child care manuals has changed from advocating disciplining children at an early stage by rigid schedules, to satisfying all the needs of children and providing warm emotional bonds, and recently, to providing intellectual stimulation and socialisation of children.[224] Childhood is now seen as a crucial developmental stage, which may affect the rest of the person's life, and mothers are primarily responsible for providing the necessary stimuli.[225]

The criterion of the best interests of the child encapsulates the focus of contemporary family law. Central to the project stands the child – conceptually separated from the rest of the family. Parents are viewed as necessary for its welfare, yet potentially dangerous to the child, justifying state intervention through the legal and welfare systems, in order to save the child and to restore the family unit after marriage break-up.[226] The child is the victim of the parents' irresponsible behaviour and the most highly prized asset in their contest about the division of "property" after divorce.[227] This pre-occupation with the development and well being of the child is replicated in psychological and welfare discourse.[228]

> "What *is* valued is the child. In patriarchal ideology, the child is the extension of the man. In capitalist ideology the child is the repository of wealth."[229]

In this narrative parents are either providers for the needs of children, if they are good parents, or brutes who harm the child through their selfish behaviour. However, this does not apply equally to men and women. Because of limited expectations of fathers, the stereotypical discourses focus mainly on mothers. They are the ones who should supply most of the physical, emotional, social and

---

221 *Stapelberg* 132.
222 *Habib* 9.
223 See generally Dally (1982); Badinter *The myth of motherhood: An historical view of the maternal instinct* (1981); Smart (1996).
224 Richardson (1993) ch 2 3; Dally (1982) 71–91.
225 Boyd (1989) 130; Richardson (1993) 57.
226 Fineman (1991) 84–85.
227 Fineman (1995) 217.
228 Kaplan (1992) 210; Ruddick (1994) 32.
229 Rothman (1989) 74.

developmental stimulation that the child needs to grow up, and thus failure to perform their allotted duties has more serious consequences than for fathers. If fathers fail as economic providers, the state, the mother or other family members can replace them. The consequences of mothers' failure, however, are much less easy to rectify, and could result in permanent "psychological" damage. Because childcare and homemaking are regarded as being primarily the mother's responsibility, any mental, social and other problems which children may develop are readily ascribed to maternal, rather than paternal or societal inadequacy.[230]

The fact that custody stereotypes focus more on mothers than on fathers does not benefit mothers, though. The effect is rather to obscure the mother as a subject. She does not emerge as an individual with needs of her own, but is seen as the adjunct to the child's needs.[231] Because the law privileges the view of the child, the *fact* of her "bad" mothering and its consequences for the child are more relevant than the circumstances under which it occurs.[232]

Structural economic inequalities and the effects of racism and sexism on women as a group are not considered by courts in evaluating the adequacy of the mothering of individual women. Instead, in the twin processes of obfuscation and individualisation, structural, societal effects on women are ignored and individual mothers blamed for their "failures" to live up to standards which may be impossible for them to achieve.[233] Mothers who are poor may be regarded as bad mothers because they don't spend all of their time with their children, mothers from cultural minorities may be seen as bad mothers because they do not ascribe to dominant western values about families and children.[234] Their social locations are viewed in the light of liberal concepts like "choice" and "rational agreement," and the fact that poverty, racism, and sexism limit their options, is overlooked.[235] Bad mothers are those who brought misfortune upon themselves by their unwise choices, laziness or incompetence:[236]

> "An important feature of the ideology of motherhood is the way it individuates mothers and the practice of mothering. This can be understood as related to the primacy of the individual in liberal ideology more generally. The individualistic focus of the dominant ideology of motherhood, and the related expectation that individual mothers will take full responsibility for their children, mean that when there is a problem with a child, the individual mother's mothering practices are subjected to critical scrutiny. The implication is that mothers are to blame for child neglect."

The recent legal and popular focus on fathers is different. When judges and pressure groups focus on the activities of the "new father" the ultimate aim is not to increase his responsibilities towards the child or to blame him for problems which the child has. Rather, they focus on what fathers do or are supposed to do, in order to extend fathers' rights beyond marriage. A focus on mothers aims to

230 Kaplan (1992) 44–52.
231 Ruddick (1994) 32.
232 Sanger (1995) 28–29 in the context of separation between mother and child.
233 Kline (1995) 121–122.
234 See Kline (1995) for a description of how First Nation mothers in Canada have been systematically deprived of custody of their children because they are poor and culturally oppressed.
235 Kline (1995) 129–130.
236 *Idem* 125.

control them. A focus on fathers aims at increasing their control over children, and thus over mothers.[237]

Thus stereotypes operate to impose a unified standard of motherhood on all women. Coupled with liberal individualism, which views society as composed of autonomous, rational, equal individuals, the effect is pernicious. All women are expected to conform to a standard which is unsuited to the realities of most women's lives. Those who fail are placed beyond the pale of "good" motherhood, which is something that all women have been taught to aspire to. Moreover, there is no recognition that social pressures and structures may have contributed to this failure. Images of bad mothers control *all* women, because, given the primary importance of motherhood to female identity, a woman who is not a good mother is ultimately an unsuccessful human being:[238]

> "It is women's motherhood that men must control to maintain patriarchy. In a patriarchy, because what is valued is the relationship of a man to his sons, women are a vulnerability that men have: to beget these sons, men must pass their seeds through the body of a woman."

In short, I would argue that, stereotypically, to women, children represent responsibilities, while to men they represent wealth in which fathers wish to acquire rights. The *rights* of men in children are maintained by allotting onerous *responsibilities* for children to women and punishing them when they fail to fulfil them. It is when women argue to extend their own rights in children or the responsibilities of men, that society takes umbrage and calls them unfeminine, bad mothers, selfish and devouring.

[B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity.

Dickson CJ in R v Big M Drug Mart Ltd *(1985) 18 DLR (4th) 321 350.*

237 Fineman (1991) 128; Brophy (1989) 226–228.
238 Rothman (1989) 30.

Freedom of expression: The constitutionality of a ban on human cloning in the context of a scientist's guaranteed right to freedom of scientific research

Jerome Amir Singh
BA LLB LLM (PhD candidate)
Lecturer, School of Law, University of Natal, Durban

OPSOMMING

Vryheid van uitdrukking: Die grondwetlikheid van 'n verbod op die kloon van menslike weefsel in die konteks van 'n wetenskaplike se gewaarborgde reg op vryheid van wetenskaplike navorsing

Indien 'n mens Darwin se evolusieteorie sou kies om die mens se evolusionêre ontwikkeling deur die eeue heen uit te stippel (vanaf die tyd toe die primate binokulêre visie verkry het, regop en op twee bene begin loop het, tot die vergroting van breinkapasiteit wat uiteindelik gelei het tot hoër intelligensie en ingewikkelde sinsbou) lyk die snelle koers van natuurlike biologiese ontwikkeling wat in 'n betreklik kort tyd plaasgevind het nogal merkwaardig. Of 'n mens egter Darwin se evolusieteorie of die teorie van die Skepping gebruik om die bestaan van die mensdom te verduidelik, kan niemand ontken dat die mens se tegnologiese "evolusie" (afgesien van die vraagstuk van die skepping of natuurlike evolusie) niks anders as verstommend is nie. Die spesie *homo sapiens* het daarin geslaag om tegnologiese wonderwerke te ontwerp, van die wiel tot die ruimtetuig, elektriese kragopwekkers en geleiers, wondere van die wêreld van die telekommunikasiewese van die telegraaf tot die Internet en die vermoë om die omgewing op subatomiese vlak te manipuleer. Opmerklike vooruitgang in die mediese sfeer het die mens in staat gestel om siektes te genees en om sowel menslike as xeno-orgaanoorplantings op mense uit te voer. Meer onlangs het verstommende ontwikkelinge in die wetenskap en geneeskunde die mens in staat gestel om sy ontsagwekkende tegnologiese vooruitgang te gebruik om die hele gang van sy natuurlike evolusionêre vooruitgang te gebruik om die hele gang van sy natuurlike evolusionêre vooruitgang en ontwikkeling as spesie op die sellulêre vlak te verander. Die era van genetiese manipulasie van die menslike spesie is hier, daar word egter aangevoer diat Suid-Afrika ontoereikend toegerus, voorberei en kundig is om die omvang van die probleem aan te pak.

1 THE PROCESS OF CLONING

Prior to 1997, the very idea of cloning an organism was restricted to the realms of popular science fiction. However, the cloning of a sheep in Scotland in 1997[1] shattered man's neat boundary between fiction and reality and forced him to confront for the first time the reality that he could clone and possibly be cloned.

1 http://www.latimes.com/HOME/NEWS/SCIENCE/REPORTS/CLONING/tues1.html.

"Extraordinary", "stupendous", "mind-boggling" and frightening" were suddenly the words on everyone's lips.[2] However, as publicised as the birth of the first cloned organism Dolly the sheep, has been, society at large still does not understand the concept of cloning, nor the implications of the procedure for humans.

The biological definition of a "clone" has been described as that of an organism which has the same genetic material information as another organism[3] while the process of "cloning" in the scientific world has been defined as the artificial production of organisms with the same genetic material.[4] To clone Dolly, scientists took a mammary gland cell from a six year old sheep, and by depriving the cell of nutrients in the laboratory, put the cell's DNA into a semi-dormant state.[5] Scientists then removed the nucleus of a sheep egg cell taken from a different ewe, and inserted the nucleus of the mammary gland cell into the now nucleus-free egg cell.[6] The scientists then stimulated the combined cells with a jolt of electricity and to their amazement, the combined cells acted as a fertilised egg cell and began to divide, using the DNA from the mammary cell as its genetic blueprint.[7] Scientists then implanted the now developing embryo into yet another ewe, and in a few months, Dolly was born, an exact genetic copy of the ewe from which the mammary cell was taken.[8]

2 AMBIT AND SCOPE OF THE HUMAN TISSUE ACT[9] WITH REGARD TO THE GENETIC MANIPULATION OF THE HUMAN GAMETE OUTSIDE OF THE HUMAN BODY

The Preamble to the South African Human Tissue Act[10] sets out as amongst its aims, to provide for the removal of tissue, blood and gametes from the bodies of living persons and the use thereof for medical and dental purposes, as well as for the control of the artificial fertilisation of persons. The Act defines "tissue" as "any human tissue, including any flesh, bone, organ, gland or body fluid, but excluding any blood or gamete";[11] while it defines the "artificial fertilisation of a person"[12] as

> "the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction, including –
>
> (a) the bringing together outside the human body of a male and female gamete or gametes with a view to placing the product of a union of such gametes in the womb of a female person;
>
> (b) the placing of the product of a union of a male and a female gamete or gametes which have been brought together outside the human body, in the womb of a female person".

2 http://www.last-word.com/nsplus/insight/clone/giantleap.html.
3 http://vetc.vsc.edu/vuhs/apbio/clone/cloning.txt.
4 *Ibid.*
5 http://www.princetoninfo.com/clone.html.
6 *Ibid.*
7 *Ibid.*
8 *Ibid.*
9 Act 65 of 1983 (hereafter "The Act").
10 *Ibid.*
11 See s 1, "Definitions".
12 *Ibid.*

Section 39A,[13] which covers the prohibition of the genetic manipulation of gametes or zygotes, states:

> "Notwithstanding anything to the contrary contained in this Act or any other law, no provision in this Act shall be so construed as to permit genetic manipulation outside of the human body of gametes or zygotes."

Having considered all the relevant sections of the Act pertinent to the genetic manipulation of the human gamete, it is submitted that the South African Human Tissue Act, in effect, appears to prohibit the cloning of a human being, which would directly involve the prohibited act of genetically manipulating the human gamete outside of the human body. Based on this interpretation, it is submitted that, since any possible experiment involving the cloning of a human being is *prima facie* prohibited in South Africa, any South African scientist or doctor who wanted to be involved in the possible cloning of a human being, would have to leave South Africa and conduct the experiment elsewhere in the world. It is submitted that, considering that South Africa possesses world class scientists and doctors and that the world's first heart transplant was in fact carried out in this country, it is not inconceivable that South African doctors or scientists would want to involve themselves in experiments involving the cloning of a human being. The apparent prohibition of human cloning in South Africa has possible legal implications for the South African government in that the constitutional rights of scientists[14] in the country might be violated by the apparent prohibition contained in section 39A of the Human Tissue Act. The South African Constitution[15] is widely regarded as one of the most progressive and liberal constitutions in the world. Section 16 of the Constitution guarantees every citizen the right to Freedom of Expression.

It reads:

> "(1) Every person has the right to freedom of expression, which includes –
>
> . . .
>
> (d) academic freedom and freedom of scientific research."

It would seem that *prima facie*, a scientist's right to conduct experiments on cloning in South Africa is violated by the offending section 39A of the Human Tissue Act, in that he or she is denied the guaranteed right to freedom of scientific research in the field of his or her choice. This also raises other interesting dilemmas for the government, in that if the South African government were to argue that cloning should be banned on moral and ethical grounds, it potentially risks losing some of the country's best scientists to other countries where cloning is not banned, or considered unethical or immoral. Before it can be established whether section 39A of the Human Tissue Act actually prohibits cloning, a thorough examination of the ambit and scope of the right to freedom of expression is needed to determine whether a scientist's right to freedom of scientific research is violated or would be violated by a prohibition on cloning.

3 FREEDOM OF EXPRESSION – AMBIT AND SCOPE

At issue here is whether section 39A of the Human Tissue Act violates a scientist's right to freedom of scientific research as guaranteed by section 16(1)(d) of

---

13 S 39A was inserted in Act 65 of 1983 by s 26 of Act 51 of 1989.

14 Hereafter, the term "scientist" will be a generic term that will be used to refer to scientists, geneticists and doctors.

15 Act 108 of 1996 (hereafter the Constitution).

the South African Constitution. It must be noted that by virtue of the supremacy clause in the South African Constitution, any law that infringes a fundamental right contained in the Bill of Rights, will be declared invalid to the extent of its inconsistency with the Constitution. However, before the effect of section 39A of the Human Tissue Act can be considered, it is important to consider the ambit and scope of the right of freedom of expression in the context of a scientist's right to conduct scientific research and then whether the law complained of interferes with the exercise of this right. This process has been referred to as the first stage of the enquiry.

Freedom of expression is fundamental to liberal democracy.[16] While the South African Constitution contains no express hierarchy of rights, in the United States, where the battle for the right to freedom of expression has been fought and is still ongoing, eminent scholars such as Tribe have referred to the right of freedom of expression as the United States' constitution's "most majestic guarantee"[17] and as "the matrix, the indispensable condition of nearly every other form of freedom".[18] In Canada, the Canadian Supreme Court has described the right to freedom of expression as "one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of Western society".[19]

Tribe[20] puts forward two jurisprudential justifications for protecting free speech:

(a) The "instrumental approach", by which is meant that freedom of speech is to be regarded only as means to some further end, like successful self government, or racial stability; and

(b) the "purposive approach" by which is meant that freedom of speech is an end in itself, it represents the sort of society that we wish to become.

Govender[21] opines that the "purposive" function of free speech allows for the development of scientific, artistic and cultural endeavours and creativity and allows us to challenge conventional wisdom and push the boundaries of our knowledge.

The right to Freedom of Expression in South Africa is guaranteed in section 16(1) of the Constitution and reads in its entirety as follows:

"Freedom of expression

16 (1) Everyone has the right to freedom of expression, which includes –

(a) freedom of the press and other media;

(b) freedom to receive and impart information and ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

(2) The right in subsection 1 does not extend to –

(a) propaganda for war;

16 Devenish *Commentary on the South African Bill of Rights* (1999) 187.

17 Tribe *American constitutional law* (1988) 785.

18 Cardozo J in *Palco v Connecticut* 302 US 319.

19 McIntyre J in *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd* (1987) 33 DLR (4th) 174.

20 Tribe 785 as quoted by Devenish 189.

21 Govender "The freedom of speech" 1997 (6) *The Human Rights and Constitutional LJ of SA* 20.

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

Devenish submits that it is clear that the drafters of the South African Constitution did not intend to restrict the protection of free speech to what was necessary for ensuring only democratic and accountable government, however important these may indeed be, since both artistic creativity and scientific research are also expressly recognised as being within the ambit of protected speech.[22] Govender supports this point of view and submits that the inclusion of artistic creativity and scientific research under the ambit of freedom of expression ensures that the content of the right to freedom of expression is not given a narrow interpretation and restricted to speech that contributes to the enhancement of the democratic order.[23] Govender further submits that freedom of scientific expression is protected and that such protection is clearly necessary as it contributes in a profound way to the healthy and robust exchange of ideas.[24] Given these arguments, it would seem that the "instrumental approach" is not applicable to the South African Constitution.

Thomas Emerson, one of America's leading commentators on freedom of speech, identified four leading values underlying the guarantee of freedom of expression:[25]

(a) Freedom of expression is essential as a means of assuring individual self-fulfilment. Suppression of belief, opinion or other expression is an affront to the dignity of human beings. Moreover, each person as a member of a society has a right to share in the common decisions that affect him or her. To cut off the search for truth, or the expression of it, is to elevate society and the state to a despotic command over individual members of society and to place each under the arbitrary control of others.

(b) Freedom of expression is an essential process for advancing knowledge and discovering the truth. Knowledge and the search for the truth are promoted by a consideration of all alternatives. Discussion must be kept open no matter how true an accepted opinion may seem to be; many of the most widely acknowledged truths have turned out to be erroneous. Conversely, the same principle applies no matter how false or pernicious an opinion appears to be; for the unaccepted opinion may be true or partially true and even if wholly false, its presentation and open discussion compel a re-thinking and re-testing of the accepted opinion.

(c) Freedom of expression provides for participation in decision-making by all members of society. This is particularly significant for political decisions. It promotes the establishment of a deliberate democracy.

(d) Freedom of expression is a means of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy disputes and necessary consensus. Suppression of discussion makes a rational judgment impossible, substituting force for reason; the exercise of power for

22 Devenish 190.
23 Govender 21.
24 *Ibid.*
25 Emerson *The system of freedom of expression* (1971) 6–7.

justification. The process of open discussion promotes greater cohesion in a society because people are more ready to accept decisions even where they disagree, if they follow upon a rational open decision-making process.

These four sentiments were echoed in the Zimbabwean judgment of *In Re: Munhumesco*.[26]

It is submitted that by applying Emerson's first principle to the right to freedom of scientific research, it could be argued that if a scientist's specialist field of interest or study is genetics, then doing research into cloning could possibly be his or her path to obtaining self-fulfilment from a scientific, academic and intellectual context or perspective. Thus, according to the reasoning of Emerson and the court in the *Munhumesco* judgment,[27] any attempt by the government to prevent such scientists from reaching and obtaining self-fulfilment would amount to a violation of their right to freedom of expression. It is submitted that, since South Africa's Constitution expressly protects freedom of scientific research, this argument is tenable.

Whereas the interim Constitution[28] gave a higher priority to political as opposed to non-political speech by virtue of its bifurcated limitation clause,[29] this is not the position any longer, since the limitation provision[30] in the 1996 Constitution is not bifurcated.[31] Devenish submits that it remains to be seen whether in practice the courts continue *de facto* to distinguish between the two categories of speech referred to above, although he does not see a return to this distinction as inconceivable. It is submitted that South African courts would be more likely to protect political speech stringently regardless of the merits of the speech, than it would scientific speech, especially on an issue like cloning which is a relatively new and unknown field and which is still largely misunderstood and considered unethical and "unnatural", regardless of cloning's alleged merits.

Section 8 of the Constitution stipulates that juristic persons may invoke a constitutionally guaranteed right "to the extent that it is applicable, taking into account the nature of the right and any duty imposed by the right". It may therefore be argued that not only scientists may claim a right to clone a human being, and that juristic persons such as scientific institutions and research laboratories may also claim constitutional protection for their right to freedom of expression. Marcus and Spitz observe that a principled approach to section 16(1) "would focus on the nature and value of speech itself, and not on the identity of the speaker".[32]

Marcus and Spitz[33] suggest that there are at least two approaches to the interpretation and application to the provision dealing with freedom of expression. The first is a content-neutral approach. By virtue of this approach, it would be impermissible to distinguish, at the initial stage, between different manifestations

---

26 1995 2 BCLR 125 (ZS).
27 *Ibid*.
28 Act 200 of 1993.
29 See Devenish 190.
30 S 36.
31 See Devenish 190.
32 As quoted by Devenish 191.
33 Marcus and Spitz *Expression-constitutional law of South Africa* Chaskalson (ed) (1996) 20.

of expressive conduct on the basis of their content.[34] This approach to the content of a statement or expressive conduct prescribes that it should not be deprived of protection at this stage, regardless of how offensive it is perceived to be.[35] Thus, according to this approach of interpreting and applying the right to freedom of expression with regard to a scientist's right to clone a human being, if the scientist were to set up the necessary facilities to clone a human being, or even remove somatic or germline cells from a human being for, cloning purposes, this interpretative approach would require that the scientist's conduct be protected at this stage regardless of how offensive the conduct or its consequences is perceived to be. This content-neutral approach is adopted by the Canadian Supreme Court.[36]

While it is accepted that not all conduct will pass the initial test, Devenish submits[37] that at the preliminary stage of judicial analysis, "speech and expression" should be liberally construed so that "activity is expressive if it attempts to convey meaning".[38] Thus, according to the content-neutral approach, if a scientist were to set up the necessary facilities to clone a human being or were to remove germline or somatic cells from a human being for cloning purposes as a means to convey his or her protest against a prohibition on human cloning or the apparent prohibition of human cloning set out in section 39A of the Human Tissue Act,[39] then his or her actions would have to be protected at this initial stage. The jurisprudential weighing up and analysis would take place with reference to the application of the limitation clause in the second stage of the enquiry.[40]

The second approach designated by Marcus and Spitz[41] employs a more exacting test at the initial stage. Devenish submits[42] that the language of both the limitation and interpretation clauses found in section 36 and section 39 of the 1996 Constitution respectively, can be used to support such an approach, which is premised on interpreting chapter two rights in a manner conducive to the promotion of values which underlie an open and democratic society based on freedom and equality. With such an approach, manifestations which clearly underlie either the substance or ethos of an egalitarian society premised on open government or democracy would fall outside the definition of "freedom of expression".[43]

The value of such an approach is that it precipitates a jurisprudential discourse into the value that underpins the political and social philosophy of our way of life.[44] It is submitted that with the bold medical and technological advances that are being made every day, our societal values have changed and are continuously changing to assimilate and accommodate these advances into our social

34 *Ibid.*
35 *Ibid.*
36 See Devenish 192.
37 *Ibid.*
38 As quoted from *Irving Toy Ltd v Quebec* (1989) 1 SCR 606.
39 Act 65 of 1983.
40 See Devenish 193.
41 Marcus and Spitz 20.
42 Devenish 193.
43 Devenish 193.
44 *Ibid.*

and philosophical way of life. Medical procedures such as organ transplantations, xeno-transplantations, test tube babies and artificial insemination, which were all once considered "unnatural", unethical and outside our societal value system, are now fully accepted as part of "our way of life". It is therefore submitted that although cloning a human being is presently considered "unnatural", unethical and outside our societal value system, given time, the process of cloning will become as accepted and assimilated into our present value system as xeno-transplantation, test tube babies and artificial insemination have become. Thus, if a court were to use this approach of considering the values that underpin our way of life, taking into account the fact that our value system has changed substantially over the past decade to assimilate and accommodate new medical and technological advancements, it is submitted that there are sufficient grounds to accept that the right of a scientist to conduct scientific research into cloning is conducive to an open and democratic society based on freedom and equality, as it is not outside our value system.

Devenish submits[45] that it is beneficial to have a discourse on values at this stage, rather than at the stage of the application of the limitation clause, as he believes that considering values at the stage of the application of the limitation clause will involve a more pragmatic balancing of competing interests. However, Marcus and Spitz[46] caution that the "wider latitude for judicial value-judgements may grant licence to the courts to exclude valuable expression from constitutional protection". It is submitted that this is an important and valid point as the scientist's right to freedom of expression in the form of scientific research would depend on the conservativeness of the presiding judge. If the presiding judge is of the opinion that cloning a human being is unnatural and immoral, based purely on philosophical and religious grounds rather than scientific grounds, then the concerns raised by Marcus and Spitz would hold true, as the conservative value-judgment and inarticulate premise of the judge will inadvertently grant licence to the courts to exclude the scientist's right to conduct scientific research on cloning a human being from constitutional protection.

Devenish submits[47] that this kind of conservative value-judgment is exactly what happened so frequently in the past and must be guarded against if our intellectual and political discourse is to be both open and democratic. Marcus further remarks that the outcome of disputes turning on the guarantee of free expression will depend upon the value a court is prepared to place on freedom of expression and the extent to which it will be inclined to subordinate other interests.[48]

In *United States v Eichman*,[49] where the court held that prosecutions for flag burning were incompatible with the United States Constitution's First Amendment, the court took the following bold stand:

> "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."

---

45 *Ibid.*

46 Marcus and Spitz 20.

47 Devenish 193.

48 Davis, Cheadle and Haysom *Fundamental rights in the Constitution. Commentary and cases* (1997) 111.

49 110 Sct 2404 (1990).

Drawing on the sound reasoning of this judgment, it is clear that the South African government cannot place a ban on cloning[50] simply because society finds the idea repulsive or disagreeable. This line of reasoning is also supported by the much respected European Court of Human Rights, which has declared that freedom of expression is "applicable not only to 'information' or 'ideas' that are favourably received or regarded as a matter of indifference but also to those that offend, shock or disturb . . . such are the demands of pluralism . . . without which there is no democratic society".[51]

Given these arguments, it is submitted that a scientist will be successful in discharging the onus that his or her right to freedom of scientific research is *prima facie* being violated by section 39A of the Human Tissue Act.[52] The onus will then shift to the government to justify why the scientist's right to freedom of expression in the form of conducting scientific research into human cloning should be limited.

4 LIMITING THE SCIENTIST'S RIGHT TO CONDUCT SCIENTIFIC RESEARCH INTO CLONING A HUMAN BEING

Even though the right to freedom of expression is guaranteed in the South African Constitution, it must be noted that this is not an absolute right. It is submitted that if a scientist were to claim that his or her right to freedom of expression in the form of conducting unrestricted scientific research into human cloning was being violated by section 39A of the Human Tissue Act, which in effect seems to prohibit the cloning of a human being, the scientist's right to freedom of scientific research may be limited by the limitation clause.[53] It is submitted that none of the internal modifiers contained in section 16(2) is applicable to section 16(1)(d) (academic freedom and scientific research) and thus, if a court were to accept that the scientist's right to freedom of scientific research is *prima facie* being violated, the limitation clause will be invoked to test this right. This process is referred to as the second stage of the enquiry.

South Africa's limitation clause reads as follows:

"Limitation of rights

36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

---

50 The effect s 39A of the Human Tissue Act seems to have.

51 As quoted by Devenish 194.

52 Act 65 of 1983.

53 S 36 of the Constitution.

The inclusion of section 36 is an acknowledgement that a constitutional state must reconcile individual protections with collective decision-making taken by a democratically elected parliament.[54] The legislature may prevail, but not where it fails to justify on democratic grounds as specified within the Constitution the reasons why it has encroached upon a constitutional right.[55] Thus the perceived prohibition on human cloning as set out in section 39A of the Human Tissue Act may prevail, but only if the legislature can justify the reasons why it must encroach upon the scientist's right to freedom of expression in the form of conducting scientific research.

It is submitted that although there have been changes made to the limitation clause contained in the 1996 Constitution as compared to the interim Constitution,[56] in general, the limitation clause of the 1996 Constitution closely resembles that of the 1993 Constitution. This view is supported by Cheadle and Davis.[57] By applying the factors listed in the limitation clause to section 39A of the Human Tissue Act, it will be possible to determine whether the limitation on a scientist's right to clone a human being is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

4 1 The nature of the right

The inquiry into the nature of the right to freedom of expression with regard to free and unrestricted scientific research has been set out at the first stage of the limitation investigation.[58] Cheadle and Davis submit[59] that the nature of the right and the closeness of the relationship to the objective of a democracy based on human dignity, equality and freedom should influence the approach to the limitation of the right in question. Thus the closer the relationship, the less generous the court should be in its decision to uphold a limitation of such right. With regard to the right to conduct scientific research, Burchell submits[60] that medical experimentation, which he remarks is recorded as far back as the time of Hippocrates, demands the striking of a delicate balance between the need to advance medical science and the equally important need to protect the inherent dignity and integrity of the individual. Crucial to any and all medical procedures is the vital importance of the legal requirement of voluntary informed consent of the patient.[61] Further, the Helsinki declaration made an important distinction between experimentation in the therapeutic context and non-therapeutic experimentation, distinguishing between "clinical research in which the aim is essentially therapeutic for a patient, and clinical research, the essential object of which is purely scientific and without therapeutic value to the person subjected to the research".[62] Further, with regard to the treatment of a sick person, the Code states that

> "the doctor must be free to use a new therapeutic measure if in his judgement, it offers hope of saving life, re-establishing health or alleviating suffering".[63]

---

54 Davis *et al* 304.
55 *Ibid.*
56 Act 200 of 1993.
57 Davis *et al* 317.
58 *Supra.*
59 Davis *et al* 319.
60 Burchell "Experimentation in human subjects: Protecting dignity and advancing medical science" 1988 *Acta Juridica* 216.
61 *Ibid.*
62 1977 *Legal and Medical Q* 14 as quoted by Burchell 217.
63 *Ibid.*

Burchell submits[64] that underlying the Conventions adopted in the second world war, and designed to protect fundamental rights and freedoms, is the need to protect the dignity and integrity of the individual, including his or her free will. Burchell thus identifies three strands in the thread running through the post-war attempts to eliminate dangerous experimentation – voluntary consent, informed consent and protection of the dignity of the individual – and he submits that a strict approach must be taken to non-therapeutic medical research.[65]

Thus, returning to the scientist's right to conduct scientific research into cloning human beings, it is submitted that the following tests be applied to determine whether the right to freedom of scientific research is closely related to the objective of a democracy based on human dignity, equality and freedom:

(a) Has the test subject/donor of the somatic or germline cell to be used in the experimentation/research process, given *voluntary consent*?

(b) Has the test subject/donor of the somatic or germline cell to be used in the experimentation/research process, given *informed consent*?

(c) Is the *inherent dignity* of the test subject/donor and clone, protected before, during and after the cloning process?

(d) Is the medical procedure/research *therapeutic in nature* in that it offers hope of saving life, re-establishing health or alleviating suffering?

(e) Has the research/experiment/medical procedure been *approved* by an ethical review committee?

(f) Is there *any other viable and safe medical treatment* known that can achieve the same end as the cloning procedure?

It is submitted that if any one of questions (a) to (e) is answered in the negative or (f) in the positive, the court must conclude that the nature of the right to freedom of scientific research into human cloning is not conducive to an open and democratic society based on human dignity, equality and freedom and must therefore limit the scientist's right, since such a limitation will be reasonable and justifiable.

It may be argued that a scientist who wants to exercise his or her right to conduct scientific research to clone a human being, would have great difficulty satisfying (d) and (e). The acceptance of such a revolutionary and controversial research proposal by an ethical committee would depend on how liberal, reformative and bold the committee members are. It is suggested that their decision would hinge largely on the scientist being able to justify the research/medical procedure, and that any non-therapeutic reason to clone a human being will immediately result in the research proposal/proposed medical procedure being rejected by the ethical committee. If the scientist can justify that his or her research/medical procedure will save a life, re-establish health or alleviate suffering for a human being, then the research proposal would have a greater chance of being accepted and approved by members of the ethical committee. It is conceivable that the untested process of cloning only individual body parts as replacements for diseased or badly injured body parts could qualify as saving a life, re-establishing health or alleviating suffering for the cell donor.

64 Burchell 217.
65 *Ibid.*

4 2 The importance of the purpose of the limitation

At this stage, the court engages in an investigation of the limiting law, its purpose and the extent to which the purpose can be said to be congruent with the objectives of the constitutional state, namely, an open and democratic society based on human dignity, equality and freedom.[66] Depending on the court's interpretation of the law, the limitation enquiry could end immediately.[67] Section 39A of the Human Tissue Act which *in effect* seems to ban cloning, was inserted into the Human Tissue Act by section 26 of the Human Tissue Amendment Act 51 of 1989. It is submitted that the purpose for the insertion was only to regulate the process of the artificial fertilisation of a human being more efficiently.[68] Given this, it is submitted that if the courts were to use the purposive approach to interpretation in interpreting section 39A of the Human Tissue Act, the court might not regard the purpose of section 39A as limiting the right of scientists to conduct scientific research into human cloning, even though the wording of section 39A is sufficiently wide to cover a prohibition on human cloning. Given that the wording of the preamble to the Human Tissue Amendment Act mentions, *inter alia*, the need to regulate and control only the process of artificial fertilisation, it is submitted that section 39A is not applicable to a prohibition on human cloning, and further that the process of cloning can be distinguished from the process of artificial fertilisation, since the process is defined in the Human Tissue Act as

> "the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction, including –
>
> (a) the bringing together outside the human body of a male and female gamete or gametes with a view to placing the product of a union of such gametes in the womb of a female person;
>
> (b) the placing of the product of a union of a male and a female gamete or gametes which have been brought together outside the human body, in the womb of a female person".[69]

It is submitted that the process of "artificial fertilization" referred to in the Human Tissue Act refers specifically to the process of artificial insemination.

The process of cloning may be described as the removal of the nucleus of somatic cell followed by the insertion of this nucleus into the nucleus-free cell of a germline cell. Thereafter, an electrical charge is applied to the germline cell with the somatic nucleus and this "tricks" the cell into "believing" that it has been artificially fertilised and thereafter starts dividing. Although this process may be likened to artificial fertilisation, the gametes involved in cloning need not even be one male gamete and one female gamete as described in (a) and (b) *supra.* Furthermore, the cloning technique developed by Ian Wilmut (the embryonist who achieved the cloning breakthrough in Scotland) does not involve the use of gametes and a cell from an embryo is not a zygote.[70] Lupton argues that on a

---

66 Davis *et al* 319.

67 *Ibid.*

68 The preamble to Act 51 of 1989 makes no mention of cloning and only mentions, *inter alia*, the need to better regulate and control the process of artificial insemination.

69 See s 1 of Act 65 of 1983 "Definitions".

70 Lupton "Artificial reproduction and the family of the future" 1998 (17) *Medicine and the law* 111.

narrow interpretation, our legislation as it stands, does not prohibit cloning, and that the state will find it difficult to justify that the purpose of the law (s 39A of the Human Tissue Act), was to limit and prohibit the process of cloning a human being. If the courts take the view that section 39A is not even applicable to human cloning, then the limitation enquiry could end immediately.

4 3 The relationship between the limitation and the purpose

At this stage the court is required to consider the rational connection between the limiting law and its determined purpose and effect.[71] It is submitted that section 39A has clearly been inserted into the Human Tissue Act to regulate the process of artificial fertilisation, and although the terms of section 39A are sufficiently wide and vague to cover a prohibition on cloning, there is no rational connection between the purpose that section 39A seeks to achieve and the prohibitory effect on cloning the law has. It is thus submitted that this element of the limitation clause will also be negated.

4 4 The nature and extent of the limitation: less restrictive means

Here, the courts investigate whether the measure (s 39A) could cause harm to the individual which is not proportional to the objective sought.[72] It is submitted that it is reasonable for the court to conclude that the damage caused to a scientist's right to engage freely in scientific research, is not proportionate to the objective sought by section 39A, since the object of the Act is to regulate artificial insemination. Thus the court could presumably conclude that the vague wording in section 39A has a disproportionate effect on the scientist's right to clone a human being in that it prohibits scientific research into the field of human cloning completely and absolutely.

The court also considers whether there is an alternative measure which could have a less restrictive effect on the constitutional right in question.[73] It is submitted that an alternative measure would be to amend section 39A to reflect that it is applicable only to artificial insemination. Another alternative would be to have the legislature specifically set out its stand on human cloning and to develop clear guidelines on this area so that scientists would be able to govern their professional conduct accordingly.

Having thus considered the limitation clause and having tested the right to freedom of scientific research against the limitation clause, it is submitted that it is reasonable to conclude that a scientist does have the right to freedom of scientific research as guaranteed by section 16(1) of the Constitution, that this right (which would include a right to conduct research into cloning a human being) is not compromised by section 39A of the Human Tissue Act and therefore cannot be limited in terms of section 36 of the Constitution. However, it is submitted that it would take a bold court to hold at the initial stage of the enquiry that a scientist's right to freedom of expression as guaranteed in section 16(1) of the Constitution includes a right to conduct scientific research into human cloning. Although strong legal and philosophical arguments have been made to

71 Davis *et al* 319.
72 *Idem* 320.
73 *Ibid*.

advance this view, it is submitted that our courts would be more likely to take a cautious and conservative stance with regard to allowing a scientist the right to conduct scientific research into human cloning. It is submitted that the courts would be more likely to take the view that the prohibition of the genetic manipulation of the human gamete outside of the human body as set out in section 39A includes a prohibition on human cloning (since cloning would involve the manipulation of the human gamete outside of the human body), even though it is clear from the preamble to the Amendment Act which inserted section 39A into the Human Tissue Act, that its inclusion was to control and regulate the process of artificial insemination, a procedure clearly distinguishable from that of cloning.

5 CONCLUSION

The procedure of cloning a human being promises to be one of the most significant medical events in the history of medicine. If properly regulated, cloning offers enormous benefits, such as the production of identical embryonic stem cells that could be used to repair an individual's damaged tissues or even the production of perfectly matched organs for organ transplants.[74] However, the cloning process is far from being perfected, as recent reports[75] from the Oregon Regional Primate Research Centre in the United States show that cloned animals, and often mothers pregnant with the clones, die during gestation or just weeks after birth, owing in part to a lack of needed DNA normally provided by both the male and female parents of the off-spring, while another study has recently shown that the cloning technique which produced Dolly the sheep may result in serious long-term damage to health in the clones. It would therefore seem that until the process is perfected, the cloning of human beings is unfeasible and unethical. As is pointed out above, a balance needs to be struck between the need to advance medical science and the need to protect the inherent dignity of the individual and the human race at large. Only if we achieve this balance and if the cloning process is perfected, should human cloning be permitted. This balance can be achieved if:

(i) the donor has given voluntary and informed consent;

(ii) the donor is given guarantees that his or her dignity and that of the clone will be protected before, during and after the cloning process;

(iii) the cloning procedure is strictly for therapeutic purposes;

(iv) the cloning process has been approved by an ethical review committee; and

(v) there are no other viable medical alternatives known that can achieve the same end as the cloning process.

As a society, we may be pleased and proud that our technology and science, has had social applications, but what we must do together as scientists and as a society is to ensure that we apply these technologies with the highest of standards. We must strive to apply them to the highest of purposes.[76]

---

74 http://www.last-word.com/nsplus/insight/clone/giantleap.html.

75 As reported on 1999-05-13 at the CNN website at www.cnn.com.

76 Dr Lander – Director, Centre for Genome Research Massachusetts Institute of Technology as quoted at: http://www.gene.com.ae/AB/WYM/lander/lander_1.html.

It is submitted that such an approach is an optimal survival strategy for the human race, as it will allow us to challenge our conventional medical wisdom and to push the boundaries of our knowledge to new and beneficial medical frontiers. Just as organ transplantations, which were once viewed with scepticism, have irrevocably changed mankind's perceptions and life span, so too does human cloning offer mankind the opportunity of shaping the course of his own destiny by allowing him a chance to influence his own life at a cellular level. It is submitted that as long as the process is properly controlled and regulated, the medical benefits it will bring will more than justify permitting it. Recently, scientists in South Korea announced that they had cloned the first human cell,[77] demonstrating that a ban on human cloning in one part of the world will not stop research into the field in other parts. Rather than to declare the process of cloning a human unlawful and forcing protagonists of the procedure underground or risk losing excellent scientists that want to be involved in such a procedure or research to other countries that do permit cloning, the state should allow research into human cloning to proceed, but insist that the procedure be strictly regulated so that the state can be kept informed about the latest developments in this field and so that research results will be open to objective and incisive scrutiny. Only with such a bold "millennium mentality" will mankind's legal, philosophical and jurisprudential evolution keep pace with the technological and medical evolution around it.

ERRATUM

THRHR Band 62 Nommer 3 Augustus 1999

'Against the criminalization of HIV-related sexual behaviour' page439:

Second paragraph:

'By sexual conduct, I mean consensual intercourse, where there is consent to the act of intercourse, rape or sexual assault.'

should read:

'By sexual conduct, I mean sexual intercourse, and not rape or sexual assault.'

Men who become rulers by prowess . . . acquire their principalities with difficulty but hold them with ease. The difficulties they encounter in acquiring their principalities arise partly because of the new institutions and laws they are forced to introduce in founding the state and making themselves secure. It should be borne in mind that there is nothing more difficult to handle, nothing more doubtful of success, and more dangerous to carry through than initiating changes in a state's constitution.

Niccolo Machiavelli The prince *(trans G Bull).*

77 *Sunday Tribune* 1998-12-20.

AANTEKENINGE

ELEKTRONIESE TJEKS

1 Inleiding

'n Onlangse verskynsel wat in die praktyk voorkom, is tjeks wat deur 'n outomatiese Tellermasjien (OTM) geskep (getrek) en gesamentlik deur die OTM en die kliënt van die bank voltooi word. Die kliënt van die banke wat hierdie fasiliteite aanbied, kan so 'n tjek aanvra deur middel van 'n OTM nadat die kliënt sy persoonlike identifikasienommer (PIN) by die OTM ingesleutel het. Die tjek word getrek op 'n tak van 'n bank en is gekruis en gemerk "Nie verhandelbaar nie/Not negotiable" en word aan order betaalbaar gestel. Die kliënt voltooi dan die tjek deur die naam van die nemer in te skryf. (Tot tyd en wyl die kliënt die naam van die betrokke nemer inskryf, het ons met 'n onvoltooide tjek te make aangesien a 5(1) van die Wisselwet 34 van 1964 (hierna die Wet) vereis dat waar 'n tjek nie aan toonder betaalbaar gestel is nie die nemer daarin by name genoem of andersins met redelike sekerheid aangewys moet word.)

Die trekker van die tjek word aangedui met die woorde "Vir Trekker" en in die spasie daarnaas kom die naam van die kliënt voor. Die naam van die kliënt word deur die OTM in die spasie ingevoeg en is natuurlik gekoppel aan die feit dat dit die kliënt is wat die tjek aanvra. Onder die voormelde naam van die kliënt kom dieselfde naam van die bank waarop die tjek getrek word voor wat gevolg word deur twee rekenaarfaksimilee handtekeninge van sekere beamptes van die bank met die woorde "gemagtigde ondertekenaars" daaronder. Die voormelde handtekeninge van die "gemagtigde ondertekenaars" word gewoonlik ook deur die OTM op die tjek aangebring. Hierdie soort tjeks staan bekend as sogenaamde "elektroniese tjeks".

Kragtens artikel 1 van die Wet is 'n tjek 'n *wissel* getrek op 'n bankier wat op aanvraag betaalbaar is. Artikel 2(1) bevat die definisie van 'n wissel en bepaal onder andere dat 'n wissel gerig moet word "deur een persoon aan 'n ander" en onderteken moet word deur die opdraggewer (die trekker). In hierdie verband bepaal artikel 3(2) verder dat indien "in 'n wissel die trekker en betrokkene dieselfde persoon is" die houer van die stuk na eie keuse die stuk óf as 'n wissel óf as 'n promesse mag behandel. Indien die stuk as 'n promesse behandel word is die gevolg daarvan dat die maker of promittent as primêre skuldenaar aangespreek kan word (Malan en Pretorius *Malan on bills of exchange, cheques and promissory notes in South African law* (1997 par 262) (hierna Malan).

2 Banktjeks

Indien 'n bank 'n tjek op homself trek staan so 'n "tjek" gewoonlik bekend as 'n "banktjek" ("bank cheque" of "cashier's cheque" of "bank drafts"). Aangesien

die trekker en die betrokkene dieselfde persoon is, is sodanige dokumente nie tjeks nie, maar eerder bankwissels (Malan par 27 en 39; *Powell v ABSA Bank Limited t/a Volkskas Bank* 1997 4 All SA 231 (SOK) 234). Ook 'n dokument waarin een banktak voorgee om 'n tjek op 'n ander banktak van dieselfde bank te trek, is nie 'n tjek nie ('n tak van 'n bank is nie 'n afsonderlike regspersoon nie: Malan par 39 en gesag in vn 116 aangehaal) hoewel die houer van die dokument die dokument óf as 'n wissel óf as 'n promesse mag behandel (a 3(2)).

In die oorsese literatuur, veral in Kanada, Engeland en Australië, het die verskynsel van 'n banktjek besondere betekenis verkry en word dit in die algemeen aldaar as 'n besondere veilige soort betaalmiddel beskou ("Irrevocability of bank drafts, certified cheques and money orders" 1986 *Canadian Bar Rev* 107; Tyree *Banking in Australia* (1998) 214ev; Holden *The law and practice of banking* vol 1: *Banker and customer* (1991) 328ev). In die algemeen word die standpunt in verskeie jurisdiksies gehandhaaf dat die banktjek veilig is omrede die trekker betaling van die tjek slegs in hoogs uitsonderlike omstandighede kan aflas. Verder vind die insolvensie van die bank as trekker nie dikwels plaas nie. In Australië is daar byvoorbeeld tans 'n debat oor die vraag of die trekker hoegenaamd betaling kan aflas (Mainwaring "Dishonouring bank cheques: latest developments" 1985 *New Soc J (NSW)* 430; Makim "The Australian bank cheque – some further legal aspects" 1976 *Monash LR* 66; Edwards "Bank cheques and solicitors" 1990 *Law Institute J* 592, "The form of bank cheques" 1991 *Bond LR* 174, "Bank cheques (Ricky Yan) and letters of credit (Inflatable Toy Company): A comparison in independence" 1997 *Australian LJ* 36; *Ricky Yan v Post Office Bank Ltd* [1994] 1 NZLR 154 en Geva se bespreking van laasgenoemde in 1994 *Canadian Bar Rev* 280). Tyree (216) merk op dat die *Australian Bankers' Association* in 1985 bekend gemaak het dat die betaling van banktjeks net in vyf gevalle afgelas kan word: waar die "tjek" 'n vervalsing is; waar dit 'n wesenlike verandering bevat; waar dit gesteel of verlore is en waar daar 'n hofbevel is ingevolge waarvan die betaling nie gemaak kan word nie. Die skrywer verduidelik dat die vyfde geval meer kontroversieel is:

> "The fifth ground for dishonour concerns the situation where the bank has not received consideration for the cheque. The announcement states that such a cheque will not be dishonoured unless the holder has not given value or unless the holder was aware at the time of giving value that funds against which the cheque was drawn would not clear. This means that if the bank wishes to issue a bank cheque before the funds have been cleared, then it is at its own risk, not that of the unfortunate holder of the cheque" (*ibid*).

In die VSA bevat die *Uniform Commercial Code* en die voorgestelde wysigings op die kode nou uitdruklike en uitvoerige voorskrifte oor die aflasting van betaling van banktjeks (Riegert "Stopping payment and refusing payment on bank checks" 1988 *Commercial LJ* 137 144ev). In die VSA word daar byvoorbeeld geargumenteer dat die openbare belang verg dat "the public regards bank checks as cash and therefore payment by bank checks should be irrevocable" (Riegert 179). Die howe pas hierdie beginsel egter nie baie konsekwent toe nie en daar is heelwat teenstrydige uitsprake in hierdie verband waar die howe wel die aflasting van die betaling van banktjeks in die VSA veroorloof.

3 Aflasting van betaling

Die vraag of die trekker geregtig sou wees om betaling van 'n banktjek in die Suid-Afrikaanse reg af te las, het nog nie voor ons howe ter sprake gekom nie. In *Powell v ABSA Bank Limited t/a Volkskas Bank* 1997 4 All SA 231 (SOK) 246

wys die hof daarop dat die betrokke bankbestuurder die relevante banktjeks "as good as cash" beskou het aangesien betaling van hierdie tjeks na bewering nie afgelas sou kon word nie. Die regter betwyfel die korrektheid van hierdie standpunt en wys daarop dat 'n ander getuie (ook 'n bankbestuurder) sou getuig het dat volgens bankpraktyk daar geen rede is waarom betaling van so 'n banktjek nie afgelas kan word nie.

Ek is egter van mening dat daar 'n duidelike onderskeid gemaak behoort te word tussen die aflasting van betaling van 'n tjek en die potensiële aanspreeklikheid van 'n wisselparty. Daar moet in gedagte gehou word dat in die geval van 'n banktjek, die bank die trekker is wat op versoek van sy kliënt 'n tjek ten gunste van 'n derde (die nemer) trek. Gewoonlik is daar geen kontraktuele verhouding tussen die bank en die nemer van die tjek nie. Die kontraktuele of onderliggende verhouding (naamlik 'n lasgewingsooreenkoms) vir die trek van die tjek bestaan gewoonlik tussen die kliënt van die bank op wie se versoek die bank die tjek trek, en die nemer. Indien daar 'n wanprestasie ingevolge die onderliggende verhouding is, is hierdie defek of verweer gewoonlik tussen die kliënt en die nemer. (Gewoonlik is banktjeks gekruis en gemerk "nie verhandelbaar nie" wat ingevolge a 80 minstens sou beteken dat daar nie 'n reëlmatige houer van die tjek kan wees ten aansien van opvolgers in titel van die nemer nie. Waar die tjek aan order betaalbaar gestel is, sal die nemer ook nie as reëlmatige houer kan kwalifiseer nie (*Moti & Co v Cassim's Trustee* 1924 AD 720; *Diesel-Electric (Natal) (Pty) Ltd v Ramsukh* 1997 4 SA 242 (HHA).) Die bank as trekker het ingevolge artikel 53(1) van die Wet onderneem om die tjek te betaal en sal hom nie op die wanprestasie wat teenoor sy kliënt gepleeg is, kan beroep as verweer teen betaling van die tjek nie. Indien die nemer egter bedrog of wanprestasie teenoor die bank as trekker as sodanig gepleeg het, sou die trekker of bank hom daarop kan beroep. Dit wil dus voorkom of 'n nemer behoort te slaag om betaling van 'n tjek teenoor die bank as trekker af te dwing ten spyte daarvan dat daar 'n moontlike wanprestasie deur die nemer teenoor die kliënt van die bank gepleeg is (Ackermann "The negotiable instrument and the unenforceable contract" 1987 *SALJ* 316 318). In die meeste gevalle sal die bedrog teenoor die kliënt, en nie teenoor die bank nie, gepleeg word. Daar bestaan egter geen duidelikheid in hierdie verband nie maar dit is nie vir die huidige doeleindes nodig om verder hierop in te gaan nie. (Kyk hieroor Pretorius "Countermanding payment of a certified cheque" 1992 *SA Merc LJ* 210; Oelofse "Onlangse ontwikkelings in die tjekreg" 1991 *SA Merc LJ* 364 370-371 en Stassen "Regsgevolge van bankgewaarborgde tjeks" 1985 *De Rebus* 149.)

4 Elektroniese tjeks

Die vraag wat egter beantwoord moet word, is of 'n elektroniese tjek wel geldig is en of dit inderdaad 'n tjek (oftewel 'n banktjek) of 'n wissel (oftewel 'n bankwissel) is. Kragtens artikel 2(1) van die Wet moet die persoon wat die opdrag in 'n wissel gee die wissel of tjek as trekker teken. Daar kan trouens nie 'n geldige wissel of tjek tot stand kom sonder die handtekening van die trekker nie (Malan par 71). Hierdie voorskrif moet egter saam met die bepalings van artikel 24 van die Wet gelees word. Kragtens artikel 24(1) kan die naam van die trekker deur sy verteenwoordiger op die tjek aangebring word en indien die verteenwoordiger by sy handtekening woorde voeg wat aandui dat hy vir of namens 'n prinsipaal teken, is die verteenwoordiger nie persoonlik uit hoofde van die tjek aanspreeklik nie, mits hy die nodige volmag gehad het om aldus te teken. Indien die

verteenwoordiger inderdaad geen bevoegdheid besit het om namens die persoon wat as prinsipaal aangedui is te teken nie, is hy persoonlik op die wissel aanspreeklik.

Die antwoord op die vraag of 'n verteenwoordiger gemagtig is om sy prinsipaal te verbind, is afhanklik daarvan of die verteenwoordiger volmag daartoe gehad het (Malan par 76). Of volmag inderdaad verleen is, is 'n feitevraag wat van geval tot geval beoordeel moet word (Joubert *Die Suid-Afrikaanse verteenwoordigingsreg* (1979) 93ev; Silke *The law of agency in South Africa* (1981) 124ev). Die omvang van die volmag is ook 'n feitevraag.

In die geval van 'n elektroniese "tjek" is die vraag derhalwe of die twee "gemagtigde ondertekenaars" inderdaad volmag gehad het om die dokument namens die kliënt te trek. Indien die "gemagtigde ondertekenaars" wel sodanige volmag gehad het of indien die kliënt die gebrek aan volmag (indien enige) geratifiseer het, sal die "gemagtigde ondertekenaars" nie persoonlik op die dokument aanspreeklik wees nie en sal die kliënt gebonde wees aan die optrede van sy verteenwoordigers.

Ek het min twyfel dat die volmag aan die "gemagtigde ondertekenaars" verleen is ingevolge die algemene gebruiksvoorwaardes van die rekening waarkragtens die betrokke tjek deur die kliënt aangevra word. Selfs as geargumenteer kon word dat daar nie uitdruklikke volmag verleen is nie, sou mens verwag dat daar minstens stilswyende volmagsverlening plaasgevind het of miskien ook ratifikasie deur die gebruikmaking van die tjek in sy voltooide vorm. Ek sou verder gaan om te sê dat die volmag gekoppel is aan die blote gebruik van die kaart tesame met die PIN by die OTM sodat selfs die ongemagtigde gebruik van die kaart en die PIN voldoende volmag aan die "gemagtigde ondertekenaars" sou verleen om die tjek namens die rekeninghouer te trek (vgl Visser "Banking in the computer age: The allocation of some of the risks arising from the introduction of automated teller machines" 1985 *SALJ* 646 655–656; Visser *Die regsbetrekkinge by bankoutokaarte* (1987) (ongepubliseerde LLM-verhandeling, RAU) 41ev, Meiring *Regsaspekte van die rekenarisering van die betalingstelsel* (1998) (ongepubliseerde LLD-proefskrif, UNISA) 151ev). Die risiko van die ongemagtigde gebruikmaking van die kaart tesame met die PIN behoort derhalwe op die kliënt of kaarthouer te val.

Uit wat hierbo vermeld is, volg dit dat die trekker van die elektroniese tjek die kliënt is en nie die bank nie. Die bank se werknemers tree bloot as "gemagtigde ondertekenaars" op en die bedoeling is inderdaad nie om namens die bank te teken nie maar eerder namens die kliënt wat deur die gebruik van sy kaart en PIN 'n tjek by die OTM aanvra. Indien die bank se werknemers telkens bloot namens die betrokke kliënt die tjek as trekker teken, volg dit dat ons nie hier te make het met 'n tjek wat deur die bank op homself getrek is nie. Die feit dat die magnetiese inknommer op die elektroniese tjek dié van die bank is, behoort ook nie hierdie beginsel te verander nie aangesien dit nie 'n voorvereiste van die Wisselwet is dat 'n persoon 'n kliënt van 'n bank moet wees alvorens 'n persoon 'n tjek op daardie bank mag trek nie. Die magnetiese inknommer is verder ook nie 'n vereiste vir 'n geldige tjek nie en is bloot 'n aanduiding van wie die houer van die tjekrekening is.

Ek wil derhalwe aan die hand doen dat elektroniese tjeks gewoonlik nie as "banktjeks" beskou kan word nie aangesien die trekkers van hierdie tjeks nie die bank is nie maar die betrokke kliënt met telkens die "gemagtigde ondertekenaars" wat die tjek namens die kliënt trek en onderteken. Aangesien die bank

bloot as verteenwoordiger van die kliënt die tjek trek, volg dit ook dat die kliënt inderdaad by magte sou wees om betaling van die tjek af te las. Die bank sal ook nie enige aanspreeklikheid as trekker van sodanige tjek opdoen nie. Daar is egter min twyfel dat elektroniese tjeks in beginsel wel as geldige tjeks beskou moet word.

5 Die vrywaringssertifikaat

Laastens kan daar kortliks na die sogenaamde "vrywaringsertifikaat" verwys word wat op die elektroniese tjeks verskyn. Hierdie sertifikaat bepaal gewoonlik dat die bank sertifiseer dat die tjek "goed" is vir 30 dae vanaf die datum op die tjek, met dien verstande dat die tjek uitgereik is vir hoogstens 'n vermelde bedrag.

Daar word aan die hand gedoen dat die regsgevolge van so 'n klousule baie analoog is aan die reëls wat geld in die geval van 'n sertifisering van 'n tjek (Malan par196; Dijkman *The certification of cheques* (1986) (ongepubliseerde LLM-verhandeling, RAU) 37ev). Om te bepaal of die bank aanspreeklik is ingevolge die "vrywaringsertifikaat" moet daar telkens vasgestel word wat die bedoeling en betekenis is van die woorde wat in die "vrywaringsertifikaat" gebruik word en of die bank bedoel om gebonde te wees op die tjek of andersins redelikerwys die indruk skep dat dit so 'n verpligting onderneem. Dit wil voorkom of dit moontlik die geval sal wees veral as die howe die woorde "goed vir" ("good for") inderdaad uitlê as 'n primêre onderneming om te betaal (*Brand v Mulder* (1829) 1 Menz 25; *Watermeyer v Neethling qq Denyssen* (1831) 1 Menz 26). Soos Dijkman opmerk:

> "[T]he bank intends to incur a primary contractual obligation (as principal debtor) to the payee or the person presenting the cheque for certification in terms of which it undertakes to pay the amount stipulated in the certification (as evidenced by the use of the words 'good for') on condition that the cheque is presented within the stipulated time" (81).

Daar behoort dus aanspreeklikheid vir minstens die vermelde bedrag te wees.

JT PRETORIUS
Universiteit van Suid-Afrika

THE PRINCIPLE OF EQUALITY IMPACTS ON THE CLASSICAL LAW OF CONTRACT

1 Introduction

It is now five years since the right to equality became enshrined in a bill of rights in the South African Constitution. Even before the recognition of this fundamental right, however, equality was a quiet, seldom-mentioned principle underpinning the law of contract, for equality between parties constitutes a logical prerequisite for freedom of contract. That this historical formal equality

was a fiction has been pointed out on previous occasions. At present, though, a trickle-down effect of the more robust constitutional equality is becoming noticeable in the law of contract. Gauteng saw the enactment of a radical Consumer Affairs Act in 1997, although it is not yet in operation. Extensive protection for lessees was introduced in the Residential Landlord and Tenant Act 3 of 1998. And in August 1998 our courts joined this trend in their application of the certainty requirement to bond contracts.

2 The general principle of certainty

The tacit recognition of the principle of equality in the law of contract can be deduced from, *inter alia*, the prohibition against unilateral determination of performance. This prohibition is part of the requirement of certainty of the contents of the agreement, which is one of the essential elements of a contract. If the stipulated performance is vague or indefinite, the contract is void for vagueness, since enforcement of an obligation is impossible if its contents cannot be determined. Consequently, contracts in which the contents of the performance are left by parties to be negotiated at a later stage, or in which one party is given a discretion to decide what is to be performed, are invalid. On the other hand, the courts are reluctant to declare void contracts which were clearly intended to be legally binding, and have in the past attempted to extract certainty from provisions that are *prima facie* vague (see Hutchison *et al Wille's principles of South African law* (1991) 424; Christie *The law of contract in South Africa* (1996) 104ff). Thus the prohibition against unilateral determination of performance has been systematically undermined by the reluctance of the courts to interfere with freedom of contract, by the principle *pacta sunt servanda*, and by the predominance of standard-form contracts.

Certainty or ascertainability of a performance can be achieved in two ways: first of all, by express definition of the rights and obligations the parties wish to create, or secondly, by agreement to identify an external standard by which the performance may be determined. The latter principle is contained in the maxim *id certum est quod certum reddi potest* (*D* 12 1 6; 45 1 74). Positive law demands that there should be no further need for the parties to be consulted in order to ascertain their intention in regard to the proposed performance (*Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A)).

In order to establish whether the requirement of certainty has been met, one must consider the express and tacit provisions of the contract, as well as any terms implied by law. A reference to the *naturalia* of an agreement, including trade usages, can serve to fill in apparent gaps (Lubbe and Murray *Farlam and Hathaway Contract: Cases, materials and commentary* (1988) 314). It is this element which has allowed the courts the leeway they have needed in order to extract certainty from apparently vague contractual terms.

3 Past application of the certainty principle

On various occasions during the past decade our courts have been required to judge the validity of contracts in which parties were given a discretion as to the content of their performance. The courts went to great lengths to extract certainty from the terms of the contracts, in order to avoid invalidating the agreements in question. Decisions covering innominate contracts, agreements of lease and bond contracts exemplify this trend.

3 1 Innominate contracts

Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991 1 SA 508 (A) was the first in the above line of decisions. There the question arose whether the determination of performance by the appellant together with an independent institution invalidated the contract. Delivering the unanimous judgment of the Appellate Division, Hoexter JA found that in this particular case the determination of performance by one of the parties in conjunction with a third person could be regarded as valid, for agreement between the contracting party and the third person as to the performance which was due could be classified as an objective and external standard (515C–D). Hoexter JA, however, qualified his decision by mentioning that in practice certain factors could influence a decision whether a third person involved in the determination of price was or was not independent of the contracting party (515D–E). The decision could depend upon evidence regarding the relationship between the contracting parties, and regarding the independence and competence of the third person involved in the determination of performance. In this instance, however, the Appellate Division held that a valid contract had come into being.

3 2 Leases

Following the *Murray & Roberts* case were two lease cases concerned with the question whether the determination of rent specified in each contract met the requirement of certainty. It is trite law that the rent agreed upon between two contracting parties must be certain (Grotius 3 19 7; Van Leeuwen *Het Roomsch Hollandsch recht* 4 21 2; Voet 18 1 23, 19 2 7; Van der Linden 1 15 11; Pothier *Contract de louage* sec 37; Cooper *Landlord and tenant* (1994) 54). Rent is, however, regarded as certain when the parties agree upon a definite method or formula by which it is possible to ascertain it (Cooper 55 fn 85).

Determination of rent by means of a formula often presents problems. In *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 3 SA 738 (A) the question on appeal was whether or not certain operating charges (referred to as "cost items") which constituted components of the rent were fixed or determinable (750B–D). Joubert JA found that the cost items mentioned in the contract were indeed determinable, since they were qualified. The qualifying clause provided that if any dispute were to arise between the landlord and the tenant concerning the reasonableness of any of the operating costs or the amount for which the tenant was liable, the dispute would be determined by the landlord's auditors acting as experts, and that their decision would be final and binding on the parties, provided that the auditors, in making a determination, would be obliged to have regard to whether the services in question had been supplied at fair market cost, and to call evidence from people whom they regarded as being suitably qualified to assist them in making their determination (747E–G).

The court accordingly concluded that the operating charges referred to were clearly described and identifiable, and that the qualifying clause provided the necessary mechanism for the objective determination of the reasonableness "of any of the operating costs or as to the amount for which the tenant is liable" *by the landlord's auditors as expert outsiders without any reference to the landlord* (751A–B).

The decision in *Proud Investments* can be distinguished from that in *Murray & Roberts*. In the latter, the performance was to be determined by the lessor

together with a third party (the Development Board of the House of Representatives). This was radically different from a determination of rent by the lessor's auditors, as was the case in *Proud Investments*. By its very nature, the Development Board is an independent institution. This cannot be said of a lessor's auditors, who are paid to look after their client's interests. In *Murray & Roberts* Hoexter JA foresaw the dangers inherent in the determination of performance by one of the contracting parties together with a third party and added, by way of *obiter dictum*, certain qualifications. The judge mentioned that the relationship between the contracting parties as well as the independence and competence of the third person could affect the answer to the question whether performance can be determined by one of the parties to a contract together with a third person (515D–E). In the *Proud Investments* case, on the other hand, Joubert JA had no reservations in deciding that the determination of performance by one of the party's auditors was sufficient to meet the requirement that performance is ascertainable with reference to an objective and external standard. This decision may be construed as a departure from the general principle that performance must be determined by means of an independent objective standard, for a determination of rent undertaken by the lessor's auditors does not truly qualify as independent. *Proud Investments* thus indicates the reluctance of our courts to declare void contracts which were intended to be legally binding. The court in that case used every tool at its disposal to extract certainty from the vagueness of the terms before it.

In *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd)* 1992 1 SA 566 (A) the lease between the parties made provision for increments in rent (574B–C), and payments for maintenance and running expenses (574C–I). The court *a quo* held that the provisions in the lease relating to the payment of rental were vague and that the whole lease was invalid for that reason. The lessor appealed (575E–F). After a thorough examination of South African and comparative law (577C–578D), Nicholas AJA came down clearly in favour of a less restictive requirement in regard to certainty of rent or price. He held, however, that it was unnecessary to decide the question, for the agreement in the *Genac* case did not provide for payment by the tenant of a reasonable amount in respect of the landlord's maintenance and running expenses (578C–D). He found that the word "reasonable" was used in relation to actual expenses, and that its use in that context did not create uncertainty. For the lessee it was argued that the clause dealing with maintenance and running expenses was invalid because it left the determination of the amount payable to the discretion of the lessor. The crucial question in this regard was whether this feature invalidated the lease. The court *a quo* held that it did, whereas Nicholas AJA found that it had nothing to do with the validity of the lease (579A–B). The judge held that an interpretation upholding the validity of the lease was to be preferred above one leading to invalidity (579E–F). He referred to *Soteriou v Retco Poyntons (Pty) Ltd* 1985 2 SA 922 (A) 931G–H, where it was held that the courts are unwilling to hold void for uncertainty any provision which was intended to have legal effect. In consequence, Nicholas AJA concluded that the lease was valid and enforceable (579H–I).

Again, the conclusion can be reached from the arguments of Nicholas AJA and the references upon which he relied (in particular, Zeffertt 1973 *SALJ* 113) that he was in favour of a less restrictive approach to the interpretation of the requirement of certainty of performance. This approach coincides with that taken in the *Proud Investments* case.

3 3 Mortgage bonds

In *Boland Bank Bpk v Steele* 1994 1 SA 259 (T) the validity of a mortgage contract arose for decision. The contract provided that the mortgagee could at any time, by way of written notice to the mortgagor, amend or adjust the rate of interest recoverable in terms of the contract, and the conditions of payment of interest and capital (273G–H). The defendant contended that the clause was vague and unclear because of the provision for the unilateral determination by the mortgagee of the performance due by the mortgagor.

Van Dijkhorst J referred to the common law governing the determination of performance by one of the parties to the contract (see 274G–J and the authorities cited there). The judge acknowledged that in a moneylending contract the interest due must be determined or determinable (275A–B) but, despite referring to the traditional literature on the point, came to the conclusion that clauses such as the one under discussion are valid (276F). The argument he relied upon was that the law proceeds from the premise that in the interpretation of this kind of provision, the court must follow an approach which results in validity rather than invalidity (276F–G). Van Dijkhorst J stated that the determination of the performance must be executed reasonably ("op redelike wyse"). What was reasonable, said the judge, had to be determined with reference to the interest rates and usages in the open market applicable to similar clauses in similar circumstances (276G–H).

Had the general principle of the law of contract been applied, it is doubtful whether the contract would have escaped a finding that it was void for vagueness.

4 Present strict application of the certainty principle

In view of the above decisions, the law appears to be well on its way to recognising a "reasonable" performance as valid. The courts have attempted to extract certainty from vague provisions in contracts that were clearly intended to be legally binding, in preference to applying the principle of void for vagueness. It is therefore interesting to note the change in direction which the courts have taken in the past year in deciding cases in which performance was undefined.

During 1998 the Witwatersrand Local Division had occasion to hear two cases dealing with this issue. In both cases the validity of clauses pertaining to variations in bond rates was questioned.

In *NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste BK* 1998 3 SA 729 (W) the applicant applied for summary judgment against the respondents on mortgage bonds which the respondents had passed in favour of the applicant. The respondents averred that the bonds were void because in terms of the contract the applicant could vary the interest rate unilaterally. The question raised was therefore whether a moneylender can validly stipulate for, and from time to time exercise, the power unilaterally to vary the rate of interest applicable to the loan (731B–D). If the applicant could legitimately exercise such a power, the first defendant was in arrears with the instalments payable under a loan granted to it. That would entitle the applicant to foreclose on the mortgage bond securing the loan, and summary judgment would have to be granted. The relevant clause read as folows:

> "Notwithstanding anything to the contrary herein contained the bank may at any time and from time to time increase or decrease the rate of interest per annum on

> all amounts owing to or claimable by the bank in terms of this bond to the rate determined by the bank as payable for the class of bonds into which this bond falls, provided that the rate as increased or decreased does not exceed any limit imposed by any law in force at the time of such increase or decrease"(732F–H).

On behalf of the plantiff it was argued that a moneylending contract can validly provide that the moneylender is to have the power to vary the rate of interest unilaterally (734H–I). To substantiate this argument, counsel placed reliance on *ABSA Bank Bpk v Saunders* 1997 2 SA 192 (NC). The point raised in *Saunders* was that it is a long-standing usage of commercial banks to determine interest rates on overdrawn facilities in the discretion of the bank manager or the bank's head office, according to the circumstances. It was also mentioned that prior to the introduction of the Usury Act 73 of 1968, it was unnecessary to inform clients of any increase or decrease in interest rates (196J–197B). In *Saunders* reference was also made to *Senekal v Trust Bank of Africa Ltd* 1978 3 SA 375 (A), where Miller JA came to the conclusion, in relation to the debiting of interest in respect of overdraft facilities, that where a customer received a statement without protesting at the deductions, the customer acquiesced in the interest charges and thereby tacitly agreed to be bound (384G–H, 385pr–A). Miller JA also referred to an alternative approach: that when seeking and obtaining overdraft facilities, a client tacitly agrees to be bound by the practice of the bank (384H–*in fine*).

In *NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste* it was argued, on behalf of the bank, that the principles raised in *Senekal* applied to moneylending contracts such as that evidenced by the mortgage bond in the *NBS* case. Once the lender had received notice of alteration of the interest rate, he or she was free to acquiesce in the varied bond rate or to repay the loan and so terminate the contract (735H–I). Stegmann J decided not to uphold these submissions, for the following reasons. The overdraft contract and the parties' respective rights and obligations surrounding overdraft facilities are unique and dependent on banking practice established by long usage (735I–J). This did not justify the conclusion that every moneylender was free to stipulate for the right to make a unilateral determination of the rate of interest (735I–736B). The conclusion was reached that moneylending contracts, no less than contracts of lease and other contracts in general, must be established on the basis of the fact that the essentials of the contract are in themselves rendered certain (736C–D). The interest rate in moneylending contracts was one of the essentials which had to be rendered certain. If it was not certain or ascertainable, the contract would, on the basis of common-law principles, be void for vagueness (736D–E).

In response to the argument that the Usury Act recognises that moneylending transactions often involve agreements for what is defined in section 1 of the Act as a variable finance charge, Stegmann J found that there was nothing in the Act to suggest that such an agreement implied that the parties were free to give to the moneylender the exclusive discretionary power to make unilateral decisions about the finance charge from time to time (736G–H). Stegmann J concluded by saying that a contract which purported to vest the moneylender with the power to determine unilaterally when, and by how much, to vary the interest rate is null and void (737B–D). Interestingly, the judgment of Stegmann J was referred to with approval by Nugent J in refusing an application for summary judgment in *ABSA Bank Ltd (United Bank Division) v Henning* (WLD 1998-02-13 Case No 97/32954, unreported).

The third case to follow the trend of strict application of the certainty principle is *NBS Boland Bank Ltd v One Berg River Drive CC* 1998 3 SA 765 (W), where the same question that arose in *Badenhorst-Schnetler* was considered. Counsel for the plaintiff relied on the line of reasoning adopted by Van Dijkhorst J in *Boland Bank Bpk v Steele* – that an interpretation should be adopted which led to validity rather than invalidity (276F–G). The right implied in the variation clause was, however, qualified by Van Dijkhorst J, who held that it had to be exercised reasonably (276G–H). In order to determine what qualified as reasonable, recourse could be had to the rates and trade usages applicable to this type of contract in the open market (276H).

Southwood J in *One Berg River Drive* conceded that there was clear authority for the first point, and that courts are reluctant to hold void for vagueness any provision which was intended to have legal effect (772B–C). In regard to the second argument relating to the requirement of reasonableness, however, Southwood J found that the clause in contention conferred an unfettered discretion on the plaintiff to vary the interest rate, and that it was not intended to be exercised *arbitrium boni viri* (774C–D). In consequence, the clause in question was invalid and unenforceable. This was in direct contrast to the decision by Van Dijkhorst J in *Steele*, where the reason for validity was sought in the qualification that the discretion to vary the interest rate must be exercised "reasonably".

This case once again illustrates a blatant departure from the previous trend. Southwood J had the opportunity to extract certainty from the vagueness by using the "reasonableness" criterion, but chose not to do so. In the same vein, Stegmann J in *Badenhorst-Schnetler* chose not to rely on the argument that such clauses are valid because the bank's clients tacitly agree to be bound by the clause, or that the client tacitly agrees to be bound by the practice of the bank. Both judges chose to apply the common-law principles strictly.

5 Conclusion

From the above historical discourse, it does not seem inappropriate to draw the conclusion that the right to equality has begun to make an impact on the law of contract. One can argue that since the inception of the Constitution the right to equality has subtly coerced the law of contract to develop a doctrine of inequality. Such a doctrine compels the courts to examine the fairness of market practices and relations, instead of assuming a satisfactory level of resources for each party and the fairness of market relations. It seems reasonable to assume that the recent trend towards strict application of the void-for-vagueness rule in mortgage-bond cases is motivated by the fact that the parties to such contracts are seldom, if ever, in equal bargaining positions. Prior to the advent of a bill of rights, disparity in the bargaining power of contracting parties was not usually taken into account, and the judiciary adhered to the theory of freedom of contract based on the assumption that contracting parties possess equal resources. In the past there has been a perception that the courts believed that elements such as equality and freedom could only be made a legal reality by the legislature. The paradigm shift that has recently taken place in mortgage-bond cases seems to exemplify a transition from classical law to modern, which is to be applauded.

LUANDA HAWTHORNE
University of South Africa

PSIGOSEKSUELE OUTONOMIE EN DIE DINAMIESE AARD VAN DIE INHOUD VAN DIE TOESTEMMINGSBEGRIP BY VERKRAGTING

1 Inleiding

Die relevante feite in die saak *R v Nicholson* (1999) 129 CCC (3d) 198 (Alberta CA) kan soos volg saamgevat word: Op 17 Februarie 1996 het klaagster besluit om die nag by haar vriendin Charmaine Richer deur te bring. Sy het dit voorheen ook al gedoen. Sy het by die huis aangekom voordat haar vriendin tuis was en toegang tot die huis verkry deur middel van die beskuldigde, N, se broer wat Charmaine se kind opgepas het. Sy het, ten volle geklee, op Charmaine se bed aan die slaap geraak. Die ligte was afgeskakel. N, Charmaine se voormalige vriend en vader van haar 3-jarige kind, was ook op besoek in die huis. Hy was egter nie teenwoordig toe klaagster die huis binnegegaan het nie. Klaagster het getuig dat sy wakker geword het toe N besig was om haar denimbroek uit te trek. Sy het verder getuig dat sy haar teëgesit en nee geskree het. N het met haar geslagsomgang gehad en die vertrek onmiddellik daarna verlaat. Sy het agtergebly en uiteindelik op die rusbank aan die slaap geraak. Later die volgende oogend het klaagster vir Charmaine gevra om haar huis toe te neem. Klaagster was gedurende die rit baie ontsteld. Toe Charmaine teruggekeer het, het sy N konfronteer, waarop hy geslagsomgang met klaagster erken, maar aangevoer het dat hy onder die indruk was dat hy met haar (Charmaine) geslagsomgang gehad het. Die verhoorhof het die getuienis van die klaagster aanvaar en dié van die N, sy broer en Charmaine verwerp.

N wend hom vervolgens in hoër beroep tot die *Alberta Court of Appeal*. Die beslissing van laasgenoemde hof word in die onderhawige bespreking as uitgangspunt geneem, en teen die agtergrond van die evolusie van die toestemmingsbegrip by verkragting evalueer.

2 Getuienis van voorafgaande geslagsomgang tussen beskuldigde en klaagster

N het eerstens aangevoer dat die verhoorregter fouteer het deur nie sy diskresie ooreenkomstig artikel 276 van die Kanadese Strafkode, om N toe te laat om klaagster te kruisondervra en getuienis te lei oor hulle voorafgaande seksuele aktiwiteite, uitgeoefen het nie. N het ten tyde van die *voir dire* getuig dat hy by twee geleenthede, toe Charmaine in die buiteland was, by klaagster se huis met haar geslagsomgang gehad het. Klaagster sou aan 'n vriendin erken het dat sy met N geslagsomgang gehad het en beken het dat sy "feelings" vir hom het.

Artikel 276 van die Kanadese Strafkode (RSC 1985, c C–46) is hier ter sake en lui soos volg:

> "(1) In proceedings in respect of an offence . . . evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of the activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief.

> (2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines . . . that the evidence (a) is of specific instances of sexual activity; (b) is relevant to an issue at trial; and (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
>
> (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account (a) the interests of justice, including the right of the accused to make full answer and defence; (b) society's interest in encouraging the reporting of sexual assault offences; (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; (d) the need to remove from the fact-finding process any discriminatory belief or basis; (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; (f) the potential prejudice to the complainant's personal dignity and right of privacy; (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and (h) any other factor that the judge, provincial court judge or justice considers relevant."

In 'n eenparige beslissing van die *Alberta Court of Appeal* (hierna: die hof) word daarop gewys dat artikel 276 uitgevaardig is om die leemte te ondervang wat die Kanadese *Supreme Court* in *R v Seaboyer* (1991) 66 CCC (3d) 321 (SCC) geskep het (sien verder hieroor Labuschagne "Versigtigheidsreël by seksuele sake: Opmerking oor die menseregtelike begrensing van die bewysreg" 1992 *Obiter* 131 en *S v J* 1998 2 SA 984 (SCA)). In die lig hiervan wys die hof daarop dat twee mites wat die voorafgaande afgeskafde regsreëls onderlê het, naamlik dat iemand wat vroeër by konsensuele geslagsdade betrokke was waarskynlik ook tot die geslagsdaad ter sprake sou toegestem het en uit hoofde van voorafgaande geslagsdade minder geloofwaardig is, deur artikel 276 uit die weg geruim is.

Namens N is aangevoer dat toelating van die getuienis ten aansien van hulle voorafgaande seksuele verhouding die klaagster se geloofwaardigheid kon toets. Daar is verder aangevoer dat die getuienis van die voorafgaande geslagsomgang van belang sou kon wees by beantwoording van die vraag of klaagster tot die betrokke geslagsomgang toegestem het. In die saak *R v Brothers* (1995) 99 CCC (3d) 64 (Alberta CA) 72 verduidelik appèlregter Russell dat artikel 276 daargestel is

> "to eradicate negative stereotyping associated with the myth that a person who has been sexually active is less virtuous, and more likely to consent to other sexual activity, or less credible".

In die onderhawige saak het die verhoorregter die volgende redes vir nietoelating van getuienis van voorafgaande seksuele aktiwiteite aangebied: (i) dit was te ver verwyderd in tyd van die feite in geskil; (ii) uit die getuienis blyk nie dat dit relevant tot die geskil is nie; en (iii) die bewyswaarde daarvan dra buite verhouding minder gewig as die potensiële benadelingseffek daarvan. Die hof onderskryf dié standpunt van die verhoorhof:

> "We are of the view that the trial judge made no error in excluding the evidence of prior sexual activity of the complainant. The appellant was not alleging that any belief on his part regarding consent was based on the incidents which occurred four years earlier. His testimony regarding his belief in consent was based, not on prior conduct but on what he termed the full and complete cooperation and participation of the complainant in the sexual activity on the date in question. We fail to see what logical connection could exist between incidents occurring four years earlier, between two people who engaged in a short-term relationship while

the girlfriend of one of them was out of town, and an act of intercourse occurring four years later, arising, on the accused's own version, from mistaken identity" (204–205. Vgl ook *R v Ecker* (1995) 96 CCC (3d) 161 (Saskatchewan CA) 183–192; *R v Crosby* (1995) 98 CCC (3d) 225 (SCC) 231–233).

Die ander geskilpunte wat by appèl in die onderhawige saak geopper is, is nie vir doeleindes van hierdie bespreking van belang nie en word vervolgens daargelaat (205–208).

3 Evaluasie van die toestemmingbegrip by verkragting

Alhoewel artikel 276 van die Kanadese Strafkode in die eerste instansie bewysregtelike betekenis het, hou dit intiem verband met die opkoms en respektering van die psigoseksuele outonomie, veral van die vrou, in die strafreg. In rudimentêre regstelsels het die vrou se baarvermoë, haar seksuele funksionering en integriteit derhalwe, aan 'n man (of 'n groep deur mans beheer) behoort (Dripps "Beyond rape: An essay on the difference between the presence of force and the absence of consent" 1992 *Columbia LR* 1780 1781–1785; Labuschagne "Geregtigheidsdinamiek van die vroutipiese" 1996 *SAPR/PL* 225 230). "Verkragting" was in dié stadium 'n vergryp teen genoemde man (of groep) en nie teen die vrou nie. Geslagsomgang met 'n vrou sonder sy (of hulle) toestemming het 'n misdaad daargestel. Die antwoord op die vraag of die vrou self toegestem het, was nie van primêre belang nie. (Labuschagne "Verkragting in die inheemse reg: opmerkinge oor die oorsprong van vroulike ondergeskiktheid in misdaadomskrywing" 1994 *Obiter* 85 93–94; Strathausen *Ver-Gewalt-Igung. Zu Soziologie und Recht sexueller Machtverhältnisse* (1987) 255; Henderson "Rape and responsibility" 1992 *Law and Philosophy* 126 135.) Na huweliksluiting het die reg op die vrou se baarvermoë op haar man (of sy groep) oorgegaan. Die sosio-emosionele en juridiese oorsprong van die aanvanklik universele reël dat 'n man nie sy vrou kon verkrag nie, kan slegs teen dié agtergrond behoorlik begryp word. In 'n latere fase van ontwikkeling, toe afwesigheid van die vrou se toestemming by verkragting deurslaggewend geword het, is "verkragting" binne huweliksverband van die werking van die strafreg deur gebruikmaking van 'n toestemmingsfiksie uitgesluit: hoewel toestemming – al sou dit aanvanklik nog dikwels gedwonge wees – van die vrou by huweliksluiting mettertyd vereis is, is haar toestemming tot geslagsomgang gedurende die bestaan van die ganse huwelik eenvoudig regtens aanvaar (Andriessen "De vrouwenbeweging en vrouwe justitia" 1989 *Delikt en Delinkwent* 760 763–764; Jansen "Verkragting binne huweliksverband: die laaste spykers in die doodkis" 1994 *SAS* 78).

Die idee van "eiendomsreg op die seksuele integriteit van die vrou" slaan hier nog baie duidelik deur.

In die ou Vrystaatse saak *R v Kalil Katib* 1904 ORC 1, wat gehandel het oor die vraag of 'n vroulike idioot bevoeg is om vir doeleindes van verkragting toestemming te gee, is beslis dat "a consent produced by mere animal instinct" voldoende is. In *S v J* 1989 1 SA 525 (A) 530 het die Appèlhof egter beslis dat die vraag gevra moet word of 'n geesteskranke slagoffer "so devoid of reason" was dat "she cannot exercise any judgment at all on the question whether she will consent or dissent from ... intercourse". Hoewel, soos elders aan die hand gedoen, 'n aangepaste reëling vir geesteskrankes behoort te geld, is dit insiggewend dat die Appèlhof die klem op die rede van die slagoffer, dit wil sê

die rasionele of kognitiewe plaas (Labuschagne "Seksuele selfbestemmingsreg van die geesteskranke: 'n Strafregtelike en huweliksregtelike evaluasie" 1990 *TRW* 123 127–130). Wat beskerm behoort te word, is die psigoseksuele outonomie van regsonderdane binne rasioneel-morele konteks (sien Labuschagne "Die opkoms van die abstrakte penetrasiebegrip by geslagsmisdade" 1997 *SALJ* 461). 'n Psigiater, wie se pasiënt sy seksuele toenadering na rasionele oorweging binne die konteks van haar (morele) waardesisteem afgewys het, wat sy kundigheid misbruik en haar emosionele onstabiliteit en afhanklikheid sodanig manipuleer om haar tot sy wil te bring, skend haar psigoseksuele outonomie (sien Labuschagne "Strafregtelike aanspreeklikheid van 'n psigiater weens seksuele misbruik van 'n pasiënt" 1995 *De Jure* 450; "Strafregtelike aanspreeklikheid weens seksuele misbruik van die dokter-pasiënt-verhouding" 1998 *SALJ* 281). Dieselfde geld vir 'n vrou wat, as gevolg van sadomasochistiese afwykings, seksueel deur gewelddadige toenadering gestimuleer word en 'n versoek tot geslagsomgang in 'n betrokke geval ondubbelsinnig afgewys het omdat sy byvoorbeeld onder psigiatriese behandeling is om haar probleem te probeer oorkom en die betrokke man, bewus van haar neigings en haar poging om haar "seksualiteit te normaliseer", haar nieteenstaande oorweldig. Hier het sy 'n rasionele (kognitiewe) besluit, binne haar (morele) waardesisteem – dit will sê binne haar siening van wat reg en verkeerd is – om haar seksuele gevoelslewe te herstruktureer, geneem en aan die dader oorgedra, wat hy verontagsaam het. Haar psigoseksuele outonomie is derhalwe geskend (sien Labuschagne "Verkragtingsfantasieë en toestemming in die strafreg" 1992 *SAS* 72 77; "Sadomasochisme en die juridiese grense van die biopsigiese outonomie van die mens" 1996 *De Jure* 186). In beide hierdie gevalle behoort strafregtelike aanspreeklikheid myns insiens te vestig.

4 Konklusie

Dit blyk duidelik dat die begrip toestemming by verkragting, asook by ander wilstrydige geslagshandelinge, nie staties is nie. Gedurende die eerste fase van die ontwikkeling daarvan het die vrou se psigoseksuele integriteit 'n ander toegekom. Daarna klaarblyklik na 'n tydsame proses, het die vrou self daaroor beheer gekry. Gedurende hierdie fase sou van psigoseksuele outonomie van die vrou gepraat kon word. Die getroude vrou het hierdie outonomie in huweliksverband aanvanklik egter nie teenoor haar man gehad nie. Die vrou se vermoë tot rasioneel-morele besluitneming ten aansien van seksuele aangeleenthede, is geleidelik ingefaseer. Eers by die volledige erkenning van die vrou se reg op moreel-rasionele seksuele selfbestemming sou gesê kon word dat die geslagte menseregtelik gelyk behandel word (vgl Wolhuter "Levelling the playing field: A feminist redefinition of the crime of rape" 1998 *THRHR* 443 461–462).

JMT LABUSCHAGNE
Universiteit van Pretoria

PUBLIC SERVICE TRADITIONS AND TENURE

1 Introduction

The traditions inherited by the Botswana public service at the time of independence from British colonial rule have impacted and still continue to impact on tenure in the public services. These traditions or conventions governing the position of public servants in the British Constitution which in turn, either by design or historic accident, were passed on to the Botswana public service at the time of independence were: public service neutrality, permanence, autonomy and accountability. These conventions are part of the nine principles which chart the course of the public service in modern-day Botswana. We turn now to these basic conventions and their impact on tenure.

2 The principle of political neutrality

The principle of public service neutrality means that public servants will not be directly involved in the political process of policy making. This is predicated on the relationship between the political executive and the public bureaucracy in multiparty democratic states. Portions of this principle have been captured below as follows:

> "A public servant does not take part in active party politics. He/she does not take part in election campaigns and cannot stand for election unless he/she resigns. A politically neutral public servant can vote but does not make publicity about his/her political convictions. Public servants, according to this principle, serve the political party which wins the general election and forms the government, without being influenced by their personal political convictions or preference for a particular political party" (Hunter and Lombard (eds) *Multi-party democracy, civil society and economic transformation in Southern Africa* (1992) 160. See further Sharma "Politically neutral public service bureaucracy in the emerging multi-party democracies of Africa" IPSA, Research Committee/Netherlands Society for Public Administration (1994)).

Basing his assertions on the concept of civil service political neutrality in Kenya, Ojwang ("Kenya and the concept of civil service neutrality: a case of silent but determined politicisation" 1978 *Indian Journal of Public Administration* 433) proceeded to say the following:

> "The civil service was visualised as a neutral tool of implementation. This entailed a rather extreme approach to the separation of powers. A neat demarcation was being drawn between the legislative and executive functions of government, and the civil service was seen as a special department within the framework of the executive organ, completely apart from the ordinary political processes."

The principle of neutrality of the public service is so well established in Whitehall that there is trust and confidence on both sides, the winning political party and public servants who understand the system. (See Asmerom and Reis (eds) *Democratisation and bureaucratic neutrality* (1996) ch 10; Sharma 201.)

> "Political neutrality is not to say that administrators will not play politics with respect to their own programmes and budgets, but rather that they rarely become involved in macroscopic policy debates. A necessary element in giving the needed professional advice is thus a sense of neutrality – withholding oneself from the

final decision" (Somolekae "Bureaucracy and democracy in Botswana: what type of relationship?" in Stedman (ed) *Botswana, the political economy of democratic development* 113).

"A bureaucracy remains a separate tool at the disposal of any party that assumes political office and therefore has to be, by nature, permanent" (*Idem* 117).

When Botswana attained independence in 1966, it inherited a relatively small civil service modelled on the above principles. The role of public servants was theoretically to advise and implement the leadership policies. This tradition, which held the public service to be a separate estate from the political order – a profession whose fundamental principle was neutrality and whose tools were in the nature of data and other politically silent values, is not accurately reflected on the ground. (See Ojwang 430.) In practice there is a fairly intimate interaction between the executive leadership and the public service.

In the words of Somolekae (161):

"It is now generally accepted that political leaders primarily concerned with public policy making, have an important role to play in their execution; similarly, public officers make significant contributions in the process of policy formulation besides being primarily responsible for their execution."

According to Ojwang (*loc cit*), "the various organs of government do operate in close interaction and a rigid conception of the doctrine would not be justified".

It is a relationship which has been compared to that of a husband and wife in a Victorian household. The minister is the head of the household, formally taking all important decisions, but doing this on advice he usually finds difficult and uncomfortable to disregard. Though he is the head of the family, he is not really in charge of it; the household is actually controlled by the permanent secretary who remains unknown to the public, hence the concept of political anonymity of the civil servants (Mading *The neutrality and anonymity of the public service* unpublished paper 3).

Morrison (*Government and Parliament* (1954) 318–319 puts it thus:

"The relationship between the minister and the civil servant should be that of colleagues working together in a team, cooperative partners seeking to advance the public interest and the efficiency of the Department. The minister should not be an isolated autocrat, giving orders without hearing or considering arguments for alternative courses; nor on the other hand should the civil servant be able to treat him as a mere cipher. The partnership should be alive and virile, rival ideals and opinions should be fairly considered, and the relationship of all should be one of mutual respect on the understanding, of course, that the minister's decision is final." (See also Sharma "Public service bureaucracy in a multi-party democracy" Eastern and Southern Universities Research Programme.)

As indicated above, the bureaucracy is conceived as a tool at the disposal of the winning political party. The presupposition is that the neutral bureaucracy itself is permanent and there is no victimisation. The founding President of the Republic of Botswana, His Excellency Sir Seretse Khama, in his speech to civil servants in December 1967, underscored this, saying:

"I feel obliged to say to you now what has been said by Heads of several independent African States soon after their countries attained independence . . .

I consider it appropriate that I should preface my remarks by reminding you of the role that the public expect the permanent civil service of a democratic government to play. In the first instance your duty, as I see it, is to generate ideas and to collate data for use by the politicians in formulating policy. Secondly, it is your duty to help us weigh up those ideas and evaluate them in the light of any

> possible consequences that may emanate from their implementation, as well as examine in the light of your administrative experience any ideas that we politicians may conceive . . .
>
> I have referred to you as the 'permanent' civil service, and I have used the word 'permanent' with a purpose. As you know I and my government hold office at the will of the people of Botswana, and if at the next general election the electorate should choose to entrust the Government and destiny of this country to another of the existing political parties I would have to yield to the will of the people. You as the Civil Service would, however, be expected to carry on under whatever party government the people should choose for themselves. Both for the sake of your own security as employees of government, and for the sake of administrative efficiency, it is important that your tenure of office in the Civil Service should not be subject to change of political party government" (see Temane *The evolution and development of the Botswana civil service (1890–1990)* (1990) 135–136).

The founding President also emphasised the significance and importance of loyalty to the party in power:

> "Personally while I am still entrusted with the heavy responsibility of leading this country I feel I am entitled to expect unqualified loyalty to the government and the state from every civil servant in the country, local and expatriate; and I trust no one will allow disaffection in any form to undermine that loyalty" (see Morrison 140).

The outgoing President of the country, Sir Ketumile Masire, has also endorsed his predecessor's commitment to the principle of public service neutrality. (See Aserom and Reis ch 10; Sharma *Neutral bureaucracy in African multiparty democracies: the experience of Botswana* (1996) 205.) Addressing the Botswana Civil Servants Association, he clearly stated the view that it is not possible for a civil servant who exudes partisan politics to be honest and dedicated in performing the functions of public service. He told Botswana's civil servants "who compromise the principle of integrity and exhibit partisan inclinations to resign from public service to practise their politics in the open with a clear conscience" (Sharma *loc cit*). He observed that if partisan orientation were to be allowed in the public service, every time a new government was formed, all servants would have to resign and new ones appointed, thus defeating the principle of permanence which in turn assumes the absolute impartiality, integrity and dedication of the public service (*ibid*).

In the case of Botswana, there is a General Order which specifically regulates the political and union activities of public officers (General Orders Governing the Conditions of Service of the Public Service of The Republic of Botswana (Govt printer, Gaborone) 31). It provides that officers are entitled to their own political views, but are required to serve all governments with equal loyalty whatever party may be elected and whatever the officers' political affiliation may be. It continues to stipulate that officers may vote at an election if they are eligible to vote, and may attend but not speak at political meetings.

In terms of the Order, no officer may –

(i) publicly speak or demonstrate for or against any politician or political party;

(ii) be an active member nor hold office in any political party or association;

(iii) speak in public on any political matter, except in the course of his official duties;

(iv) publish his views on political matters in writing;

(v) take an active part in support of any candidate in an election;

(vi) hold political office in any Local Government body, except where the office is held *ex officio*; or

(vii) do anything by word or deed which is calculated to further the interests of any political party or association.

The regulation of political behaviour by persons holding public office in Botswana is consistent with that of other Anglophone states with multiparty systems in Africa. In the case of those Anglophone states, including Botswana, the rewards of a politically neutral public service are a relatively secure and permanent job in the service unaffected by the vicissitudes of political forces. Indeed, the neutrality of the service has been said to be complementary to the "merit system", according to which appointments and promotions to various positions in the public service are expected to be governed by merit, which is assessed through established legal-rational mechanisms and not on the basis of political affiliation or patronage. (See Asmeron and Reis *loc cit*; Sharma *Neutral Bureaucracy* 205.)

3 Permanence of the public service

> "Political neutrality is predicated upon the existence of a career civil service which owes allegiance to any duly elected government, and upon the preservation of a sharp dividing line between on the one hand parliamentary and ministerial officials who are not permanent and on the other hand the permanent and non-ministerial public servants" (Drewry and Butcher *The civil service today* (1988) 217).

Indeed, the permanence of the service in Botswana is endorsed by the General Order which governs the conditions of service of public employees. It provides:

> "Elections may pass, and political power may ebb and flow, but the Public Service Stands firm. Career Officers, serving the Government of the day without fear or favour, provide the continuity that is essential for stability and public confidence."

In the words of Henry Parris (*Constitutional bureaucracy* (1969) 27):

> "[P]ermanence in a Civil Servant means something more than security of tenure or the mere retention of a job for long time. It means the retention of that job during a change of government."

By referring to "career officers" the General Order envisages a situation where young men or women are recruited at an early age into the service with an implied promise of a life career during which they may work their way up the hierarchy of the service. This service is distinctly non-political and has certain key features; a uniform system of recruitment into the service, uniform rules of conditions of service, promotion on the basis of merit and uniform rules on pensions. The promise of a career means an assurance of life-long employment which can be terminated only by mental or physical incapacity or the commission of a criminal offence. (A career civil service is one of the traditions left behind by the British in their former African territories, Botswana being one of them. The promise of career is, however, subject to laws governing the conditions of service of public service employees. See Rweyemamu and Hyden *A decade of public administration in Africa* (1975) 37.)

The importance of the existence of a uniform system of recruitment means that arbitrariness, favouritism, nepotism and cronyism, amongst other vices, do not creep into the system thus rendering it open to abuse by politicians. Without a uniform system, politicians could pick and choose whom they liked. The whole idea and underlying basis of a permanent public service would be destroyed. Permanence here implies some form of security for public servants. Moreover, the existence of uniform rules of conditions of service guarantees that the "playing fields" are level, that no public servant is treated more favourably than

others. In Botswana, the Public Service Act and Regulations and the General Orders provide that uniformity, and consequently impact on employment security. The pension scheme, which entitles an officer to additional remuneration on his retirement on the ground of age, is an important feature of the career system supporting and sustaining permanence in the public service.

Inevitably, the consequences of a career system in the public service supported by a host of regulations predominantly protective in nature and buttressed by the application of public law principles, are that almost every public servant remains in his job until retiring age. The retiring age in the service varies between 45 and 65 years.

Generally, the appointment system impacts directly on the employment security of public servants. There are some officers who are subject to presidential discipline and who hold office at the pleasure of the President, and in respect of these officers no disciplinary procedures are prescribed and there is no appeal against the decision of the President (Order 47 37). These are political appointees whose tenure may be linked to the Presidential term of office. Such officers include Ambassadors, High Commissioners, Principal Representatives of Botswana in any other country or accredited to any international organisation, the Secretary to Cabinet and Commissioner of Police. (See Order 44 36. There are also some presidential appointments, such as appointments to the Office of Attorney-General, whose tenure is constitutionally protected.) The presidential involvement in these appointments impacts on their loyalty. It is difficult to imagine a Secretary to Cabinet of a former government continuing to perform his functions with equal loyalty to a new government which is voted into power. Even if his loyalty is not in doubt, automatic confidence from the new government would be difficult to come by. In other jurisdictions like the United States of America, there are political appointees and political appointees qua-political appointees. (Political appointees, as the term suggests, are servants of the state who are appointed on political grounds. They serve a political purpose and their tenure may terminate when a new president takes office and appoints his/her own people. Political appointees qua-political appointees are those servants who are politically appointed and serve the political appointees as presidential aides, advisers and consultants. Their term of office is invariably linked to that of the United States President. The concept of permanence in the face of changes of government does not apply to them in those circumstances.)

4 Anonymity, accountability and autonomy

Generally, civil servants are required to be loyal to the government of the day and to carry out its decisions with "precisely the same energy and goodwill, whether they agree with it or not" (Fredman and Morris *The state as employer* (1989) ch 6 209). It is in return for this loyalty that they remain anonymous and insulated from public criticism and public praise. The general understanding is that civil servants are accountable to their departmental ministers who are in turn accountable to Parliament for the conduct of the civil service. The General Orders governing the conditions of service of public servants in Botswana in its Charter on the public service, reflect accountability as one of the nine principles charting the course of the public service in the country. (This Charter is in the General Order governing the conditions of service of public servants and serves as a guide to officers both in their relations with each other and in their dealings with the public which they serve.) This accountability is described as follows:

> "Cabinet Ministers are politically accountable to the public for the successes or failures of the Ministries they supervise. Permanent Secretaries are administratively accountable to the public for the performance of their Ministries, Every Public Officer is, however, accountable for the due performance of his duties and for the general successes and failures of those he supervises. Accountability carries with it the right to share the credit for the successes of the Ministry, the Department or the Public Officers themselves, but also the responsibility to share or shoulder the blame for their mistakes or failures."

In a general overview on the structure of the public service in Botswana, Temane states (151):

> "A Cabinet Minister is responsible for every act done or omitted to be done by his ministers. Occasionally, Ministers delegate certain things to civil servants, and when this happens, all that the Minister is delegating is his authority but he should accept the consequences of any defect of administration or any policy which provokes criticism in Parliament. He cannot avoid responsibility by trying to pass the blame to civil servants."

This is in conformity with the provisions of the "Public Service Charter". Indeed, the Minister is the political head of the Ministry and consequently also its political mouthpiece. It is here that the principle of anonymity manifests itself strongly. Since the public servant is denied public praise, it also logically follows that he should be protected from public criticism. The same author continues:

> "The only way in which the blame could be passed directly to a civil servant is if the said civil servant could be allowed to exculpate himself through the same forum and on the same platform. An attempt to allow public officers to respond publicly to political criticisms can only serve to place the integrity and political neutrality in jeopardy" (*ibid*).

Ideally, the public servant will remain anonymous if he has acted in accordance with the instructions of his superiors, including the Minister. He should also be protected if he has acted in accordance with policy laid down by the Minister or has carried out his explicit order. It is clear that anonymity and accountability have a significant impact on security of tenure in the public service. Without anonymity, the public servant would become exposed to public criticism, thus making it difficult for him to execute his duties without fear or favour. There are situations where, for example, the public servant has taken action against the Minister's instructions or policy or without the Minister's knowledge or where the public servant's conduct is deplorable. It is in such circumstances that the anonymity and protection could be lost:

> "[T]here is no obligation on the part of the Minister to endorse what he believes to be wrong or defend what is obviously wrong. In the circumstances, the matter would be the subject of disciplinary proceedings and the Minister would provide full account to Parliament" (*idem* 152).

The question of tenure is interwoven with the public service traditions. Neutrality, permanence, integrity, accountability, anonymity, loyalty and autonomy all impact to a degree on public service tenure in various ways. In Botswana, the constitutional dispensation of a multi-party set-up reinforces the autonomy of the public service. The constitutional context predicated on the doctrine of the separation of powers leaves little scope for the politicisation of the service. Only states with one party available for election as the government of the day can heavily politicise the service, consequently eroding its neutrality, permanence and autonomy, factors impacting on the tenure of public officers. To date, the autonomy of the bureaucracy in Botswana has been maintained by the country's

Constitution, the Public Service Act and Regulations and the General Orders. These statutes have not been amended to allow for any systematic politicisation of the service.

5 Other principles

The above are not the only public service traditions in Botswana. There are others which have also fostered a proud tradition of public service and are expected to be upheld by every officer. These other principles which are part of the nine set out in the Charter, are set out below for the sake of completeness.

5 1 Regard for the public interest

The Charter indicates that the conduct of public servants must be characterised by courtesy, humility, respect for every person, regardless of station in life, and regard for the public interest. This public interest, according to the Charter encompasses respect for the law, immediate compliance with court orders, adherence to principles of natural justice and full consideration of both the long-term and the short-term effects of administrative action. It also covers adherence to previous commitments including international obligations, avoidance of personal interests and the consideration of all matters relevant to any issue.

5 2 Continuity

This is based largely on the principle of permanence. The Charter states that the service is expected to operate in a regular and reliable manner, so that all services which it offers to the public, including decision-making services, are provided on a continuous basis. If further states that situations of non-continuity where key officers in a field are away at the same time, leading to interruptions or delays in the rendering of service, should not be permitted to occur. Similarly, the Charter continues, continuity of knowledge and experience should not be disturbed by block transfers or relocation of public officers. Continuity also demands that powers be delegated when sole-decision makers are absent. This effectively guarantees prompt and predictable service to the general public.

5 3 Transparency

This is an aspect of accountability. The Charter provides that transparency does not entitle public officers to breach their normal duty of confidentiality under the Public Service Act, nor does it entitle members of the public to have access to private information concerning others which is to be found in the public service files. According to the Charter, members of the public are entitled to have access to non-confidential information on the operation and activities of the public service. Administrative law principles of natural justice form part of this principle of transparency. Those interested in administrative decisions or actions are entitled to be heard before decisions adverse to them are made and to be informed of the reasons for such decisions and of any avenues of appeal which may be open to them. This, according to the Charter, applies equally to members of the public and to public officers.

5 4 Freedom from corruption

Public officers are required not only to be on their guard against corruption, abuse of office and influence-peddling in all its forms, but actively to participate in the fight against corruption by promptly reporting all improper activities and by helping to bring offenders to justice.

5 5 The duty to be informed

The Charter enjoins public officers to be conversant with the Public Service Act, General Orders, Financial Instructions and Procedures, Supplies Regulations, Transport Regulations and all other rules governing public officers. They are required to keep themselves informed of all matters pertinent to their services.

5 6 Due diligence

This requires that the concerns, complaints and applications of members of the public should be dealt with promptly and thoroughly. Officers are required to adhere to the highest standards of diligence and efficiency as a matter of national duty and pride.

The above principles, together with others inherited at independence, provide the necessary framework on which service to the public is based. Public employees holding a specific position within the Botswanan Constitution and in most cases forming part of the executive wing of government, are subject to the above principles or conventions. Underscoring the importance of these conventions Adu (*The civil service in Commonwealth Africa* (1969) 234) states that "[a] civil service in which this tradition is widely accepted and understood is secure in its future".

5 7 Confidentiality

This is an important aspect of public service tradition or convention. It cuts across most, if not all, public services in the world. In Botswana, public servants are required to sign a declaration in the relevant forms as an acknowledgement of their obligation of confidentiality under the Public Service Act.

It is also an offence under the National Security Act (ch 23:01 Laws of Botswana) to impart confidential information gained as a public officer to any unauthorised person either during service or after leaving the public service. This relates to breaches of National Security, but breaches of confidentiality in the public service are also covered. This obligation of confidentiality is clearly illustrated by the *Wright* case in the United Kingdom (*Spycatcher* 1990 1 AC 109; 1988 3 All ER 545).

In 1986 the Thatcher government attempted to prevent the publication of a book, Spycatcher, by Peter Wright, a former counter-espionage officer in MI5, who was then retired and living in Australia. The book alleged that the former head of MI5 had been a Soviet agent, and that MI5 had carried out unlawful and criminal acts, notably a plot to destabilise the Wilson government in the mid-1970s. The Thatcher government had declined to take action to prevent two other publications by two other persons containing allegations similar to those made by Wright. This time the government took civil action in the Australian courts to prevent publication of the Wright book on the ground that, as a former MI5 officer, Wright had an obligation of confidentiality to the Crown which bound him to permanent silence about his intelligence work. A blanket ban had already been obtained in the British courts on the publication, in any part of the British media, of the allegations made by Wright.

When the matter came before the New South Wales Supreme Court, the Cabinet Secretary testified for the British government. The judge, Justice Powell, was not convinced by the British claim and dismissed the government's case. He accepted that Wright had a duty of confidentiality to his former employers, but

felt that this was overridden by the consideration that most of the information in the Wright Memoirs was no longer secret. He held that the British government had surrendered its claim to confidentiality. It had acquiesced in the publication of other books about MI5, and had also done nothing to prevent television interviews by other officers making similar allegations. The British government appealed to the New South Wales Court of Appeal which upheld the trial judge's decision by a two-to-one majority. In England however, where similar proceedings were being conducted, the House of Lords upheld by a three-to-two majority, a decision of the Court of Appeal that the public interest required the continuation of temporary injunctions restraining newspapers in the United Kingdom from disclosing or publishing material from Spycatcher.

6 Conclusion

Public service traditions constitute an important and indispensable politico-legal device, whose effect is basically to ensure that as governments come and go, and political power ebbs and flows, public servants retain their jobs. A public service that has cultivated virtues such as loyalty, integrity, impartiality, autonomy and accountability is certain of a secure future. These virtues are central concerns and constitute the ethics of the service. Some of these traditions may or may not have legal force, but any public servant abiding by these principles will certainly have permanent tenure. If it is apparent that the public servant identifies with a particular ideology or party in the performance of his duties, or the public considers that he does so, his impartiality will be questionable and consequently his tenure would be seriously at risk. What is clear from the above discussion, is that any serious breach of the service traditions impacts on that particular public servant's employment security.

KHOLISANI SOLO
University of Botswana

LOST CHEQUES

1 Introduction

Not infrequently a cheque is lost or destroyed after a customer has delivered it to his or her bank for collection. There can be little doubt that such an event can greatly inconvenience the payee of the cheque. In this analysis I consider the legal remedies available to a person whose cheque is lost or destroyed after it has been deposited with a bank for collection.

2 The banker-customer relationship

The relationship between a customer who deposits a cheque for collection with a bank is governed by the contract between the bank and its customer. This contract is classified as one of mandate (*mandatum*) (Malan and Pretorius *Malan on bills of exchange, cheques and promissory notes in South African law* (1997)

("Malan") para 203; Stassen "Driepartybetalingsmeganismes in die moderne bankreg: die regsaard van die verhouding tussen bank en kliënt" 1980 *MBL* 77 79–80; Luntz "Cheques as mandates and as bills" 1998 *Banking & Finance LR* 189 190ff; Geva "Allocation of forged cheque losses – comparative aspects, policies and a model for reform" 1998 *LQR* 250 251ff). The legal characterisation of the banker-customer relationship is important for the purpose of determining the natural incidents (*naturalia*) of the contract – once the nature of the contract has been determined, the parties' obligations can be ascertained (Joubert *Die finansiële huurkontrak* (1991) 59–81; "Die klassifikasie van nuwe verskyningsvorme van kontrakte" 1991 *TSAR* 250ff).Thus the natural incidents of mandate are relevant to the contract between the bank and its customer.

When a customer pays a cheque into his or her account for collection the bank should exercise reasonable diligence in presenting it for payment (Holden *The law and practice of banking* (1991) 1 ("Holden") 214; Crawford *Crawford and Falconbridge Banking and bills of exchange* (1986) ("Crawford & Falconbridge") vol 1 para 4001.2 1043). Holden puts it thus: "[A] banker to whom a cheque is delivered for collection is under a duty to his customer to use reasonable diligence in presenting it for payment" (214). This "duty" is but a natural incident of the contract of mandate: the mandatary must execute the mandate without negligence and will be liable if his or her failure to perform is attributable to negligence (Van Zyl and Joubert "Mandate and negotiorum gestio" in Joubert (ed) *The law of South Africa* vol 17 (1983) ("Van Zyl and Joubert") para 10 at 11) and authorities cited there). The mandatary must perform his or her mandate in good faith. This means that he or she must perform the mandate in the interests of the mandator (Van Zyl and Joubert para 11 at 12).

3 Paying a debt by means of a cheque

A cheque is not legal tender. A creditor may therefore refuse to take a cheque in payment of a debt, unless the parties have agreed that payment be made by cheque. In addition, if a cheque is delivered in payment of a debt, the underlying obligation between the drawer and the payee is not extinguished thereby (Malan para 14). In *Adams v SA Motor Industry Employers Association* 1981 3 SA 1189 (A) 1199G–1200A Jansen JA explained:

> "[I]n our law the matter may be clarified by reference to the position where a negotiable instrument such as a promissory note is given in respect of an existing debt. There can be little doubt that – unless a novation is intended, which is not presumed – two obligations then exist: the original obligation and the obligation arising from the note. They are interdependent. The original obligation may, in a sense, be said to be the *causa* of the new obligation . . . and defences in respect of the original obligation may be raised in respect of the new obligation; performance of either discharges the other. Fortified by two obligations in respect of the same performance, the creditor has, however, no free election to enforce the original obligation. Our cases have followed the English law that, upon acceptance by the creditor of the negotiable instrument, the right to enforce the original obligation is suspended until maturity of the instrument, and when the creditor claims payment of the original obligation *he must account for the negotiable instrument*" (my emphasis).

Delivery of a cheque in payment of a debt suspends the creditor's action arising from the underlying obligation. If the parties have not agreed on novation, delivery of the cheque creates an obligation additional to the underlying

obligation between the drawer and the payee. The cheque obligation is, however, a supporting obligation – it serves to strengthen the underlying obligation (*Rosen v Wasserman* 1984 1 SA 808 (W) 813E–H; Malan "Evolusie van die wisselreg" 1976 *TSAR* 1 15–16). It follows that once the cheque obligation is discharged, the underlying obligation is also automatically discharged. In *Mannesmann Demag (Pty) Ltd v Romatex Ltd* 1988 4 SA 383 (D) the court explained: "When a debtor tenders payment by cheque, and the creditor accepts it, the payment remains conditional and is only finalised once the cheque is honoured" (389E–F). In *B & H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 (A) E M Grosskopf JA remarked:

> "[W]here parties agree to make and accept payment of a debt by cheque, the debt is extinguished when the bank pays the cheque to the payee (creditor), whether or not payment was at that stage authorised by the drawer (debtor)" (292D–E).

If the cheque is dishonoured, however, the creditor may fall back on the underlying obligation, or may base his or her claim on the obligations arising from the cheque itself.

This is the relevance of the above: if a creditor sues his or her debtor on the underlying obligation and the debtor claims that the obligation was "paid" or "discharged" by cheque, it goes without saying that the mere delivery of a cheque in payment of a debt does not constitute "payment" until the cheque has actually been honoured. To succeed in a defence of "payment" of the underlying obligation, the debtor must first prove that the cheque was properly delivered to the creditor. The significance of requiring proper delivery of the cheque by the debtor (drawer) to the creditor (payee) was explained in *Mannesmann Demag (Pty) Ltd v Romatex Ltd* 1988 4 SA 389E–390B as follows:

> "When a debtor tenders payment by cheque, and the creditor accepts it, the payment remains conditional and is only finalised once the cheque is honoured . . . Until that happens a real danger exists that the cheque may be misappropriated or mislaid and that someone other than the payee may, by fraudulent means, convert it into cash or credit, for instance, by forging an endorsement or by impersonating the true payee. That risk is the debtor's since it is the debtor's duty to seek out his creditor.
>
> But when the creditor stipulates (or requests) a particular mode of payment and the debtor complies with it, any risk inherent in the stipulated method is for the creditor's account. That is said to be 'the legal position' . . ., 'the principle', or 'the law' . . ., at least when the post is to be employed for that purpose. And of necessity that must mean that, if the worst comes to the worst and the cheque is intercepted and misappropriated by a thief, the obligation to pay is deemed to be fulfilled even though the amount of the cheque was never credited to the creditor . . .
>
> A stipulation of this sort may of course form part of the agreement creating the debt which is due to be paid but it does not have to be so. More often than not the request only reaches the debtor thereafter. In that event, if the debtor accedes to the request, the parties have reached agreement about the particular mode of performance to be employed in that particular instance. It is a term of this subsequent agreement that the creditor assumes the risks of any inadequacies in the method selected by him. And to the extent that it is presented, as it invariably is, as a proposition of law, the term becomes one that is implied by law."

Section 79 of the Bills of Exchange Act 34 of 1964 embodies the same principle. The section states that if payment is made in accordance with the provisions of the section and "the cheque has come into the hands of the payee", the drawer "shall . . . be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof". The principle

can be formulated thus: if a debtor posts a cheque to his or her creditor without the latter's consent or request, he or she has to pay the amount of the debt again if the cheque is discharged (eg in terms of s 79) without the creditor having received it. Since the cheque has not been delivered, ownership in it does not pass. So the debtor, because he or she remains owner, bears the risk that it will be stolen or lost (Malan para 222 399). But where the cheque is posted pursuant to an agreement, the debtor discharges his or her debt, subject only to the condition that the cheque be paid. In *Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* 1950 2 SA 763 (T) 769 Ramsbottom J said:

> "The principle is that if a debtor is asked by his creditor to make payment in a particular way, eg, by drawing a cheque and putting it in the post, then, when he has done what he was asked to do and has posted the cheque, he has, subject to the cheque being honoured, made due payment, and the risk of loss thereafter is on the creditor."

Such an agreement is usually preceded by a request from the creditor for payment by post. The agreement can be concluded expressly or tacitly. To determine whether it was concluded tacitly, one must adopt the approach followed to find a tacit term in a contract. All material factors must be taken into account (*Dadoo & Sons Ltd v Administrator, Transvaal* 1954 2 SA 442 (T) 445G–H; *HK Outfitters (Pty) Ltd v Legal & General Assurance Society Ltd* 1975 1 SA 55 (T) 61ff; *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N) 908).

To show that the underlying obligation has been discharged by payment, the debtor must also prove that the relevant cheque was in fact "paid" or "honoured" – in other words, that his or her account was actually debited, and that the drawee bank was *entitled* to debit the account in the amount of the cheque (Tager and Daniels "Negotiable instruments" in Joubert (ed) *The law of South Africa* vol 19 (1997) para 157 99). The drawee bank will be entitled to debit the drawer's (debtor's) account when it effects "payment in due course" (s 1 read with s 57 of the Bills of Exchange Act), or when the bank is protected by section 58, section 79 or section 83 of the Bills of Exchange Act (Oelofse "Die posisie van die trekker en betrokkene bank na onreëlmatige betaling van 'n tjek" 1983 *MBL* 12 14ff). Accordingly, if the cheque was delivered by the drawer to the payee and the payee is its owner, the payee bears the risk of loss of the cheque if it is later discharged in circumstances in which the drawee bank has made a payment in due course or is protected by any of the above provisions. If, however, the drawer's negligence in drawing the cheque caused the payee loss, the drawer may still in certain circumstances be liable on the underlying obligation, despite the fact that the drawer's account has been debited in the amount of the cheque (*Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N)).

This principle can also be illustrated by *Hallmark Motor Group (Pty) Ltd v Phillip Motors CC* 1997 4 All SA 707 (W). There the buyer of a motor vehicle drew a cheque in favour of the payee in payment for the vehicle. The cheque was stolen after it had been delivered to the payee. The thief then cunningly requested the drawer to cancel the crossing. The drawer, believing the thief to be employed by the payee, deleted the crossing and signed the deletion. The thief later obtained payment of the cheque, presumably over the counter, but without having obtained an indorsement of the payee. The court had to decide whether the obligation to pay the purchase price of the vehicle had been discharged (in other words, whether the cheque had been paid). Malan J (Goldstein J

concurring) held that the drawer had to prove payment. The court noted that the cheque had been delivered and accepted in payment of the purchase price of the vehicle. The underlying debt (the obligation to pay the purchase price) would have been discharged, not by delivery of the cheque, but by payment of it. Delivery of the cheque constituted performance or payment of an underlying debt, subject to the condition that the cheque be paid (710*a–b*, with reference to *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 3 SA 685 (A) 693F–G and *B & H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 (A) 286C–F). The court called the agreement in terms of which the cheque had been given "debt-extinguishing". Malan J said that this agreement, like any other, could not be unilaterally amended or varied. So it followed that the cheque itself, which had been given and taken in payment, could not be changed without the agreement and consent of the payee (710*b–c*). Because the purported cancellation of the crossing was made without the payee's consent, the drawer's unilateral act brought about, or purported to bring about, a material change in the duty of the drawee bank to pay the cheque to another bank in accordance with section 78 of the Bills of Exchange Act (see also Mofokeng "Drawee banks and the risk of the cancellation of a crossing" 1998 *SA Merc LJ* 255). As the cheque had been crossed, the drawer and payee had agreed that the cheque had to be paid to a bank. Thus payment was not effected in terms of the debt-extinguishing agreement, for payment had not been made to another bank as required by section 78. Since payment had not been made in accordance with the debt-extinguishing agreement, the drawer had failed to prove payment of the underlying debt (710*c–f*). The drawer of the cheque could therefore be called upon to pay the purchase price of the vehicle, as he could not prove that he had actually "paid" the cheque (debt) in question.

The *Hallmark* decision is in line with the principles underpinning *Greenfield Engineering Works*. In the *Greenfield* case there was also a creditor which sued on the underlying obligation and a debtor which pleaded payment of the debt. The drawer of the cheque (the debtor) twice had to pay the amount due in terms of the underlying obligation, as it had neglected to draw the first cheque with the necessary skill expected of a reasonable businessman. This was despite the fact that there was proper delivery of the cheque, and the fact that the drawer's account was debited in the amount of the cheque, as the drawee bank was entitled to do in terms of section 79 of the Bills of Exchange Act. Although the court in *Hallmark* did not so decide, I believe that in view of the fact that the drawee bank did not make a "payment in due course" as defined in section 1 of the Act, the drawee bank should not have been entitled to debit the drawer's account, for the cheque in question had not been discharged within the meaning of section 57. The potential protection which the drawee bank may have had in terms of section 58 could also not apply, as the cheque was not indorsed (Malan para 209; *National Bank v Paterson* 1909 TS 322 326–327). Section 79 was likewise of no avail, for the payment in *Hallmark* was not made to another bank. Since the drawee bank in *Hallmark* would not have been entitled to debit its customer in respect of the payment of the cheque, it would have had to suffer the loss arising from that payment.

4 Collection of a cheque through an automated clearing bureau

A brief reference to the process for the collection of cheques is appropriate. Almost all cheques in South Africa are collected through the Automated Clearing Bureau (Pty) Ltd ("ACB"). This process has been discussed elsewhere (Pretorius "Aspects of the collection of a cheque cleared through an automated

clearing bureau" 1998 *SA Merc LJ* 326). This discussion need not be repeated in full here. Note that the automated clearing of cheques is regulated by an agreement (known as the "clearing-house rules") between the ACB and participating financial insitutions. Although these are "confidential" and said to be designed for the benefit of the banking industry alone, they were referred to and applied by the courts in *Rosen v Barclays National Bank Ltd* 1984 3 SA 974 (W) 976F–977F and *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank)* 1991 3 SA 605 (A). There can also be little doubt that a bank's customer would be bound by these rules (see Malan *Collective securities depositories and the transfer of securities* (1984) ("Malan *Collective Securities Depositories*") 191ff, and the authorities there cited).

One should remember that one of the first steps in the cheque-clearing process is taken when the collecting bank *provisionally* credits the account of a customer in the amount of the cheque deposited with it for collection. (For a full discussion, see Pretorius 1998 *SA Merc LJ* 327.) The provisional entries become final on the expiry of the stipulated period, in the absence of notification that a particular cheque will not be paid. In *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank)* the court made three very important preliminary remarks. First, the fact that the automated clearing of cheques involves the application of modern sophisticated procedures does not mean that settled legal principles should be discarded (611H–612B). Secondly, there is no indication in the clearing agreement that it intends to deprive participating banks or their clients of any rights. In particular, it does not deprive the drawer of a cheque of the right to countermand payment – provided, of course, that the procedures prescribed in the clearing agreement are followed (612B–C). Thirdly, payment is a bilateral act requiring the co-operation of the payer and the recipient (612C–D; see also *Matador Buildings (Pty) Ltd v Harman* 1971 2 SA 21 (C) 25H; *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 993A–B; Malan *Collective securities depositories* 190 n227).

Where a particular cheque has properly been dishonoured, the collecting bank is entitled to reverse the credit entry on its customer's account, or reclaim the amount of the cheque from its customer, on the basis of either the contract of mandate or unjustified enrichment (*ABSA Bank Ltd v I W Blumberg and Wilkinson* 1997 3 SA 669 (SCA); *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 1 SA 242 (SCA); *ABSA Bank v De Klerk* 1998 Commercial Law Reports 337 340). The payee or customer will then have to recover the amount of the cheque from the drawer. The principle that the payee must look to the drawer for payment of a dishonoured cheque is equitable, since it was the payee who entered into the contractual relationship with the drawer and agreed to take the cheque in payment of the debt. The payee bears the risk of dishonour and suffers a loss if he or she is unable to recover the amount of the cheque when the drawer is declared insolvent or absconds.

5 The role and function of bank statements

Entries on current account are merely *prima facie* evidence of their contents (*Standard Bank of SA Ltd v Kaplan* 1922 CPD 214). The generally accepted view is that a customer can dispute a *debit* entry on his bank statement at any time (*Standard Bank of SA Ltd v Kaplan*). The customer is not even obliged to examine his or her bank statements, or to inform his bank of the incorrectness of the entries made on them (*Standard Bank of SA Ltd v Kaplan* 1922 CPD 220–221;

Universal Stores Ltd v OK Bazaars (1929) Ltd 1973 4 SA 747 (A) 762E–F; *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 3 SA 267 (W) 283B; *Holzman v Standard Bank Ltd* 1985 1 SA 360 (W) 363E–I; Malan para 208 at 355). If, however, the customer admits to the bank that the statement rendered is correct, that admission is *prima facie* proof of the correctness of the statement (*Trull v Standard Bank of South Africa Ltd* 1892 SAR 203).

Where an erroneous *credit* entry appears on a customer's bank statement, it is possible that the customer may be misled into believing that he or she has more funds at his or her disposal than is in fact the case. Although the bank is entitled to make the correction, it is obliged to honour a cheque that has been drawn on the strength of the erroneous entry (*Hollard v Manchester and Liverpool District Banking Co Ltd* 1909 TLR 386). In *ABSA Bank Ltd v I W Blumberg and Wilkinson* 1997 3 SA 669 (SCA) the court confirmed that a drawee bank could reverse a credit entry on its customer's account in respect of a cheque deposit when the cheque was later dishonoured. (On this point, the court on appeal overturned the decision of the lower court (see *Absa Bank Ltd v Blumberg and Wilkinson* 1995 4 SA 403 (W).) The appeal court found that the drawee bank was entitled to do so despite the fact that it might have permitted its customer to draw cheques without an agreement to that effect (1997 3 SA 675H–I). Zulman JA stated that where a customer, without an overdraft facility, drew a cheque on his bank, this constituted a request for a loan; if the cheque were honoured, the customer was said to have borrowed the money (676C–D, quoting with approval from *Cuthbert v Robarts, Lubbock & Co* 1909 2 Ch 226 233).

In *ABSA Bank Ltd v De Klerk* 1999 1 SA 861 (W) Leveson J later noted that not all cheques drawn in the absence of an overdraft facility were necessarily loan applications. In this case the client had deposited into his account a cheque drawn in his favour on a foreign bank. The client was initially not allowed to draw against the cheque. Some days later, however, the manager of the bank found the client's account to be in credit and allowed him to draw against the credit. The client then wrote a cheque for the entire amount of the credit, withdrew it in cash, and used it to discharge a debt to a third party. The bank later sought to recover the amount from the client (defendant) on the basis of contract, alternatively, unjustified enrichment. The court distinguished *ABSA Bank Ltd v IW Blumberg and Wilkinson*. It held that the defendant did not request a loan when he drew the cheque in question. Instead, the client believed that there were adequate funds to his credit and he intended to draw against them (865A–B). At the same time the bank, in honouring the cheque, had no intention to lend money. Its purpose was to pay the funds out of the amount deposited by the client, which the plaintiff believed had resulted from honouring the foreign cheque. Since both parties acted with the same intention, which turned out to be misguided, the proper cause of action was an enrichment action – the *condictio indebiti* (865A–D). As the bank's claim to debit the customer's account was based on unjustified enrichment, the question arose whether the bank could be estopped from claiming because of its negligence. In the present case, however, the court found no negligence on the part of the drawee bank (865F). Another element of the defence of estoppel is prejudice. The bank is not entitled to debit its customer's account if the customer can prove that he or she relied on the representation contained in the bank statement to his or her detriment. Here, the client had used the money to extinguish an existing debt. The effect of this was to create another debt to the bank for the same amount as the original debt; in

other words, the client had replaced one creditor with another (865I–J). Had this not been the case (eg, had the client used the money to gamble), the client would not have been enriched. So there may be circumstances in which the client acts to his detriment by relying on an erroneous credit entry on his bank statement.

The rule is, therefore, that if a customer has been incorrectly credited with an amount, the bank may correct the error. Amounts that have already been paid out, however, have to be recovered by means of an enrichment action (*Gallewski v Henderson* 1889 SAR 22). The customer may rely on the bank's misrepresentation only if he or she has actually been induced by that misrepresentation to act to his or her detriment (*Kircos v Standard Bank of South Africa Ltd* 1958 4 SA 58 (SR)). If the mistake is corrected before it comes to the customer's attention, he or she cannot claim to have been misled by it (*British and North European Bank Ltd v Zalzstein* 1927 2 KB 92).

6 The duties of the collecting bank

Receipt of a cheque for collection imposes on the collecting bank a range of obligations to its customer and to third parties (Goode *Commercial law* 2 ed (1995) ("Goode") 594). The collecting bank owes its customer a duty to collect promptly and diligently all items which are the lawful property of the customer, whether payable to the customer himself or to a third party who has indorsed it to him (Goode 599). Unless the depositing customer gives specific instructions that are accepted by the bank, the choice of the appropriate method of collecting payment of the cheque is part of the duty of the collecting bank (Crawford & Falconbridge vol 1 para 4001.2 at 1043).

Also, the collecting bank should promptly collect payment of those cheques deposited with it (*Barclays Bank plc v Bank of England* 1985 1 All ER 385 391*d–e*). Holden states:

> "[A] banker to whom a cheque is delivered for collection is under a duty to his customer to use reasonable diligence in presenting it for payment. To take an extreme case, if a banker put such cheques into a drawer and forgot about them for several days, there would be no doubt that this would amount to a failure to use reasonable diligence in presenting the cheques for payment. Hence, the banker would be liable to the customer for any loss suffered by him; if, for example, the drawer of one of the mislaid cheques was adjudicated bankrupt with the result that the customer obtained only a dividend in the bankruptcy, the collecting banker would be liable to the customer for the amount so lost" (214–215).

Although I agree in principle with this statement, it should still be borne in mind that a party to a contract is always under a duty to mitigate his or her damage in the event of a breach of contract (*Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A); Christie *The law of contract in South Africa* (1996) 610f), and that it must be shown that the parties actually or presumptively contemplated a loss of the kind claimed by the plaintiff (*Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 2 SA 545 (A)). The duty to mitigate damage would, in the present instance, embrace steps to recover the amount of the cheques first from the original debtor (the drawer). This proposition is implicit in Holden's statement. One can also argue that the collecting bank is entitled to raise the defence that the cheque would in any event not have been paid, even if it would have been presented timeously for payment, because of the drawer's insolvency.

7 Section 67 of the Bills of Exchange Act and lost cheques

At English common law, the loss of a negotiable instrument caused considerable hardship (Crawford and Falconbridge vol 2 para 5802 1702–1703): as the original debt remained suspended, the holder was unable to demand payment if he or she could not tender the instrument. It did not matter whether the negotiable instrument was lost before or after maturity, or whether it was payable to bearer, or to order and not indorsed. If the party primarily liable on the instrument pleaded loss, the courts were mainly concerned about his or her risk if a holder in due course should later demand payment. (The same sentiment appears from *Adams v SA Motor Industry Employers Association* 1981 3 SA 1189 (A).) With the common law thus impotent, *equity* had to prevent injustice. (On the role of the courts of equity in the English law, see Maine *Ancient law* (1930) 52ff; Barker *An introduction to English legal history* (1971) 15ff.) The "holder" of the lost instrument could tender an indemnity to the party primarily liable to pay the lost instrument; if that was refused, payment of the bill might be enforced in a court of equity.

Section 69 of the English Bills of Exchange Act 1882 (45 & 46 Vict c 61) adopted this approach taken by the courts of equity. A similar provision found its way into section 67 of the South African statute. (For a comparative analysis of s 67, see Joubert "Enkele probleme by verlore verhandelbare dokumente" 1987 *De Jure* 141 and Malan, Oelofse and Pretorius *Proposals for the reform of the Bills of Exchange Act, 1964* (1988) 501ff.) It is interesting to note that the provisions of section 69 of the English Bills of Exchange Act were originally contained in section 87 of the Common Law Procedure Act 1854 (17 & 18 Vict c 125), taken over from (1698) 9 Will III c 17.

Section 67 states that the person who was the holder of a lost bill may request the drawer to give him another bill of the same tenor. If required to do so, he must give adequate security to the drawer to indemnify him against any valid claim if the bill should reappear. The drawer may be compelled to give another bill as a replacement for the lost bill (s 67(2)).

Section 67 has many shortcomings. It is, for example, not clear whether the section applies to lost promissory notes (Oelofse, Stassen and Du Plessis "Hersiening van die Wisselwet" 1983 *MBL* 67 73). There are some other uncertainties: for example, a previous acceptor or indorser could probably not be compelled to sign the duplicate bill (Malan para 109 fn 125). In practice, it often happens that a drawer is reluctant, or even refuses, to give a duplicate. Proceedings to compel him to do so in terms of section 67(2) are time-consuming and often very expensive.

Also, only "the person who was the holder" of the lost bill is entitled to request the drawer to give him another bill. As cheques are primarily used as instruments of payment, and thus are rarely negotiated (Malan para 188), this will inevitably mean that the payee will be required in terms of section 67 to request the duplicate from the drawer. The collecting bank will not normally qualify as the "holder" of a cheque deposited for collection, since order cheques are very seldom "indorsed" before they are deposited (Malan para 224). Where a cheque is lost or destroyed, it is often difficult to establish whether the cheque was actually indorsed, and whether it was perhaps non-transferable. Here it is necessary to refer to section 84. This states that if a cheque which is "payable to order, is delivered by the holder thereof to a banker for collection, and such cheque, draft or document is not indorsed or was irregularly indorsed by such

holder, such banker shall have such rights, if any, as he would have had if, upon such delivery, the holder had indorsed it in blank". Malan explains that this section governs, not the status of the collecting bank, but only its rights (Malan para 225 at 407). In *Bloems Timber Kilns (Pty) Ltd v Volkskas Bpk* 1976 4 SA 677 (A) 686D–E the court held that

> "[s] 84 was not intended to define the status of a banker who takes delivery of a cheque in the circumstances outlined in the section. It deals purely with his rights".

To qualify as *holder* of a cheque, one has to be the payee or indorsee in possession of an order cheque, or the bearer of a bearer cheque (s 1). A bill (or cheque) is payable to bearer if it is expressed to be so payable, or if the only or the last indorsement on it is an indorsement in blank (s 6(2)). (It is also trite that one cannot be a holder in due course of a cheque if one is not its *holder*.) Section 84 does not alter or affect the definition of "holder" in section 1. Instead, it works on the *hypothesis* that the collecting bank will have the same rights it would have had if the holder had indorsed the cheque in blank after delivery (Malan "Aspekte van art 84 van die Wisselwet" 1974 *De Jure* 59 60; De Beer "Artikel 84 van die Wisselwet 1964 – 'n interpretasieprobleem?" 1977 *De Rebus Procuratoriis* 196 197). Section 84 does not "convert" the order instrument into a bearer one. The section also does not deal with non-transferable cheques. A non-transferable cheque cannot be "negotiated" within the meaning of section 29 (Malan para 234). No one other than the named payee can be its holder, and since it cannot be negotiated in terms of section 29, no one can hold it in due course. Where a non-transferable cheque is delivered to a banker for collection, and it has not been indorsed by its holder before delivery, section 84 will not "transform" the cheque into a bearer cheque. So even if one works with the hypothesis of section 84, the collecting bank cannot have any rights to such a cheque despite the provisions of section 84, simply because even if the cheque had been indorsed in blank, the indorsement would have had no effect on the negotiability or transferability of the cheque. The relevance of all this is that with a non-transferable cheque, the collecting bank cannot become its holder, and therefore cannot request a duplicate of the lost cheque from the drawer in terms of section 67. Furthermore, it is not clear whether a collecting bank would be entitled to rely on section 84 to request a duplicate of a lost cheque in terms of section 67.

8 Cheques lost or destroyed after deposit with the collecting bank

What are the consequences if a cheque is lost or destroyed after it has come into the hands of the collecting bank? There is little doubt that this could greatly inconvenience the holder of the cheque.

I have consulted various textbooks on this question. Most of them do not deal with it. In Hapgood *Paget's law of banking* (1996) however, it is stated that "[w]here bills are lost or destroyed while in the hands of a banker purely for collection, the loss will fall on the customer if the banker is not at fault" (407). The author cites *Thompson v Giles* 1824 B & C 422, 2 LJOSKB 48 and *Ex Parte Atkins in re Wise* 1842 3 Mont D & De G 103, 12 LJ Bcy 28 as authority. Only *Thompson* was available to me. In this decision Best J remarked that

> "if a person places in his bankers' hands bills not due, the property continues to [be] in the party paying them in. If by any accident they were destroyed, without fault of the banker, the loss would not fall upon him, but upon the customer. As the

> property continues in the customer, and it is well known that bankers receive bills as factors or agents, to obtain payment of them when due, they do not, in case of bankruptcy, pass to the assignees" (445).

One should, however, remember that this decision deals with bills not yet due and that the court had to decide whether they fell into the insolvent estate of the *banker*. Still, I believe that one should not rely only on this decision for the proposition that where a cheque deposited for collection is lost or destroyed, the loss should fall on the customer. Rather, the matter should be resolved with reference to the general principles of mandate.

I have tried to show that the specific "duties" of a collecting bank are merely manifestations of the terms of the contract of mandate between the bank and its customer. What is the position if the collecting bank breaches its duties and fails to collect payment of the cheque, because it has been lost or destroyed after it came into the hands of the collecting bank? Here one should remember that the loss of the cheque could be due to the "fault" of the collecting bank or of its employees, or to circumstances in which the collecting bank is not at fault.

Where a collecting bank breaches its duties and fails to collect payment on a cheque because the cheque was lost or destroyed after it came into the hands of the bank, the bank is in breach of its contract with its customer. The customer would, theoretically, be entitled to sue the bank for the loss he or she has suffered as a result of the breach. The principle of mitigation of loss in the event of breach of contract here requires the plaintiff to show that he or she has exhausted the equitable remedies in terms of section 67 – he or she should have taken the necessary steps to obtain a duplicate cheque from the drawer. The collecting bank would probably not be entitled to rely on section 67 (see para 7 of this note, above). Where the customer incurs expenses in his efforts to obtain a duplicate from the drawer (eg where the drawer has to be compelled to give a duplicate in terms of s 67(2)), those expenses would arguably constitute "damages" for which the collecting bank can be held liable. It should not matter in principle whether the loss or destruction of the cheque was due to the "fault" of the collecting bank, as fault is not a prerequisite for liability in the event of breach of contract. I believe that this view is in line with the purpose of the equitable remedy contained in section 67, and with the general principles of mandate. The principal debtor on a cheque is the drawer. The delivery of a cheque in payment of a debt does not constitute payment of the underlying obligation until the cheque has been met. If one duly considers the background to section 67, one will appreciate that this equitable remedy is specifically intended to deal with the situation in which a cheque has been lost and destroyed. It would be prudent for a drawer from whom a duplicate cheque is requested first to countermand payment of the lost cheque before he or she issues a duplicate. It might also be prudent not only to insist on the indemnity contemplated in section 67(2), but also to enquire from the drawee bank whether the lost cheque has been "found" before the drawer has had the opportunity to countermand payment of it.

JT PRETORIUS
University of South Africa

MORE ABOUT LANGUAGE, MEANING AND STATUTORY INTERPRETATION

> "*Dieu* was the French for God and that was God's name too; and when anyone prayed to God and said *Dieu* then God knew at once that it was a French person that was praying. But though there were different names for God in all the different languages in the world and God understood what all the people who prayed said in their different languages still God always remained the same God and God's real name was God"
>
> *Portrait of the Artist as a Young Man* (James Joyce)

1 Introduction

Until about 25 years ago, statutory interpretation in South Africa was a pretty sterile exercise. (See Devenish *The interpretation of statutes* (1992) 1: "Although statutory interpretation has become an increasingly seminal aspect of law, it was until very recently relegated to the status of a Cinderella branch of the law in South Africa, in regard to teaching, research and publications.") The idea of the intention of the legislature was accepted without question, and where there was any doubt in the mind of the interpreter about this intention, there was always a comforting mantra to be found in Steyn's *Uitleg van wette*. Dennis Cowen probably deserves the credit for sparking off the debate about statutory interpretation in South Africa with his "Prolegomenon", first published in 1976 (Prolegomenon to a restatement of the principles of statutory interpretation" 1976 *TSAR* 131). Since then there has been a steady increase in academic writings seeking to establish a satisfactory theoretical basis for the interpretation of statutory instruments. The arrival of a supreme constitution and the newfound (for South Africa) interest in constitutional interpretation, as well as the burgeoning number of theories of linguistic and literary interpretation, added further impetus. Thus we find a debate which is very much alive in South Africa today. The importance of statutory interpretation as a discipline is emphasised by Devenish in the following terms:

> "Legislation has become the most cogent and pervasive source of contemporary law. It is therefore not surprising to discover that our courts are unremittingly grappling with legal issues which concern the ascertainment of the meaning and application of the statutory provisions of the law . . . The interpretation of statutes is becoming a principal growth area of contemporary law in South Africa and other countries. The eminent German jurist Von Savigny opined that the interpretation of legislation is 'the foundation of legal science', while Prof L Fuller, the prominent American scholar, observed that 'the problem of interpretation occupies a sensitive, central position in the internal morality of law' and at a more parochial level Van Tonder remarked that interpretation of statutes is a 'sleuteldissipline in die hele regswetenskap'" (1).

The latest offering on the topic of statutory interpretation in this journal is the contribution by Jacques de Ville in the August 1999 issue, in which the author analyses and subjects to criticism the work of Christo Botha and LM du Plessis ("Meaning and statutory interpretation" 1999 *THRHR* 373).

It is not my intention in this article to act as apologist for either Botha or Du Plessis, or, for that matter, to put forward any preferred theory of meaning, but merely to add one or two further elements to the crucible in the hope that this will contribute to the debate about the appropriate approach to statutory interpretation. I certainly do not intend entering into any argument about whether language precedes thought or *vice versa*. (I do feel, though, that it is a pity that De Ville restricted himself to a critique of Botha's student handbook. Such a work necessarily provides an incomplete picture: it would have been more satisfactory if regard had also been had to Botha's doctoral thesis and even to his other work (*Waarde-aktiverende grondwetuitleg:vergestalting van die materiële regstaat* unpublished LLD thesis Unisa (1996); cf further eg "Literalisme: stuit en onttrek, of 'n nuwe offensief?" 1990 *THRHR* 614; "Interpretation of the Constitution" 1994 *SAPR/PL* 257; "Steeds 'n paar tekstuele ikone teen die regstaatlike muur" 1995 *THRHR* 523; "Maatskaplike geretigheid, die 'animering' van fundamentele grondwetlike waardes en regterlike aktivisme: 'n nuwe paradigma vir grondwetuitleg" in Carpenter (ed) *Suprema lex: Essays on the Constitution presented to Marinus Wiechers* (1998) 57).) I should be surprised if Botha indeed holds the view ascribed to him by De Ville, namely that, because he describes the written and spoken word as imperfect renderings of human thought, this implies that thought is "something pure and perfect which must be rediscovered with the assistance of the rules and presumptions of interpretation"(375).

Interestingly, De Ville does not put forward concrete solutions to the problem he perceives, but merely postulates that an approach to interpretation be found which recognises the inherent indeterminacy of the legislative text, so that interpretive norms can be used "to transform society in accordance with the ideals of the Constitution (as interpreted)".

2 The problem with language: its inherent indeterminacy

There can be no doubt that indeterminacy and even ambiguity are ever-present in any verbal expression. Even language which is ostensibly self-evident is open to differing interpretations. The following example is used to illustrate this point to students of statutory interpretation at the University of South Africa:

> "A municipal by-law provides as follows: 'nobody is permitted to sleep on the station'. At first glance this provision seems to be very clear, unambiguous and straightforward. But: Does it apply to sleeping babies? What about a grandfather dozing away while he awaits the arrival of his grandchild? What about a tramp who unrolls his sleeping bag against a pillar on the platform, and enjoys his loaf of bread and jug of wine. Since he is not asleep, will the provision apply to him?"

The same point made in this simple (simplistic, even!) example is made by Devenish, rather more "academically":

> "Statutory interpretation as a discipline is problematic because of the nature of words and language. Words are 'symbols of meaning', but in contrast to mathematical symbols they can never attain quantitative precision, since they are intrinsically qualitative and palpably inexact. Language is also 'historical – the repository of our whole culture's way of seeing'. Language is a means of communication; using words is therefore inherently flexible and is very often ambiguous, vague or general. In the words of Innes CJ in *Venter v R*:
>
> '[N]o matter how carefully words are chosen there is a difficulty in selecting language which, while on the face of it expressing generally the idea of the framer of the measure, will not, when applied under certain circumstances go beyond it, and when applied under other circumstances fall short of it.' . . .

> It must also be borne in mind that, as Singer explains, '[a] legislature is not compelled by any superior force to obey the rules of grammar and composition'. Furthermore words do not have an entirely predictable character. They can be dynamic and even unruly in their performance . . .
>
> It is difficult to express ideas in words with complete accuracy; and the more complex the idea the greater the difficulty. The law has to regulate an intricate and sophisticated society. Axiomatically this requires complicated laws involving language of a fair degree of sophistication, which compounds the difficulties inherent the process of statutory interpretation, since the more sophisticated the language, the more open it is to interpretation . . . Even when statutes are drafted with great legal and linguistic insight, there will always be cases that the draftsman did not anticipate and for which the statute apparently does not make provision owing to the 'lack of human prescience'.
>
> Furthermore the incidence of ambiguity in language is not exceptional, it is commonplace. According to Walker '[h]ardly any form of words can be thought of which is not, in some circumstances, ambiguous and requiring interpretation'. . .
>
> Ambiguity is not the only phenomenon that makes language problematic. Vagueness, obscurity, and elasticity *inter alia* may give rise to semantic problems" (2–4).

In the words of the famous American judge, Felix Frankfurter: "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification" (in his dissenting judgment in *United States v Monia* 317 US 424 431–432 (1943)).

One can therefore only agree wholeheartedly with De Ville that any approach to statutory interpretation that is worth its salt must accept the inherent indeterminacy and ambiguity of language as a given. The problem is to find a realistic and pragmatic solution.

3 The trouble with the law: the search for legal certainty

Legal certainty is consistently held up as a desirable outcome of legal proceedings, as being in the interest of justice and fairness. The objective of legal certainty manifests itself in the *stare decisis* rule, which is based on the need for a predictable outcome rather than on any deeply felt confidence in the rightness of decisions of superior courts, and also in the rule against vagueness. It is indisputably true that there is a need for a measure of certainty in the law: if the outcome of legal disputes were to be altogether unpredictable, there would not even be any pretence of fairness, let alone justice.

Absolute certainty, obviously, is unattainable. More specifically as far as statutory interpretation is concerned, there can be no such thing as fixed meaning, since shifts in accepted meaning of words and phrases take place over time, and language is beset by indeterminacy and ambiguity, as we have agreed. But the legal interpreter does not enjoy the luxury of being able to use indeterminacy as a cop-out; a meaning has to be given to statutory provisions, and it must be a meaning that does not depend on the whims or predilections of the individual interpreter. This is where it becomes extremely hazardous to draw analogies between legal interpretation, literary interpretation and even scriptural exegesis.

Both legal interpretation and literary interpretation begin with linguistic interpretation. Linguistic theory (including the theory of meaning) is therefore directly relevant to statutory interpretation and is not merely something with which academics can while away the time until something more important crops up.

Literary interpretation, by contrast, is of interest to students of legal interpretation, but has different objectives and different imperatives. A novel and perhaps totally individualistic interpretation of *Hamlet* may be of great interest and considerable value to the study of literature, but is not a determination that anyone is compelled to live by. (This is by no means to denigrate the importance of literary study; merely to emphasise divergences in focus.)

The similarities between statutory interpretation (particularly constitutional interpretation) and Biblical exegesis are perhaps even more striking. Perry (1985 *Southern California LR* 551) makes a most interesting comparison between the interpretation of constitutional texts and other "sacred" texts such as scripture. He takes the view that this is a more valid comparison than that between literary interpretation and legal interpretation, because both religious and political communities approach their foundational texts with the same questions, and both legal and religious texts are normative in a sense that a literary text is not. In the context of the debate about original intent or original meaning, Perry quotes from the work of a theologian, David Tracy (*The analogical imagination* (1981) 100):

> "The heart of any hermeneutical position is the recognition that all interpretation is a mediation of past and present, a translation carried on within the effective history of a tradition to retrieve its sometimes strange, sometimes familiar meanings."

(See also Dworkin "Law as interpretation" 1982 *Texas LR* 527.)

Lategan ("Die uitleg van wetgewing in hemeneutiese perspektief" 1980 *TSAR* 107) points out that there are both similarities and differences between the two disciplines: on the one hand, both seek to interpret authoritative texts in the light of concrete situations; both have an "existential urgency" (in the case of statutory interpretation, this relates to the quest for legal certainty and legal order); both have to deal with the demands which changing circumstances make on the interpreter; and both are influenced by history. On the other hand, legislation is a unique genre with its own rules, which are aimed at the *juridical* rather than the *spiritual* ordering of society; and the Biblical text is choate, while legislation (even the Constitution) is characterised by constant development and change. (See also Botha *Grondwetuitleg* 99–100.) To this one could add that, as in the case of literary interpretation, new developments in Biblical interpretation do not place any legal obligation on the community at large, particularly not on those members of the community who are not adherents of Biblical canons.

Another unique feature of legal interpretation as opposed to the interpretation of other writing, is that legal interpretation has its own set of conventions, presumptions and so on. Presumptions of statutory interpretation are particularly interesting, especially in this new age in which constitutional values attract so much attention. They represent a mixture of common sense and constitutional values rather than formal logic. (Wiechers *Administrative law* (1985) 41–45 sees presumptions as a means to ensure adherence to the principle of legality.) What better example of a common-sense rule than the presumption that legislation does not contain futile or meaningless provisions? Or that new legislation does not change the existing law more than is necessary? And what better examples of a rule based on constitutional values than the presumption that the jurisdiction of the courts is not restricted or ousted by legislation, or the presumption against harsh or unreasonable consequences, or the presumption against retrospectivity (unless retrospective operation favours the individual), or the presumption that legislation treats all persons equally, or the presumption that the interpretation

most favourable to the individual must be adopted? (Of course, the presumption that the state is not bound by its own legislation could be said to be an exception, in that it could operate harshly against the individual; in fact this presumption may well be under threat in terms of a supreme Constitution, particularly if applied in its most extreme form. This is a topic which possibly merits more detailed analysis.)

4 The dangers of labelling

Much has been made of what is the "correct" approach to statutory interpretation, the implication being that the use of the correct approach will inevitably lead to the correct answer; in other words, the one and only true meaning of the word, phrase or provision sought to be interpreted. Now I strongly suspect that when Botha says that a contextual or purposive approach is preferable to a textual or intentionalist approach, he is not saying (or even implying) that contextual or purposive interpretation will yield the right result (ie the correct or "perfect" meaning) or that the use of a textual, literalist or intentionalist approach will yield the wrong result.

There are numerous labels currently attached to the practice of statutory interpretation. Approaches to interpretation are interlinked and overlap; furthermore, it comes as no surprise to find that they mean different things to different people. A cursory examination of some of these may be of interest (even though they are very much "old news"; I lay no claim to novelty or profundity in this regard).

4 1 The literalist or textualist approach

The Concise Oxford Dictionary defines literalism as: "Following the letter, text, or exact or original words; taking words in their usual or primary sense and applying the ordinary rules of grammar . . ." and textualism as "adhering strictly to the letter of the text". This was the traditional approach to interpretation in South Africa. Primacy was accorded to the text and the "ordinary meaning" of the words of the text. This ordinary meaning could be modified only if the interpreter could perceive no obvious ambiguity, or if adherence to the literal meaning would result in absurdity. Only then could recourse be had to context, presumptions, legislative history and the like. Such an approach permits of little if any recognition of the inherent ambiguity of language and is supposedly based on common sense notions of meaning. In the words of Michael Perry ("The legitimacy of particular conceptions of constitutional interpretation" 1991 *Virginia LR* 669 674): "To ask about a constitutional provision, or about any text, 'What does it say?' is not the same as asking 'What does it mean?'"; he adds that where there is a widely shared understanding of a text in a community, the question "What does it mean?" will elicit the reply that it means what it says.

The deficiencies of this approach have been pointed out repeatedly; it serves no purpose to mention them all again, despite the fact that there are still South African judges who display a predilection for textualism and intentionalism.

Just an aside, though: I do not for a moment imagine that when Anton and Eduard Fagan make a plea for greater adherence to the "plain meaning" or textual approach (see Anton Fagan "In defence of the obvious – ordinary language and the identification of constitutional rules" 1995 *SAJHR* 545 and Eduard Fagan "The longest erratum note in history" 1996 *SAJHR* 79) they are

advocating a return to the kind of "primitive" literalism which Davis ("The twist of language and the two Fagans: please sir may I have some more literalism!" 1996 *SAJHR* 504) calls "the crude pseudo positivism of earlier years". The same goes for the oft-quoted dictum of Kentridge AJ in *S v Zuma* 1994 4 BCLR 401 (CC); 1995 2 SA 642 (CC) par 20 to the effect that "[i]f the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination . . ." (By the same token of course, the call for a broader, more dynamic approach to interpretation does not imply that the text is ignored or even relegated to a minor position and superseded by values, context or whatever.)

4 2 Intentionalism

The intentionalist approach is based on the notion that the function of the interpreter's task is to establish the intention of the legislature. It is closely linked with literalism and textualism because a textualist approach is regarded as the most reliable guide to the (mythical) intention of the legislature.

In his student textbook, Botha treats intentionalism as to all intents and purposes synonymous with textualism and literalism, and in his thesis as closely akin because all are essentially text-based. The dangers inherent in labelling become apparent when one considers that textualism could be equally rationally linked with purposivism; there one would argue that the words of the text are the most reliable guide to the purpose of the legislation (rather than the intention of the legislature).

4 3 Purposivism

The purposive or functional approach may appear, at first glance, to be a close relative of intentionalism. After all, is it not pure sophistry to distinguish between the intention of the legislature and the purpose of the legislation? Will the two not, more often than not, be identical or at any rate yield the same interpretive result? Of course the result may often be the same. But there is a fundamental difference between the bases on which the approaches rest: purposivism is founded on the (objective) purpose or function of legislation, while intentionalism has a subjective foundation.

Like all the other approaches to interpretation, purposivism has its critics as well. For example, Mureinik ("Administrative law in South Africa" 1986 *SALJ* 615 620) points out:

> "Nowadays it is commonplace, though, and dangerously so, for well-meaning lawyers to think that a proper approach to the interpretation of statutes requires only that they emancipate themselves from the literal meaning . . . and instead to give full effect to the legislature's purpose. It is just as commonplace, and even more dangerous, to think that this approach is always progressive and libertarian . . .
>
> It is true, of course, that purposive interpretation is generally superior to a mechanical application of the ordinary grammatical meaning of words . . . literal interpretation aspires to no more than making sense of a fragment of a statute; but purposive interpretation enjoins the reader to prefer the construction that makes sense, or the best sense, of the statute as a whole: purposive interpretation seeks the construction that makes the statute most coherent. But this strength of purposive interpretation suggests its most important limitation. That is its failure to aspire to a higher coherence: the coherence of the legal system as a whole."

And, again: "If the policy of a statute is iniquitous, a purposive interpretation may well foster the iniquity" (624).

One of the most comprehensive critiques of purposivism is that of Simmons ("Unmasking the rhetoric of purpose: the Supreme Court and legislative compromise" 1995 *Emory LJ* 117). Simmons argues as follows:

(a) In interpreting statutes, most judges distinguish between private- and public-law adjudication (and, in the process are more inclined to a textualist approach in private-law issues, but will be more willing to depart from the text in public-law matters and to infer an overriding legislative purpose).

(b) A "normative loading" is often assigned to what he terms the "legislative compromise".

(c) The two above themes are revealed through an analysis of statutory purpose.

Simmons argues that although judges usually identify a single overriding legislative purpose, there is almost always more than one purpose, especially where the legislation is the result of legislative compromise. He suggests that ascribing one or more purposes to legislation in this way could be viewed by the more cynical among us as a rhetorical device to reach the desired outcome. On the other hand, he concedes that "[w]hether a judge sees a singular purpose or multiple purposes depends on his or her normative view of legislative compromise" (133).

Purposive interpretation has also on occasion been equated with a "generous" approach by our courts, particularly in constitutional issues. The two are clearly not necessarily synonymous (see Hogg "Interpreting the Charter of Rights: Generosity and justification" 1990 *Osgoode Hall LJ* 818 and the discussion of this issue in Carpenter and Botha "The 'constitutional attack on private law': are the fears well founded?" 1996 *THRHR* 126).

In short, then, purposive interpretation is not necessarily a panacea for all interpretive ills either.

4 4 The contextual (or systematic) approach

True contextualism implies that context is factored into the interpretive process right from the outset, and not only when there appears to be some obvious ambiguity or contradiction. The latter is what Devenish calls the "qualified contextual approach". It involves a basic reliance on the text, with recourse to the context only if the text is unclear or ambiguous or if adherence to the plain meaning would lead to absurdity. At first glance this seems to be at least consonant with common sense. The trap one could fall into when concentrating on what appears to be plain and obvious to the exclusion of the broader context can be illustrated with reference to the "sleeping-on-the-station" example above, as well as De Ville's "dressing-up" example.

Again Botha links purposivism and contextualism as wider, more objective approaches. They, too, are not altogether synonymous: on the one hand, recourse to context may be seen as the means to the end (to establish purpose); on the other hand, context could logically be used to establish intention as well, thus forming a link between contextualism and intentionalism. (This certainly is not part of the traditional *modus operandi* of South African courts – it is merely mentioned to illustrate the point I am trying to make about labels.)

As is pointed out by De Waal *et al* (*The Bill of Rights handbook* (1999) 135), however, contextual interpretation must also be used with caution: there is the danger, first of all, that context can be used to limit rights rather than to interpret them; secondly, contextual interpretation "may be used as a short-cut to eliminate 'irrelevant' fundamental rights".

4 5 The teleological approach

The teleological is often regarded as synonymous with purposivism, even by our courts. In fact there is a major distinction: purposivism looks at the result sought to be achieved, with or without regard to actual outcome. It does not necessarily have any regard to value or morality. Teleology, by contrast (from the Greek *telos*, end) refers to the view that developments are due to the purpose or design actually served by them, not only to the purpose or design sought to be served. Botha refers to the teleological approach as "value-coherent", and Mureinik, too, advocates value-coherent interpretation, which he explains in the following terms:

> "[B]eyond the literal interpretation of statutes, and beyond their purposive interpretation, there lies a superior conception of interpretation. By that conception of interpretation, the judge is charged with the duty of finding the construction most consonant with the morality that affords the best explanation of the legal system. That morality itself contains principles attaching due weight to textual and purposive considerations. We might call this conception of interpretation value-coherent interpretation" (623).

It is important to bear in mind that this was written before the coming of a supreme value-based constitution in South Africa, and that Mureinik was not talking about the interpretation of a supreme constitution, but about "ordinary" statutory interpretation, and more specifically in the context of administrative law.

4 6 Historical interpretation

First of all, one must distinguish between political history and drafting history. It is obvious that South Africa's political history is relevant, not only to the interpretation of the Constitution, but to that of other legislation as well. It has a bearing on purpose, context, constitutional values, and the like. Admittedly, what is now recent history, will be less relevant a hundred years from now.

Drafting history is now generally recognised as a potentially useful secondary source in constitutional interpretation, less so in the interpretation of other legislation. However, the so-called "mischief rule" is certainly a form of historical interpretation as well.

4 7 Other interpretive labels

There is really no end to the possible number of labels that can be attached to interpretive approaches. Dworkin's concept of constructive interpretation, based on fairness and "law as integrity", postulates justice and moral coherence and is therefore akin to the teleological approach (see *Law's empire* (1984)). Du Plessis based his "indigenous" theory of interpretation on what he termed a "normative transposition" within a specific contextual framework (see De Ville 379–383 for references to Du Plessis's work). The American WN Eskridge postulates a theory of "dynamic statutory interpretation", which is of interest to South Africans even though it is based on peculiarly American political structures and processes (see "Dynamic statutory interpretation" 1987 *Univ of Penn LR* 1479; *Dynamic statutory interpretation* (1994)). Labuschagne, too, refers to "Die dinamiese aard van die wetgewingsproses en wetsuitleg" (1982 *THRHR* 422), and further postulates what he calls "doelorganiese regsnormvorming" as part of the interpretive process ("Doelorganiese regsnormvorming: opmerkinge oor die grondreëls van die uitleg van 'n handves van menseregte" 1993 *SAPL* 127).

5 Two potentially useful analogies

5 1 Baxter's dialectical reasonableness

Baxter (*Administrative law* (1985) 484–485) distinguishes between two facets of reasonableness in the administrative law context: the dialectical and the substantive. He explains this as follows, quoting various authors:

> "[R]easonableness has some of the features of an 'essentially contested concept'; that is, a concept which admits of different *conceptions*, disputes about which, 'although not resolved by arguments of any kind, are nevertheless sustained by perfectly respectable arguments and evidence'.
>
> . . . A proposition may be regarded as 'reasonable' in the dialectical sense if, in support of it, an appeal was made to factors, values and standards which the other party would recognize as legitimate given the context of the argument. The proposition would be regarded as 'reasonable' in the substantive sense if it is itself accepted by the other party as the conclusion to be drawn from the arguments used in its support."

It is not difficult to see the possible analogy between the above line of thinking and the interpretive context. Meaning is certainly a contested concept, one which often cannot be resolved by argument but which can be sustained by "respectable" (logically sustainable or legitimate) arguments. The interpretive equivalent of substantive reasonableness would be a meaning given to a provision which is accepted as the "correct" meaning without qualification, while the interpretive equivalent of dialectical reasonableness would be a meaning which all parties find acceptable, even if some of them would have attached a different meaning to the provision.

I suggest that the value of Baxter's concept of dialectical reasonableness lies in the sustainability of the arguments on which the finding is based, not on the end product which the process of argumentation yields. By the same token, the process of interpretation is not rendered futile or meaningless by the mere fact that the ideal of discovering the one and only absolute, immutable and perfect meaning is unattainable. Furthermore, the inherent indeterminacy of language does not absolve the interpreter from the responsibility of establishing a meaning that can be sustained by argument and accepted even by those who may reach a different conclusion following the same process – any more than the entity charged with determining reasonableness can plead the inherent contestability of reasonableness as an excuse for not seeking to achieve a result that is acceptable even to those who disagree with it.

As I see it, at least part of the problem with statutory interpretation is that it is performed in a process that is subconscious or even unconscious, particularly when the ordinary meaning of a provision appears to be obvious. Even when it is not, it is hard to conceive of an interpreter saying to himself: "This is what the text says. It appears to mean X if I read it literally; but I must not forget that the purpose may be something different, and that the context has to be considered. And then I must remember the political history, and perhaps the drafting history as well. Oops, what about section 39 of the Constitution? Is my interpretation value-coherent? Am I interpreting too literally, or not dynamically enough?" And so on. It all seems pretty silly. All this happens subconsciously or even unconsciously. The question is whether subconscious legal interpretation is legitimate, particularly when we are dealing with judicial interpretation.

The trouble is that subconscious interpretation can yield the kind of result found in the decision in *S v Kola* (1966 4 SA 322 (A), quoted by De Ville 386–387).

This example is both a good one and a bad one. It is a good example of the absurdity and injustice that can result from rigid literal interpretation. On the other hand, it is a bad example for the simple reason that the judgment fails every possible interpretive test except adherence to literalism. Even under the old system, a different result could (and should) have been reached, whether the court resorted to intention, purpose, context, presumptions of interpretation (such as the presumption against absurdity and the presumption in favour of the individual), the mischief rule or anything else. Value-coherent or teleological interpretation did not even have to be taken out of the cupboard.

Absurd as it may seem, interpreters simply have to get used to the idea that nothing is as obvious as it seems and that interpretation is a conscious process throughout, a process in which the problem must be examined from every angle so that a meaning can be established which is acceptable to the widest possible range of interpreters. (This is where legal interpretation can take a leaf out of the book of literary and scriptural interpretation: these certainly cannot take place unconsciously or subconsciously and are still taken seriously.) Clearly there is no ready-mix formula (fifty percent text plus ten percent context and so on) which will serve every case. Each case will require its own mix, but all the elements must be present. This means that the interpreter will inevitably have a measure of discretion as regards the importance attached to each element of the interpretive whole.

Which brings me to the second analogy from administrative law.

5 2 The exercise of discretion

It is trite law that no discretion is unbounded and that every discretion must be exercised within the parameters of certain limits. In the administrative context these limits are provided by the enabling Act and the general rules of administrative law.

The interpretive context has its parameters as well. We all know that, and it is nothing new. Except that the parameters have changed: interpreters are no longer hamstrung by a literal adherence to the text or the imagined intention of the legislature. They have in fact been instructed by the Constitution to add the values of Chapter 2 to the mix, as well as the rules of international human rights law and the entire context of constitutional values. It has even been suggested that a pinch of foreign law could improve the flavour.

Judges will obviously still exercise a discretion when interpreting statutes. (Anyone who argues that the textual approach excludes discretion has lost touch with reality.) Now, of course, the Constitution spells out the obligation to take certain values into account, but this does not mean that interpretation has become a subjective business dependent on the interpreter's own personal predilections. We have also been told that there will be provisions that do not, in fact, reflect constitutional values. I think judges should not be too eager to assume that no values are involved, just because the provision appears to be mundane and purely practical.

6 Conclusion (albeit a tentative one)

The easy answer then (perhaps a facile one?) is that all methods of statutory interpretation must be used in a conscious effort to find an acceptable answer to every interpretive exercise, one that is not only logically coherent, but value-coherent as well. Then it will be possible to agree about the way in which the provision has been interpreted, even if there is difference of opinion about the actual meaning given to the provision.

GRETCHEN CARPENTER
University of South Africa

VONNISSE

ONREGMATIGE BESLAGLEGGING OP GOED: DIE *ACTIO LEGIS AQUILIAE*, KOUSALITEIT EN STRIKTE AANSPREEKLIKHEID

Meevis v Sheriff, Pretoria East 1999 2 SA 389 (T)

Soos by 'n vorige geleentheid opgemerk (sien Neethling "Onregmatige beslaglegging op goed: Die *actio iniuriarum* en strikte aanspreeklikheid" 1998 *THRHR* 706), gebeur dit nie aldag dat 'n geval van onregmatige beslaglegging op goed voor die howe dien nie. (Vir 'n kort samevatting van die belangrikste beginsels wat op hierdie gebied toepassing vind, sien Neethling 1998 *THRHR* 706; sien ook Neethling *Persoonlikheidsreg* (1998) 227–229; Neethling, Potgieter en Visser *Law of delict* (1999) 352–353 370–371.) Daarom is dit nuttig om die aspekte van onregmatige beslaglegging wat *in casu* aandag geniet, hier te beklemtoon.

Die feite was kortliks die volgende. Die eiseres het sekere juweliersware as sekuriteit aan die balju (verweerder) oorhandig ter finalisering van 'n aksie hangende teen S ten einde S se teenwoordigheid by die verhoor te verseker. Die verweerder het onderneem om die juwele in 'n goeie toestand aan die eiseres terug te besorg nadat die saak afgehandel is. Na finalisering van die saak het die verweerder in opdrag van die suksesvolle skuldeiser teen S egter op die juwele beslag gelê en geweier om hulle aan die eiseres te oorhandig. Ten einde die beslaglegging teen te staan, het die eiseres 'n verklaring afgelê ter bevestiging dat sy, en nie bedoelde skuldeiser nie, die eienaar van die juwele is. Voordat hierdie proses egter verder gevoer kon word, is die juwele tydens 'n gewapende rooftog van die balju se perseel gesteel. Die eiseres voer aan dat die verweerder aanspreeklik is vir haar skade, onder andere omdat die roof voortgevloei het uit die feit dat hy onregmatig op die juwele beslag gelê het en dat hy gevolglik nie meer in staat is om hulle aan haar terug te besorg nie.

Ten aanvang vra regter De Villiers die vraag (392H–393A)

> "whether the plaintiff's . . . claim discloses a cause of action in view of the fact that plaintiff is claiming patrimonial damage [and not satisfaction ('genoegdoening')] . . . whereas no express averment is made in regard to fault (intent or negligence). Compare Neethling *Law of Personality* (1996) at 72–6.
>
> It is trite law that the same set of facts may give rise to different causes of action, for example if an attorney is defamed as being dishonest he may have a claim based on the *actio injuriarum* in respect of the defamation, as well as a claim based upon the *actio legis Aquiliae* in respect of the pecuniary loss he has suffered as a result of the defamation."

As antwoord op sy vraag verwys hy met instemming na die skrywer se standpunt dat nóg opset nóg nalatigheid nodig is om 'n eis op grond van onregmatige beslaglegging te fundeer (393D–E):

> "'In the case of wrongful attachment of property the conduct concerned takes place without any justification or judicial authority whatsoever. Such wrongful conduct makes the defendant liable without further ado. Fault (intent or negligence) is unnecessary to found liability. Accordingly the defendant cannot raise mistake or absence of consciousness of wrongfulness as a defence – he is liable without fault'" (*Law of personality* 202).

Die beginsel van skuldlose aanspreeklikheid weens onregmatige beslaglegging geld volgens die hof ten aansien van sowel genoegdoenings- as skadevergoedingseise (393–394). Daarom openbaar die eiseres se pleitstukke wel 'n skuldoorsaak.

Vervolgens bevind die regter dat die verweerder inderdaad onregmatig op die eiseres se eiendom beslag gelê het (394–396) en maak korte mette met die verweer dat die verweerder *bona fide* onder die indruk verkeer het dat die juwele aan S behoort (395A–I):

> "'But no reasons in law or equity were adduced why a third party's goods should become liable for another's debts because the messenger honestly believed that they belonged to the debtor, or because he was not guilty of any negligence; or why such a person's goods should be sacrificed because a messenger takes upon himself a paid office which places him "between the devil and the deep sea".' [*Weeks v Amalgamated Agencies Ltd* 1920 AD 218 236.]
>
> That a wrongdoer's legal liability might exist in the case of certain forms of *injuriae*, including wrongful attachment, even in the absence of this appreciation of the wrongful nature of his injurious act, has been explicitly recognised by the Supreme Court of Appeal. See *Minister of Justice v Hofmeyr* (*supra* at 154J–157F).
>
> Even if the defendant honestly believed that the jewellery belonged to [S], that would not be a defence unless it was in [S's] possession at the time of attachment [wat nie die geval *in casu* was nie]."

Ten slotte moet die hof bepaal of die onregmatige beslaglegging die oorsaak (feitelik en juridies) van die eiseres se skade was. Wat feitelike kousaliteit betref, pas die hof die sogenaamde "but for"- of *conditio sine qua non*-toets toe (396F–H):

> "[T]he test is whether, but for the wrongful attachment, the event giving rise to the harm in question would have occurred. The test is otherwise known as the *causa (conditio) sine qua non.* No act, condition or omission can be regarded as a cause in fact unless it passes this test.
>
> The wrongful attachment can only be regarded as having caused or materially contributed to plaintiff's loss if the loss would not have taken place but for the wrongful attachment. It necessarily involves a hypothetical inquiry into what would have happened had the wrongful attachment not occurred. The *onus* is on the plaintiff to establish this proposition on a balance of probabilities."

Regter de Villliers kom tot die slotsom dat, "but for" die onregmatige beslaglegging, die juwele aan die eiseres terugbesorg sou gewees het en daarom nie in die verweerder se besit sou gewees het toe die roof plaasgevind het nie. Die beslaglegging was gevolglik die feitelike oorsaak van haar verlies.

Die kwessie van juridiese kousaliteit beantwoord die hof met verwysing na die vraag (397G) "whether the wrongful attachment is linked to the harm sufficiently closely or directly for legal liability to arise or whether the harm is too remote". Om dit te bepaal, moet 'n soepele benadering gevolg word waar oorwegings van beleid, redelikheid, billikheid en regverdigheid op die feite voorhande toegepas word (sien 397–398). In hierdie proses speel 'n faktor soos die redelike voorsienbaarheid van die gewraakte gevolg ook 'n rol, en hieroor laat regter De Villiers hom soos volg uit (398C–398E):

"'In delict, the reasonable foreseeability test does not require that the precise nature or the exact extent of the loss suffered or the precise manner of the harm occurring should have been reasonably foreseeablc for liability to result. It is sufficient if the general nature of the harm suffered by the plaintiff and the general manner of the harm occurring was reasonably foreseeable.' [*Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 765.]

In the instant case it could not reasonably have been foreseen that the jewellery would be robbed from the defendant's possession but the gencral nature of the harm suffered by the plaintiff and the general manner of the harm occurring was, in my view, reasonably foreseeable. To my mind, it was reasonably foreseeable that the defendant might lose possession of the jewellery in some fortuitous manner and that plaintiff would suffer loss in such an event.

It follows that I do not regard the robbery as a *novus actus interveniens*."

Die hof vervolg (398F–I):

"Legal policy, as well as considerations of reasonability, fairness and justice require, in my view, that the defendant should be held liable in the present circumstances. Not a long time elapsed between the wrongful attachment and the robbery. The plaintiff took steps to try and recover the jewellery from the defendant after the wrongful attachment. The defendant was, in effect, taking the risk of losing possession of the jewellery before the interpleader proceedings were heard. The defendant had no right to retain the jewellery in his possession pending the hearing of the interpleader proceedings. He has an affidavit from the plaintiff in his possession in which she claimed that she was the owner. As indicated, he had not attached the jewellery while it was in [S's] possession and was accordingly obliged to give it back to the plaintiff. Why he did not do so remains unexplained. Presumably, his reason was that the jewellery originally emanated from the same address where plaintiff and [S] had at all relevant times resided. As indicated, that was not a sound reason for attaching the jewellery or for retaining possession thereof. Judged by the consideration I have mentioned, the loss suffered by plaintiff is not too remote."

Die volgende opmerkings kan in verband met die uitspraak gemaak word:

(a) Die hof bevestig dat aanspreeklikheid weens onregmatige beslaglegging op goed – ook wat skadevergoedingseise betref (vgl Neethling *Persoonlikheidsreg* 229) – strik of skuldloos is. Dit was ook die geval in *Minister of Finance v EBN Trading (Pty) Ltd* 1998 2 SA 319 (N) waar beslis is dat die Aquiliese aksie ingespan moet word om skadevergoeding weens onregmatige beslaglegging te verhaal maar dat skuld (of dan *dolus* in die regstegniese sin van wilsgerigtheid én onregmatigheidsbewussyn) nie vereis word om aanspreeklikheid te fundeer nie (sien ook Neethling 1998 *THRHR* 708–709).

(b) Ter regverdiging van skuldlose aanspreeklikheid by onregmatige beslaglegging, haal regter De Villiers met goedkeuring soos volg uit die skrywer se *Law of Personality* (203 fn 539) aan:

"This negation of the intent requirement must be ascribed to English law influence, as it is inconsistent with the common law foundations of the *actio iniuriarum*. Nevertheless, a deviation from the common law position in this case (as in the case of wrongful deprivation of liberty) is understandable in view of the fact that it is mostly officials of the State who are involvcd in wrongful attachment of property and deprivation of liberty. Consequently the parties find themselves in a relationship of complete inequality: on one hand thc commanding, faceless State organisation with its overpowering means of coercion and almost unlimited financial means, and on the other the virtually defenceless individual – the unfortunate victim of the clearly wrongful conduct of State officials. Reasonableness and justice therefore require that the State, or the person who uses the State machinery without a valid judicial process, must bear the risk of liability in these cases even in the absence of fault: cf Neethling and Van Rensburg 1973 *THRHR* at 303–304."

Hierdie beskouing is ook in ooreenstemming met die handves van fundamentele regte in die Grondwet 108 van 1996, waarvan die primêre oogmerk is om onderdane teen arbitrêre optrede van die staat te beskerm (Neethling *Persoonlikheidsreg* 20–21 68; *Gardener v Whitaker* 1995 2 SA 672 (OK) 682–685). Of soos regter Magid dit in *Minister of Finance v EBN Trading (Pty) Ltd* 1998 2 SA 319 (N) 329 stel, die aanvaarding van skuldlose aanspreeklikheid van die staat "seems to me to accord better with the human rights culture of the new South Africa, which is stressed in both the interim and the final Constitutions of the Republic". Hierdie standpunt word gerugsteun deur die verskansing, as deel van die reg op privaatheid, van die reg dat daar nie op 'n persoon se besittings beslag gelê word nie (a 14(c) van die Grondwet; sien ook Neethling 1998 *THRHR* 709).

(c) Omdat opset nie 'n vereiste vir aanspreeklikheid is nie, kan dwaling of afwesigheid van onregmatigheidsbewussyn nie as 'n verweer opgewerp word nie (sien ook *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 154; *Ramsay v Minister van Polisie* 1981 4 SA 802 (A) 818–819). Die verweerder kan dus nie aanvoer dat hy *bona fide* geglo het dat die beslaglegging regmatig was nie (*Weeks v Amalgamated Agencies Ltd* 1920 AD 218 236, aangehaal hierbo).

(d) Waar op 'n verkeerde persoon se goed beslag gelê word, is die verweerder in beginsel dus summier aanspreeklik op grond van sy onregmatige optrede (sien *Weeks v Amalgamated Agencies Ltd* 1920 AD 218; *Wade and Co v Union Government* 1938 CPD 84; *Trust Bank van Afrika Bpk v Geregsbode, Middelburg* 1966 3 SA 391 (T)). Word die goed egter in besit van 'n vonnisskuldenaar gevind, is die geregsbode nie aanspreeklik nie tensy hy geweet het of rede gehad het om te glo dat die goed aan 'n derde (die eiser) behoort. In hierdie omstandighede word skuld (opset of nalatigheid) wel as aanspreeklikheidsvereiste naas onregmatigheid gestel (Neethling *Persoonlikheidsreg* 228). Indien die verweerder dus *bona fide* geglo het dat die goed aan die vonnisskuldenaar behoort, sluit sy dwaling onregmatigheidsbewussyn/opset en bygevolg aanspreeklikheid uit (sien bv *Weeks v Amalgamated Agencies Ltd* 1920 AD 218 226; *Trust Bank van Afrika Bpk v Geregsbode, Middelburg* 1966 3 SA 391 (T) 393; *Theron v Steenkamp* 1928 CPD 429 432–433; *Consolidated Motors Ltd v Reed* 1927 TPD 750 758–759).

(e) Die implementering van die sogenaamde "but for"- of *conditio sine qua non*-toets vir feitelike kousaliteit is vatbaar vir kritiek. Soos by herhaling beklemtoon, is die "toets" gebaseer op 'n lompe, onregstreekse denkproses wat op 'n sirkelredenasie uitloop, faal dit volkome in gevalle van kumulatiewe veroorsaking, en is dit in werklikheid geen kousaliteitstoets nie aangesien dit bloot 'n *ex post facto* wyse is om 'n voorafbepaalde kousale verband uit te druk (sien Neethling, Potgieter en Visser *Delict* 174–178; sien ook Snyman *Criminal law* (1995) 72–73; Van der Walt en Midgley *Delict: Principles and cases* (1997) 166). Die korrekte benadering tot feitelike kousaliteit is om op grond van kennis en ervaring te bepaal of een feit (roof van juwele) uit 'n ander (beslaglegging op juwele) gevolg het (sien Neethling, Potgieter en Visser *Delict* 180–181).

(f) Juridiese kousaliteit – onafhanklik van enige skuld aan die kant van die dader – word tereg as selfstandige delikselement beklemtoon (sien ook *Minister of Finance v EBN Trading (Pty) Ltd* 1998 2 SA 319 (N) 326 329; Neethling 1998 *THRHR* 710; vgl Neethling, Potgieter en Visser *Delict* 200–201; vgl ook mbt onregmatige vryheidsberowing, bv *Thandani v Minister of Law and Order* 1991 1 SA 702 (OK) 705–706; *Ebrahim v Minister of Law and Order* 1993 2 SA 559 (T) 564–566; *Ncoyo v Commissioner of Police, Ciskei* 1998 1 SA 128 (CkSC) 137–139; Neethling *Persoonlikheidsreg* 140 vn 26).

(g) As uitgangspunt word die soepele benadering ingespan om juridiese kousaliteit te bepaal. Alhoewel klem op die redelike voorsienbaarheid al dan nie van die gewraakte verlies geplaas word, moet onthou word dat die bestaande regsoorsaaklikheidskriteria net 'n subsidiêre rol by die toepassing van die soepele benadering speel (sien *S v Mokgethi* 1990 1 SA 32 (A) 40–41; Neethling, Potgieter en Visser *Delict* 185–187). Nietemin is dit te betwyfel of die toepassing van die voorsienbaarheidstoets *in casu* stand hou (al verdien die hof se uiteindelike slotsom in verband met regsoorsaaklikheid instemming). Die hof se veralgemening van die aard van die skade en veral die wyse waarop dit kon plaasvind (nl dat dit redelikerwys voorsienbaar was dat "the defendant might lose possession of the jewellery in some fortuitous manner and that plaintiff would suffer loss in such an event"), grens aan die oneindige waar enige verlies wat verband hou met die eiseres se juwele en ongeag die wyse waarop dit ingetree het uiteindelik as 'n (vae of geringe) moontlikheid voorsienbaar sou wees. Sodoende word die gevestigde beginsel van *redelike* voorsienbaarheid of *redelike* moontlikheid van skade ten onregte negeer (vgl *Barnard v Samtam Bpk* 1999 1 SA 202 (SCA) 213 214; sien in die algemeen Neethling, Potgieter en Visser *Delict* 194–196). Hierbenewens moet die "general nature of the harm suffered by the plaintiff and the general manner of the harm occurring" (*Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 765, hierbo aangehaal; vgl Van der Walt en Midgley *Delict* 175) tog seker verband hou met die gebeure wat werklik plaasgevind het. Dit verg dat die *verlies van die juwele deur roof* redelik voorsienbaar moet gewees het alhoewel nie die presiese manier waarop dit geskied het nie. Hierdie benadering word soos volg in *Ablort-Morgan v Whyte Bank Farms (Pty) Ltd* 1988 3 SA 531 (OK) 536 met betrekking tot die voorsienbaarheidstoets by nalatigheid verwoord:

> "In applying the law to the facts it must be borne in mind that the test is not whether, in the abstract, danger should have been foreseen. The facts peculiar to the occurrence under consideration must be established and in the light thereof one must determine whether the defendant ought reasonably to have foreseen the occurrence itself."

(Vgl verder Neethling, Potgieter en Visser *Delict* 137–139 in hierdie verband. In *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 210 gee Van Heerden AHR trouens te kenne dat spesifiek wat die redelike voorsienbaarheid van skade (psigiese letsels) betref, dit uit 'n praktiese oogpunt geen verskil maak of die nalatigheids- dan wel regoorsaaklikheidskonstruksie verkies word nie (sien ook Neethling 1998 *THRHR* 340).)

Hoe ook al, indien in ag geneem word dat 'n balju se perseel na alle waarskynlikheid deurentyd waardevolle artikels bevat waarop beslag gelê is, en dat roof hedendaags redelik algemeen voorkom, is die kans dat die verweerder se perseel beroof kon word (anders as wat die hof bevind) minstens so groot dat dit as 'n redelike moontlikheid – en nie as gering of "besonder onwaarskynlik" nie (sien Neethling, Potgieter en Visser *Delict* 202 vir die algemene reël wat Van Rensburg in hierdie verband aan die hand doen) – aangemerk sou kon word. Die verlies van die juwele deur roof was dus redelikerwys voorsienbaar, en noop, tesame met die ander faktore wat die hof op grond van billikheid, redelikheid en regverdigheid bybring, die afleiding dat die verweerder se onregmatige beslaglegging as regsoorsaak van die eiseres se verlies gebrandmerk moet word.

J NEETHLING
Universiteit van Suid-Afrika

TIME FOR THE BELL TO TOLL ON THE TOLLING OF BELLS?

Garden Cities Incorporated Association Not For Gain v Northpine Islamic Society 1999 2 SA 268 (C)

1 Facts of the case

The business of the applicant, an incorporated association not for gain, was the development of townships in the Cape Peninsula. In terms of the conditions of establishment imposed by the Administrator in terms of section 18 of the Townships Ordinance 33 of 1934, two of the erven in the township were designated for use for religious purposes. One of these had been sold to the respondent, a body corporate formed with the objective of erecting and maintaining a mosque and madressah in the area of Northpine in Brackenfell. Clause 20 of the written agreement between the parties read as follows:

> " No amplified sound:
>
> (a) The purchaser will conduct no activities on this erf which will, in the opinion of Garden Cities, be a source of nuisance or disturbance to other owners of erven in the township and, in particular, no sound amplification equipment will be used on or in the buildings and/or structures to be erected on this erf.
>
> (b) No 'call to prayer' will be made from the buildings and/or structures and the purchaser undertakes to install a light at the top of the minaret which will be switched on at the hour of prayer. The light to be installed will be used in such a way as not to be a nuisance or disturbance to other owners of erven in the township."

Notwithstanding this clause, the respondent had installed sound amplification equipment and added a loudspeaker to the mosque which it had built on the property purchased. In response to complaints from the residents of the surrounding properties, the applicant applied for an order interdicting the respondent from using such equipment and obliging it to remove such equipment. The respondent claimed that its constitutional right to religious freedom was being infringed.

2 Judge Conradie's views

In respect of the issue of freedom of religion, Conradie J essentially makes two points. The first is that the respondent's contention that the prohibition on the call to prayer infringes the right of the respondent, its members and any other Muslim to freedom of religion "is too dramatically stated" and that the "prohibition does no more than consensually regulate a particular ritual practised at a particular place" (271B–C).

The second point is that it "should not matter" (272B) whether the call to prayer is merely a custom or a fundamental precept of Islam, "since the essence of individual freedom of religion is the right to discard established dogma and believe in something new or different or nothing at all" (272B–C). In a poor effort to substantiate this argument, Conradie J quotes Article 9.1 of the European Convention on Human Rights (272C–D), which provides:

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance."

Conradie J has erred on both points. In order to evaluate his views, a basic understanding, at the very least, of the public call to prayer or *athaan* is necessary.

3 The call to prayer (*athaan*) in Islam

The purpose of the *athaan*, which is delivered prior to each of the five daily prayers, is that it should reach the ears of the greatest possible number of congregants. However, the *athaan* is not merely an announcement of prayer – in the words of Conradie J "a particular ritual practised at a particular place" – but also, and more importantly so, an announcement of the fundamental principles of the Islamic faith. It contains both the fundamental affirmations of Divine Unity and the Messengership of God's final Prophet, Muhammad (on whom be peace).

As far as the origin of the call to prayer is concerned, before his migration from Makkah to Madinah, the Prophet, together with his companions, had to take every precaution to conduct their prayers in secrecy in Makkah for fear of being persecuted. In the peaceful conditions of Madinah, where the Muslims enjoyed the freedom to practise their religion, the issue of how to summon the congregants to the mosque arose. The Prophet considered the Jewish method of blowing trumpets as well as the Christian method of striking gongs to be inappropriate for such sacred purposes. He believed that the human voice should communicate the inspiration and spiritual emotion which the sanctity and solemnity of the occasion demanded.

Indeed, when a melodious human voice chants the call to prayer, a great deal of inspiration and spiritual emotion is aroused. No amount of light – perhaps only God's light – at the top of a minaret – as "consensually regulated" in clause 20(b) of the contract – can ever replace such call to prayer by the human voice. And this, I think, is not "too dramatically stated"!

4 Freedom of religion

Judge Conradie's second point was that it "should not matter" whether the call to prayer is merely a custom or a fundamental precept of Islam, "since the essence of individual freedom of religion is the right to discard established dogma and believe in something new or different or nothing at all" (272B–C).

One would have thought that the essence of freedom of religion was the right to believe in something *original*! And since the *athaan* is an affirmation of the fundamental principles of Islam, it certainly does matter. The *athaan* is a manifestation of Islam in practice and observance and thus falls fairly and squarely within the letter – let alone the spirit – of Article 9.1 of the European Convention of Human Rights. Conradie J has misconstrued Article 9.1. Article 18 of the Universal Declaration of Human Rights is of similar purport and is likewise relevant here.

5 The spirit of the Constitution

Judge Conradie's decision does not accord with the spirit of the Constitution. Leaving aside the freedom of religion clause (s 15), the decision ignores section 31, which recognises the cultural, linguistic and religious diversity of South Africa's people. Nor does the decision take into account the functions of the Commission for the Protection and Promotion of the Rights of Cultural, Religious and Linguistic Communities. One of the most important functions of the

Commission is "to promote and develop peace, friendship, humanity, tolerance and national unity amongst cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association" (s 185(1)(b)). Furthermore, the preamble declares that "South Africa belongs to all who live in it, united in our diversity".

Decisions such as these will certainly not foster peace, friendship, humanity, mutual tolerance or national unity. As far as tolerance among religious communities in South Africa is concerned, what is required is the mutual tolerance of the striking of a bell, the blowing of a trumpet or the Islamic call to prayer. Ironically, clause 20(b) of the contract states that even the light to be installed at the top of the minaret should be used "in such a way as not to be a nuisance or disturbance to other owners of erven in the township".

6 Concluding remarks

If, however, the Islamic call to prayer (*athaan*) constitutes a source of nuisance or disturbance to some members of our society, then the striking of bells equally amounts to noise pollution to other members of our society. If the *athaan* is curtailed, then perhaps the time has come for the bell to toll on the tolling of bells in a secular South Africa. This would amount to equality of treatment in respect of all noises, nuisances and disturbances emanating from religious buildings and/or structures.

Finally, there is no reason why Mr Yusuf Hassiem, chairperson of the Northpine Islamic Society, should have stated in so apologetic a tone that the calls to prayer "are not loud and . . . do not disturb the surrounding residents" (272F). This further prompted Judge Conradie to argue that after centuries of calls to prayer without sound equipment, there was nothing to suggest that electronic amplification had become a precept of Islam (272G)!

Perhaps the judge wants to take us back down the centuries, to the time when the Prophet Muhammad (on whom be peace) had to take every precaution to conduct his prayers in secrecy for fear of being persecuted.

NMI GOOLAM
Vista University (Bloemfontein Campus)

ANALOË AANWENDING VAN DIE *HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION* BINNE STAATLIKE VERBAND

Hof Leeuwarden 1 April 1998, NJ 1999, 164

1 Inleiding

In hierdie saak wat op 1 April 1998 voor die Hof Leeuwarden in Nederland gedien het, was die feite kortliks soos volg: aan M en V is gesamentlik ouerlike gesag oor hulle minderjarige kind toegeken. V het die kind vanaf Curacao in die Nederlandse Antillen, sonder M se toestemming, na Nederland ontvoer. M

beroep hom, in sy aansoek vir teruglewering van die kind, op die *Hague Convention on the Civil Aspects of International Child Abduction* (hierna genoem: die Haagse Konvensie). Die Haagse Konvensie is deur 'n Rijkswet van 2 Mei 1990 (Stb 201) vir die hele Nederlandse Koningkryk bekragtig. M het aangevoer dat die Haagse Konvensie, by wyse van analogie, op die onderhawige geval van toepassing gemaak behoort te word. In haar onlangse doktorale proefskrif spreek Caroline Nicholson ook die vraagstuk van interprovinsiale kinderontvoerings deur ouers in Suid-Afrika aan (*Recognition and enforcement of foreign custody orders and the associated problem of international parental kidnapping: A model for South Africa* LLD-proefskrif Unisa (1998) 243 *et seq*). Teen die agtergrond van genoemde Nederlandse saak, asook beskikbare wetenskaplike literatuur, word dié problematiek in hierdie bydrae aangespreek.

2 Die Haagse Konvensie: Relevante bepalings

Die Haagse Konvensie het op 24 Oktober 1980 tot stand gekom. In 'n (steeds) toenemende mate het state dit onderteken en gevolglik die beginsels onderliggend daaraan onderskryf (sien Silberman "Hague Convention on International Child Abduction: A brief overview and case law analysis" 1994 *Family LQ* 9). Deur die Wet op die Haagse Konvensie oor die Siviele Aspekte van Internasionale Kinderontvoering, 72 van 1996, het Suid-Afrika hom op 1 Oktober 1997 by dié getal state gevoeg.

Die doelstellings van die Haagse Konvensie is tweërlei van aard. Eerstens het dit ten doel die spoedige terugkeer van 'n kind, wat onregmatig verwyder of aangehou word, na sy/haar plek van gewone verblyf ("habitual residence"). Nicholson verduidelik tereg dat hierdie doelstelling

> "is premised upon the view that the place of habitual residence is the forum with the most significant interest in resolving the dispute and the best suited to make a determination on the merits" (46).

Die Haagse Konvensie is ook daarop gerig om ouers af te skrik om, ter oplossing van gesinsprobleme, eierigting aan te wend deur te verseker dat voogdy- en toesigregte, asook omgangsregte, in ondertekende state onderling erken en afgedwing word. Die kernpremisse waarop die Haagse Konvensie staan, is dat 'n "court implementing the Convention is not making a custody determination but deciding where custody jurisdiction should be exercised" (Nicholson 47. Sien in die algemeen Nygh "The New Hague Convention on Child Protection" 1997 *Australian Journal of Family Law* 5; Schuz "The Hague Child Abduction Convention: Family law and private international law" 1995 *ICLQ* 771; Labuschagne "Human rights' status of court order, in terms of the Hague Convention, that a child, abducted by a parent and taken from one country to another, has to be returned" 1998 *SAYIL* 281 *et seq*).

Artikel 3 van die Haagse Konvensie bepaal dat die verwydering of aanhouding van 'n kind onder die volgende omstandighede onregmatig is:

> "where – (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention"

(sien verder hieroor Nicholson 49–51; Silberman 16–31; McMurty "Defences under the Hague Child Abduction Convention" 1996 *Kentucky Bench and Bar* 12).

Blykens artikel 4 is die Haagse Konvensie van toepassing op kinders wat gewoonlik verblyf in 'n ondertekende staat onmiddellik voor die skending van beheer- of omgangsregte gehad het. Die Haagse Konvensie is verder slegs van toepassing op kinders onder die ouderdom van 16 jaar. Artikel 12 bepaal dat die betrokke owerheid van die ondertekende staat waarin die kind hom/haar na onregmatige wegname of aanhouding bevind, moet beveel dat hy/sy, indien minder as 'n jaar intussen verstryk het, onmiddellik teruggestuur word. Sou meer as 'n jaar verstryk het, is genoemde owerheid nie verplig om die terugkeer van die kind te beveel indien sou blyk dat die kind in sy/haar nuwe omgewing aangepas het nie.

Artikel 13 skep uitsonderinge op die algemene reël in artikel 12 vervat en lui soos volg:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that – (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation . . . The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

Volgens artikel 20 kan 'n aansoek vir die terugkeer van die kind ook geweier word indien die respektering van menseregte en fundamentele vryhede in die versoekende staat nie na wense is nie (sien verder McMurty 14–15; Schuz 773–774; Levy "Memoir of an academic lawyer: Hague Convention theory confronts practice" 1995 *Family LQ* 171; Nicholson 53–57).

Wat die betekenis van die begrip "gewoonlik woonagtig" ("habitually resident") betref, het 'n federale appèlhof in die VSA in *Feder v Evans-Feder* 63 F 3d 217 (3rd Cir 1995) 224 daarop gewys dat

> "a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective".

In die Engelse saak *In re* (*A Minor*) [1990] 3 WLR 492 (HL) 503–505 is beslis dat "gewoonlik woonagtig" 'n feitevraag is en dat 'n tydelike afwesigheid nie as sodanig daaraan verander nie (sien ook Nicholson 51–52). 'n Gewysdereg is nog nie in Suid-Afrika in dié verband opgebou nie.

3 Analoë aanwending in staatlike verband

In die saak waarmee die onderhawige bespreking ingelei is, beslis die Hof Leeuwarden (in par 4–7) soos volg:

> "De door de man gestelde 'ontvoering' van de minderjarige – over wie beide ouders met de ouderlijke macht zijn belast – van de Nederlandsc Antillen naar Nederland valt, gelet op het hiervoor overwogene, niet binnen de werkingssfeer van het Haags Kinderontvoeringsverdrag. Het geschil tussen partijen is niet van internationaal-privaatrechtelijke aard, maar interregionaalrechtelijk, daar dit geschil immers

> geheel gelegen is binnen (de rechtsfeer van) het Koninkrijk der Nederlanden . . . Het verdrag kan derhalve geen toepassing vinden . . . Aangezien er met betrekking tot het geschil ook geen toepasselijke regeling, vervat in een Rijkswet voorhanden is, zal worden bezien of er ruimte is voor analoge toepassing van het Haags Kinderontvoeringsverdrag . . . Nu, blijkens de Memoire van Toelichting van de Rijkswet tot goedkeuring van voornoemd verdrag, dit verdrag zich vooral concentreert op samenwerking tussen de verdragsstaten, is onder de omstandigheden van het geval geen plaats voor een analoge toepassing van voornoemd verdrag."

Indien die beginsels onderliggend aan die Haagse Konvensie daarop afgestem is om die beste belang van die kind te dien, waarom moet dit tot internasionale ontvoerings beperk word? Indien die plek waar 'n kind byvoorbeeld gewoonlik woonagtig is, Kaapstad is en 'n ouer verwyder die kind onregmatig na Pietersburg, behoort die Kaapse hof myns insiens in onderhawige verband jurisdiksie te hê. Dit is ook die standpunt wat Nicholson in haar proefskrif inneem (243–246).

4 Konklusie

Al sou die beslissing van die Hof Leeuwarden in die onderhawige saak volgens die geldende reg in Nederland fundeerbaar wees, is die effek daarvan nie met die beste belang van die kind, soos in die Haagse Konvensie beoog, versoenbaar nie. Die beste belang van 'n kind kan tog nie deur 'n staatsgrenslyn as sodanig beïnvloed word nie. Ouers wat in 'n (regs) twis oor regte ten aansien van 'n kind betrokke is, mag nie ruimte gegun word om, ter risiko van verwarring en benadeling van die kind, van een hof tot 'n ander te gaan – hofspringery derhalwe – totdat 'n gewensde bevel, dit wil sê wat die betrokke ouer pas, verkry is nie.

JMT LABUSCHAGNE
Sentrum vir Kinderreg, Universiteit van Pretoria

The training of lawyers is a training in logic. The processes of analogy, discrimination and deduction are those in which they are most at home . . . The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion and repose is not the destiny of man.

Oliver Wendell Holmes "The path of the law" 1897 Harv LR *457 465.*

BOEKE

TAX STRATEGY

by EB BROOMBERG and DES KRUGER

Butterworths Durban 3rd ed 1998 xxiv and 266 pp

Price R175,00 (soft cover)

The third edition of Tax Strategy is based on the Income Tax Act as it stood at 31 March 1998, but references have been included to changes to the law foreshadowed in the Budget Speech for 1998/1999. Professor Broomberg was ably assisted by Des Kruger in updating the 1983 version.

The most significant contextual additions are references to the Value Added Tax Act and an amplification of the chapters dealing with employment, with special reference to the Seventh Schedule.

The topics discussed are similar to those of the previous edition. However, the chapters are generally better structured and are also grouped more effectively. For instance:

- "Special tax implications out of the purchase and sale of a business" with its subheadings of "Fixed assets", "Trading stock", "Work-in-progress", "Goodwill", etcetera, previously formed a separate chapter. This is now logically included in the chapter on "The Assets forming the Subject Matter of the Sale".
- All aspects concerning the purchase price generally are now grouped into one chapter.
- Three chapters concerning aspects of the lease agreement are now grouped together under one logical heading.

The style of the book does not deviate much from that of the previous edition. This is not a "reference" book in which statements are consistently substantiated by a list of footnoted authorities. Although many cases are referred to in the text and in the substantial "Table of Cases", mention is often made of "supporting authority" or the opinion of "academic writers", without any references to the authorities concerned (see eg 41 and 180). The newly introduced references to the viewpoints of Silke, Meyerowitz and Butterworths Books on Screen and Huxham and Haupt in some of the chapters are welcomed, even though no page or paragraph referencing is evident (eg 180).

The value of the book remains its refreshing approach to various tax issues which are of extreme importance to tax consultants and contract lawyers. After discussions on how the parties to the agreement, the nature of the contract, the assets forming the subject matter of the sale and the purchase price may generally influence the incidence of tax, the favourite tax planning *capita* of contracts

of sale, lease, rental, employment and the tax treatment of damages and compensation received are discussed comprehensively, highlighting various pitfalls and inconsistencies which should be kept in mind when drafting an agreement or structuring a scheme.

This book remains a necessary and valuable addition to any tax library.

BA VAN DER MERWE
University of South Africa

It is the lack of understanding of the role of interpretive norms – and an emphasis on the inevitably value-laden or political character of those norms – that drive some commentators to the pretense that words have plain meanings before interpretation and outside of their context; others to the demonstrably false claim that statutes are generally indeterminate in meaning; and still others to the uniformative view that meaning is a function of authority.

Cass Sunstein After the rights revolution *7.*