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TRIBUTE TO PROFESSOR ELLISON KAHN

After an astonishing (and possibly unparalleled) fifty years as the editor of the *South African Law Journal*, Professor Ellison Kahn has retired, leaving behind a tradition of meticulous scholarship. There can be no other candidates for the title of doyen of South African academic legal editors, and arguably the title of doyen of academic lawyers as well. The name of Ellison Kahn is not known only to law students at the University of the Witwatersrand: an entire generation of South African students made their first acquaintance with South African law via Hahlo and Kahn's *The Union of South Africa: The development of its laws and Constitution.*

The impact of Professor Kahn on South African law and legal writing is reflected in the number and range of tributes published in the 1999 *Law Journal*. The list reads like a Who's Who of South African academe and legal practice: Judges Mahomed, Corbett, Goldstone, Zulman and Margo, academics and practitioners such as George Bizos, John Dugard, Carole Lewis, June Sinclair, David Zeffertt. All testify to Professor Kahn's erudition, technical expertise, respect for the sensibilities of authors – and his humour. There can be no doubt that his trimestrial potpourri was a major feature of each issue of the *SALJ* and that readers looked forward eagerly to each new offering.

We wish Professor Kahn a happy and fulfilling retirement and his successors everything of the best. They will know that they have a hard act to follow.

GRETCHEN CARPENTER
Editor

REDAKSIONELE KOMMENTAAR

Daar het in die afgelope tyd heelwat polemiek ontstaan rondom sekere aspekte van die regspleging, en veral rondom die vraag hoe regters verantwoordbaar gehou kan word vir hul uitsprake. Dit is natuurlik niks nuuts nie. Die debat oor die sogenaamde ondemokratiese aard van regterlike hersiening van wetgewing van die hoogste wetgewende gesag woed al lank al, veral in die Verenigde State van Amerika; 'n heeltemal bevredigende oplossing vir die "countermajoritarian dilemma" is nog nie gevind nie. Dit is 'n vraagstuk wat verwant is aan die presiese omvang en betekenis van die begrip van regterlike onafhanklikheid, maar die probleme is nie in alle opsigte identies nie.

Die konstitusionele staat of regstaat as verfynde moderne demokratiese model vereis die onafhanklikheid van die regbank as 'n onmisbare wesenskenmerk. Regters lê 'n eed af om reg te spreek sonder aansien des persoons. Dit sou hulle nie kon doen indien hulle verantwoording verskuldig was aan die kiesers, die wetgewer of die uitvoerende gesag (of enige ander insethouer) nie. Tog krap hierdie gedagte van 'n magsgroep wat nie demokraties verkies of aangestel word nie aan baie mense. (Ten spyte van die Amerikaanse skrywer Alexander Bickel se beskrywing van die regsprekende gesag as "the least dangerous branch" van die staatsgesag, kan die werklike mag van die regsprekende gesag in 'n staatsbestel soos dié wat ons tans in Suid-Afrika het nie realisties ontken word nie.)

Dit is enigsins ironies dat die onlangse eise dat regters vir hul uitsprake "verantwoording" moet doen, voortgevloei het uit beslissings wat nie inherent "polities" van aard was nie. Ek dink veral aan die ontevredenheid wat deur sowel die publiek as die regering uitgespreek is oor strawwe wat vir verkragting opgelê en wat as te lig beskou is, en ook die reeks uitsprake waarin die konfiskering van eiendom wat vermoed is die opbrengs van misdadige aktiwiteit te wees, ongrondwetlik bevind is. Daar is selfs gedreig dat regters wat na bewering die reg eenvoudig verontagsaam of "omseil" aan dissiplinêre optrede onderwerp sou word. Vanselfsprekend was die regsprofessie (onder andere) glad nie te vinde vir 'n stap wat selfs krasser en meer drakonies sou wees as die berugte uitsluitingsbepalings of "ouster clauses" wat veral in die 1980's hoogty gevier het nie.

Politieke verantwoordelikheid is natuurlik nie die enigste vorm van verantwoordelikheid nie. Dit is louter onsin om te beweer dat regters aan geen vorm van kontrole onderworpe is suiwer omdat hulle nie polities verantwoordbaar is nie. Daar is geykte en alombekende vorms van kontrole oor regterlike optrede wat universeel aanvaar word: die stelsel van hersiening en appèl is natuurlik die voor die hand liggendste. Weliswaar is die uitsprake van die Hoogste Hof van Appèl en die Konstitusionele Hof nie vir hoër beroep vatbaar nie, maar hulle is wel onderworpe aan kritiek deur die media asook akademiese kritiek. Die kwessie van regterlike verantwoordbaarheid is redelik uitvoerig behandel deur regter Johan Froneman in 'n referaat wat hy in 1996 in 'n konferensie oor die Handves van Regte gelewer het ("The constitutional invasion of the common law – can the judges be controlled?" in *Focus on the Bill of Rights* Unisa (1996) 6). Hy spreek onder andere die mening uit dat regters in 'n stelsel van grondwetlike oppergesag *meer* verantwoordbaar is as in 'n stelsel van wetgewende oppergesag, nie minder nie, en onderskei verder tussen drie vorms van verantwoordelikheid, naamlik persoonlike, formele en materiële verantwoordelikheid.

Persoonlike of morele verantwoordelikheid kan makliker ontduik word as die standpunt ingeneem word dat regters nie reg skep nie, maar dit bloot "vind". Dan kan 'n mens rasionaliseer dat jy werklik geen keuse gehad het nie. Formele verantwoordelikheid is dit wat in die Grondwet en ander wetgewing gevind word: bepalings wat reël hoe regters aangestel en ontslaan word, appèlprosedures en dies meer. (Alles oorbekend.) Die belangrikste is seker materiële verantwoordelikheid: grondwetlike beginsels soos die skeiding van magte en regstaatlikheid; openbare en akademiese kritiek; ensovoorts. Hy verwys ook na die mite dat die "objektiewe" en "neutrale" standaarde van die verlede nou vervang is deur 'n subjektiewe waardebelaaide standaard: eerstens was die standaarde van die verlede, op die keper beskou, geensins so objektief as wat ons gemeen het nie, en tweedens dwing 'n kultuur van ontleding en kritiek (wat die Grondwet vooropstel) enige regspreker tot groter objektiwiteit. Kortom, regters kan steeds nie doen net soos hulle wil nie.

Of ons dit nou wil erken of nie, bly die hele vraag nóú verbind aan die vraagstuk van legitimiteit. Dit ly geen twyfel dat die regbank onder die "ou" Suid-Afrikaanse bedeling nie die erkenning en legitimiteit geniet het wat ons graag sou wou gehad het nie. Basies was die probleem dat die hele staatsbestel aan 'n gebrek aan legitimiteit gely het; dit was onvermydelik dat die regsprekende gesag ook hierdeur besmet sou word. Nou het ons 'n legitieme regeringstelsel en 'n staatsbestel wat funskioneer ingevolge 'n oppermagtige Grondwet. Ongelukkig is daar nog 'n mate van agterdog wat kleef aan sommige van die lede van die regsprekende gesag wat die oorgang oorleef het – hetsy geregverdig, hetsy nie.

Daar moet ook erken word dat die lede van die regbank ook 'n mate van skuld hieraan het. Toe hulle – heeltemal tereg – kapsie gemaak het teen die onlangse aanvalle op hul onafhanklikheid en die ongeregverdigde pogings om die regsprekende gesag aan die kontrole van veral die uitvoerende gesag te onderwerp, is die vraag gevra: Waarom nou eers? Waar was die beswaarmakers toe hulle onafhanklikheid deur uitsluitingsbepalings en bepalings soos die berugte artikel 103*ter* van die Verdedigingswet aangetas is? Kan daar ernstig aangevoer word dat die regbank in die "goeie ou dae" voor 1994 werklik onafhanklik was?

Die kwessie van legitimiteit hang verder saam met die rol van die openbare mening. Die Konstitusionele Hof het in die *Makwanyane*-saak meer as een keer beklemtoon dat howe hulle nie deur openbare mening kan laat lei nie. (In die besondere konteks het dit gegaan oor die argument dat die publiek ten gunste van die doodstraf is: die hof het gesê dat dit wel vir die wetgewer belangrik is om van die openbare mening kennis te neem, maar dat die hof hom moet bepaal by wat die reg, en meer spesifiek die Grondwet, vereis.) Dit is egter nie heeltemal so maklik om die openbare mening af te lag nie. Regter Mokgoro het inderdaad in dieselfde saak 'n uitspraak van die Europese Hof aangehaal waarin verklaar is dat die reg in 'n demokrasie dit nie kan bekostig om die morele konsensus van die gemeenskap te ignoreer nie. Of, met ander woorde: "[t]he authority of the law rests on public confidence" (Miller *Law and contemporary problems* (1970) 70 82). Volgens Shimon Shetreet (*Judicial independence: the contemporary debate* (1985) 592) berus die legitimiteit van die regbank in die besonder op

> "other fundamental values underlying the administration of justice. These include the value of the quality of adjudication and fairness of the judicial process, the value of efficiency of the court system and judicial proceedings, the value of accessibility of the justice system and the value of maintaining public confidence in the courts and the judiciary".

Die Suid-Afrikaanse Grondwet plaas heelwat klem op waardes. Regsprekers word uitdruklik aangesê om sekere waardes te bevorder in die uitleg van die Handves van Regte en om die gees, strekking en oogmerke van die Handves te bevorder in die uitleg van *enige* wetgewing en in die ontwikkeling van die gemenereg. Die skeidslyn tussen waardes en openbare mening is nie altyd so duidelik as wat 'n mens sou dink nie.

Dit is miskien interessant om te let op die woorde van regter RD Nicholson van die Hooggeregshof van Wes-Australië ("Judicial independence and accountability: can they co-exist? 1993 *Aust LJ* 404) wat waarsku dat "assertions of the principle of judicial independence are not infrequently seen as claims to self-protection rather than protection of any matter of public interest"; verder dat terwyl dit vir regslui vanselfsprekend mag wees dat 'n vry en demokratiese gemeenskap op die beginsels van 'n demokraties verkose wetgewer en onafhanklike howe berus, "it cannot be said that such perceptions are necessarily shared by persons outside the law". Inderdaad kommerwekkend!

Die taak van die howe in enige bestel wat voorgee om 'n regstaat te wees, is veeleisend. Die Suid-Afrikaanse situasie verg besonder baie van regsprekers: die hoogste mate van getrouheid aan die Grondwet (die stelsel is immers dié van *grondwetlike* oppergesag en nie *regterlike* oppergesag nie), gekoppel aan sensitiwiteit vir die realiteite van ons gemeenskap. Persepsies (soms ongelukkig negatiewe persepsies) maak deel van hierdie realiteite uit.

GRETCHEN CARPENTER
Redakteur

The law and ethics of information and consent in medical research

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OPSOMMING

Die reg en etiek aangaande inligting en toestemming in mediese navorsing

Die onderhawige artikel handel oor die reg en etiek insake inligting en toestemming by mediese navorsing. Die etiekriglyne van die Mediese Navorsingsraad oor dié onderwerp word gesistematiseer, uiteengesit en krities ontleed teen die agtergrond van 'n bespreking van die heersende regsposisie aangaande inligting en toestemming. Voorstelle word gemaak vir die spesifieke toepassing van die algemene beginsels betreffende inligting en toestemming om voorsiening te maak vir die besondere probleme wat mediese navorsing op dié terrein bied. By sodanige voorstelle word die heersende internasionale standpunte oor die reg en etiek rakende inligting en toestemming by mediese navorsing in aanmerking geneem.

1 INTRODUCTION

The present article expounds and examines the legal requisites for, and ethical guidelines on, information and consent to medical research interventions[1] against

1 In terms of the maxim *volenti non fit injuria*. On information and consent to medical interventions generally, inclusive of medical research interventions, see eg Gordon, Turner and Price *Medical jurisprudence* (1953) 129 153 ff; Strauss and Strydom *Die Suid-Afrikaanse geneeskundige reg* (1967) 175 ff 209 ff 246 256; McQuoid-Mason and Strauss "Medicine, dentistry, pharmacy, veterinary practice and other health professions" in *The law of South Africa* 17 (1983) (eds Joubert and Scott) §§ 191 ff; Schwär, Loubser and Olivier *The forensic ABC in medical practice* (1988) 8ff; Strauss *Doctor, patient and the law* (1991) 3 ff 17 ff 29 ff 267 ff 286–287 289–290; Van Oosten *The doctrine of informed consent in medical Law* (1991) *passim* and 178 322; Claassen and Verschoor *Medical negligence in South Africa* (1992) 57ff; Strauss *Regshandboek vir verpleegkundiges en gesondheidspersoneel* (1993) 10ff; Van Oosten *Medical law: South Africa – international encyclopaedia of laws* (1996) (eds Blanpain and Nys) §§ 88 108ff. On information and consent to medical research specifically, see eg Smit "Enkele opmerkings aangaande eksperimentering op menslike wesens deur medici" 1975 *THRHR* 254 257ff 266–267; Smit "Clinical trials, children and the law" 1977 *SAMJ* 155ff; Burchell "Non-therapeutic medical research on children" 1978 *SALJ* 193 197 ff; Burchell "Human experimentation: basic legal norms" in *Genetics and society* (1980) (eds Oosthuizen, Shapiro and Strauss) 74 76–77; Giesen *International medical malpractice law* (1988) 339ff 559ff 569ff 573ff; Skegg *Law, ethics, medicine* (1988) 59ff 68ff 85 92–93 97–98; Nys *Geneeskunde, recht en medisch handeln* (1991) 348–349 355ff; Laufs and Uhlenbruck *Handbuch des Arztrechts* (1992) 362ff 373 759–760; Kennedy and Grubb *Medical law* (1994) 1043ff 1052ff 1055ff; Mason and McCall Smith *Law and medical ethics* (1994) 359ff; Leenen *Handboek gezondheidsrecht* II (1996) 236ff 241ff 249ff; Picard and Robertson *Legal liability of doctors and hospitals in Canada* (1996) 86ff; Deutsch *Medizinrecht* (1997) 374ff 380ff

continued on next page

the backdrop of (i) an outline of the structure and function of research ethics committees and the nature and application of Medical Research Council's (MRC) *Guidelines on Ethics for Medical Research*[2] for medical research;[3] and (ii) the fundamental principles of informed consent to medical interventions. The reasons for the general background on informed consent are that (i) research interventions are but a *species* of the *genus* medical interventions; and (ii) a sophisticated body of statutory law and/or judicial precedent pertinently addressing the issues of information and consent in medical research is largely absent, which renders the fundamental principles of informed consent in standard medical interventions indispensable guidelines for determining the nature, scope and application of the informed consent requisite in medical research interventions.

2 BACKGROUND

2 1 Ethics committees

Ethical authorisation for medical research must be procured from the relevant ethics committee. Ethics committees fall into two categories: (i) the Ethics Committee of the MRC; and (ii) the ethics committees of academic institutions for medical training and of various other bodies.

2 1 1 The MRC Ethics Committee

The MRC is a creature of the legislature.[4] Section 3 of the South African Medical Research Council Act[5] lists, as one of its objects, the promotion and improvement of the health and quality of life of the population of South Africa through research development and technology transfer.

383–384 386ff 392–393 397ff 518ff 525; Furrow, Greany, Johnson, Jost and Schwartz *Health law* (1997) 1205ff 1216ff.

2 (1993). For comparative purposes, reference is made in the footnotes to the relevant provisions of the current version of the World Medical Association Declaration of Helsinki (hereinafter referred to as the Helsinki Declaration), which is presently under revision.

3 For purposes of the present discussion, the term "research" is used in its wide sense to include therapeutic and non-therapeutic research, experimentation and innovation. The reason for this is that the dividing line between "research", "experimentation" and "innovation" is, in any event, somewhat nebulous: cf Smit 1975 *THRHR* 254, who defines "experimentation" as an intentional manipulation of the research subject's clinical situation which changes the patient's situation in order to procure information or to solve a problem, or to develop a new treatment; Burchell 1978 *SALJ* 195, who rejects the term "clinical trial" because of its failure to "stress the non-therapeutic nature of the procedure" and who prefers the term "research" "since 'experiment' tends to give the impression of the scientist utilizing his subject like a 'test animal' or 'guinea pig'"; Giesen 548, who maintains that "therapeutic experiments" differ "in relation to their purpose" from "research experiments", but who refers to other terminology in this context, such as "research treatment", "innovative therapy", "research experiments" and "non-therapeutic research or experimentation"; Mason and McCall Smith 350, who distinguish between "research" and "experimentation" in the following terms: "Research implies a predetermined protocol with a clearly defined end point. Experimentation, by contrast, involves a more speculative, ad hoc, approach to an individual subject"; Picard and Robertson 87–88, who distinguish between "treatment", which may be experimental or innovative, and "research", which involves "a procedure which offers no therapeutic benefit to the patient".

4 See s 2 of the South African Medical Research Council Act 19 of 1969, the predecessor of the present Act.

5 58 of 1991.

Section 17(1) makes the Board of the MRC responsible for regulating and controlling research on, or experimentation with, humans, animals or human or animal material performed by (i) employees of the MRC; or (ii) persons performing such research or experimentation for or on behalf of the MRC, or with research aid by the MRC.

Section 17(2) empowers the Board of the MRC to (i) determine, for purposes of section 17(1), ethical directives which must be followed in such research or experimentation; and (ii) take such control measures as it may deem necessary to ensure that ethical directives are complied with.[6] The legislative objectives are endorsed in the MRC's core mission statement under which the MRC is committed to, *inter alia*, "maintaining high ethical standards in research". The Ethics Committee of the MRC is responsible for the implementation of the Board's policy and for advising the Board on all matters pertaining to ethics in medical research and experimentation.[7]

2 1 2 Other ethics committees

Other ethics committees owe their existence to the academic or other institution which they serve.[8]

2 2 Ethics guidelines

2 2 1 International

Although international medical research guidelines, such as the Nuremberg Code (1947) and the Declaration of Helsinki (1964), are evidently not directly enforceable,[9] South African research ethics committees generally appear to consider them as binding. A failure to observe the provisions of these guidelines may, in given circumstances, render a medical practitioner liable to (i) disciplinary action by the Health Professions Council of South Africa[10] and/or the academic or other

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6 The Board may in its discretion enter into an agreement with any person to exercise the control referred to in s 17(1), on behalf of the Board, on the conditions determined in the agreement: s 17(3).

7 See *Guidelines* iv. The duties of the ethics committee are (i) to review and decide on all research protocols of the MRC's own staff and of researchers whose research is not supervised by any other accredited ethics committee; (ii) to grant accreditation to other ethics committees which conform to satisfactory standards of evaluation and supervision of medical research; (iii) to establish and provide guidelines for the ethics of all MRC-funded research, irrespective of whether such research is the responsibility of the MRC or other accredited ethics committees; (iv) to monitor and co-ordinate the activities of other accredited ethics committees which supervise MRC-funded research in South Africa and to provide them with information, training and advice to maintain uniformly high standards in the system; (v) to advise other interested parties nationally and internationally on the ethics of medical research and to participate in the debates and activities of the scientific community on the subject; and (vi) to foster the subject of medical ethics in research and to encourage research and discussion on the subject: *Guidelines* iv.

8 Eg the ethics committees of the Pretoria Academic Hospital and the Pretoria Biomedical Research Centre.

9 See also Giesen 549: "These Declarations, Codes, Bills and Charters *could probably be admitted as evidence of the required standard of care in all appropriate cases*" (italics supplied) and (549 fn 8): "[S]tandards set in these codes of medical ethics will never be conclusive and will have to be scrutinized and endorsed by the courts in individual cases."

10 In terms of s 3 ff of the Medical, Dental and Supplementary Health Service Professions Amendment Act 89 of 1997.

institution concerned; and/or (ii) civil action and/or criminal prosecution,[11] provided the requirements of the delict or offence in question have been satisfied.[12]

2 2 2 National

The principal document which prescribes standards for medical research is the MRC's publication *Guidelines on ethics for medical research.*[13] The *Guidelines* are, in turn, based on the guidelines and reports of the Royal College of Physicians,[14] the Council for International Organisations of Medical Sciences[15] and the South African Forum for Radiation Protection.[16] The *Guidelines* cover a wide variety of aspects of medical research[17] and devote an entire chapter[18] to consent.

The binding force of the *Guidelines* is clear in one respect and less so in another: Obviously, all medical research undertaken by employees of the MRC and persons acting for or on behalf of the MRC, or with the assistance of the MRC, must be performed in accordance with the *Guidelines.*[19] But medical research undertaken by employees of academic or other institutions and persons acting for or on behalf of academic or other institutions, or with the assistance of academic or other institutions, must conform to the ethical guidelines of the institution concerned. If no such guidelines exist in a given instance, it is submitted that the

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11 Cf Smit 1975 *THRHR* 255 fn 5, who makes the sweeping statement that medical rules of conduct are as much part and parcel of the law and a reflection of societal convictions as are criminal law, the law of delict and the law of contract (see also 265). Indeed, the opposite is sometimes true: see Van Oosten "The interaction between medical law and medical ethics: Some practical examples" 1996 (10) *Continuing Medical Education* 1459ff; cf Burchell 1978 *SALJ* 194, who is rather more cautious: "Ethical codes do not, strictly speaking, contain legal rules, but ethics and law in the field of medical research are so interwoven that ethical criteria assume a legal import."

12 One of the requirements will be wrongfulness or unlawfulness, in terms of which the plaintiff or the prosecution, as the case may be, will have to establish (i) that the relevant prohibition or injunction of the applicable international medical research code accords with the prevailing juristic notions of society; (ii) that a legal duty to comply with the relevant provision was incumbent upon the researcher; (iii) that such legal duty was breached by the researcher; and (iv) that no legal justification for such a breach existed; cf Van Oosten fn 11.

13 Of which there have been three editions, the first in 1979, the second in 1987 and the third in 1993. The Ethics Committee of the MRC is currently preparing the fourth edition.

14 *Research on healthy volunteers* (1986); *Research involving patients* (1990); *Guidelines on the practice of ethics committees in medical research involving human subjects* (1990): see *Guidelines* vii.

15 *Ethics and epidemiology: International guidelines* (Eds Bankowski, Bryant and Last) (1991): see *Guidelines* vii.

16 *Ethical considerations in the use of ionising radiation and radioactive nuclides for research involving human volunteers* (1991). See *Guidelines* vii.

17 Under the following chapter headings: 1 Introduction, 2 Definitions, 3 Justification for Research, 4 The Role of Research ethics committees: Assessment of the Ethics of Research, 5 Assessing the Value and Risks of Research, 6 Research on Volunteers, 7 Research on Patients, 8 Consent, 9 Financial Transactions and Inducements, 10 Randomised Controlled Therapeutic Trials, 11 Conduct of Research, 12 Ownership of Results of Research, 13 Monitoring the Conduct of Research, 14 Legal Implications and Arrangements for Compensation, 15 Reproductive Biology, 16 Biohazards, 17 Human Tissue Act 65 of 1983, 18 Epidemiological Studies, 19 Drug Trials, 20 Use of Animals in Biomedical Research, 21 Use of Radiation in Research, 22 Publication and Authorship and 23 Liaison with the Public Media.

18 Ch 8.

19 In terms of s 17, as quoted under 2 1 1 *supra.*

MRC's *Guidelines* should be followed on the basis that (i) the MRC is a *national* medical research institution;[20] and (ii) the MRC *Guidelines* have *statutory* authority.[21] Should a conflict arise between the MRC's *Guidelines* and the guidelines of an individual academic or other institution, it is submitted that the MRC *Guidelines* should be followed, provided the guideline concerned accords, or is not irreconcilable, with international medical research guidelines.

3 CONSENT A REQUISITE FOR MEDICAL RESEARCH

3 1 The law

3 1 1 The Constitution

Informed consent as a requirement for lawful medical research is explicitly entrenched in section 12(2)(c) of the Constitution of the Republic of South Africa Act,[22] which provides that "[e]veryone has the right to bodily and psychological integrity, which includes the right . . . not to be subjected to medical or scientific experiments without their informed consent".[23] The use of the word "their" in section 12(2)(c) makes it patently clear that the only person who is capable of giving consent to medical research is the research subject and that surrogate consent to medical research is out of the question. In that respect, section 12(2)(c) is clearly out of step with current local and international medical research ethics.[24]

3 1 2 Common law

From a common-law point of view, the relationship between doctor/hospital and patient is essentially and largely a private law matter and is governed by the law of obligations, that is to say, by the law of contract and the law of delict. In the ordinary course of events, the relationship between the parties is a contractual one. However, since breach of a duty of care and negligence may underlie both breach of contract and a delict, the same act or omission by a doctor/hospital may result in liability for both.[25] The relationship between doctor/hospital and patient being, generally speaking, a contractual one and *consensus ad idem* between the parties being a requisite for a valid contract, it goes without saying that the effective consent of the patient personally or someone acting on the patient's

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20 See 2 1 *supra*.

21 See s 17(2)(a) and (b), as quoted under 2 1 1 *supra*.

22 108 of 1996.

23 For a similar provision in Belgian law, see Nys 351 355.

24 See *infra*.

25 See *Van Wyk v Lewis* 1924 AD 438 443 450–451 455–456; *Correira v Berwind* 1986 4 SA 60 (Z) 63ff, 66; *Edouard v Administrator Natal* 1989 2 SA 368 (D) 389ff; *Administrator Natal v Edouard* 1990 3 SA 581(A) 585ff; *Castell v De Greef* 1994 4 SA 408 (C) 425; cf *Hewat v Rendel* 1925 TPD 679 680ff; *Allott v Paterson & Jackson* 1936 SR 221 224; *Nock v Minister of Internal Affairs* 1939 SR 286 290ff; *Dube v Administrator Transvaal* 1963 4 SA 260 (W) 266; *Magware v Minister of Health* 1981 4 SA 472 (Z) 476; *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 501ff; *Mtetwa v Minister of Health* 1989 3 SA 600 (D) 604; *Ramsaroop v Moodley* 1991 (N) (unreported, discussed by Strauss 1991 (4) *SAPM* 16); *Jansen van Vuuren v Kruger* 1993 4 SA 842 (A) 848–849; *Friedman v Glicksman* 1996 1 SA 1134 (W) 1138ff; *Clinton-Parker v Administrator Transvaal; Dawkins v Administrator Transvaal* 1996 2 SA 37 (W) 39–40 64 69; *Mukheiber v Raath* 1999 3 SA 1065 (SCA) 1068–1069.

behalf is fundamental to lawful medical intervention.[26] "Lawful medical intervention" in this context refers to prophylaxis, examination, diagnosis and treatment, and includes (i) therapeutic interventions, the aim and object of which is treating and/or curing the patient, and (ii) non-therapeutic interventions,[27] such as purely diagnostic, scientific or cosmetic procedures or interventions performed for the benefit of others. Therapeutic interventions and non-therapeutic interventions may in turn take the form of standard interventions or research interventions. In this context, it is sometimes argued that (i) the distinction between therapeutic and non-therapeutic research is often difficult to make,[28] particularly where the research project consists of a mixture of therapeutic and non-therapeutic procedures; and (ii) a healthy volunteer in a research project may unexpectedly become a direct beneficiary or eventually become an indirect beneficiary of non-therapeutic research.[29] For purposes of, and reasons which will transpire from, the present discussion, it is submitted that the distinction between the two kinds of research is not only a healthy one, but is also essential for the protection of the personal autonomy of research subjects who are incapable of consenting.[30]

3 2 The *Guidelines*

The *Guidelines*[31] proceed from the premises that (i) research subjects should *know* that they are taking part in research; and (ii) research involving subjects

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26 See besides the cases cited *infra*, *Palmer v Palmer* 1955 3 SA 56 (O) 59. The answer to the question whether a research intervention on an unconsenting patient may, in principle, be justified by an emergency, and if it does, under what circumstances, falls outside the scope of the present article: Smit 1975 *THRHR* 256–257 takes the view that an emergency may justify a research intervention, but (i) the example he gives of necessity as a justification for medical research (a seriously ill patient who fails to respond to standard treatment and who may die as a result, but who may possibly be cured by a completely unknown medication which, however, may have serious side-effects) is unconvincing inasmuch as he makes no mention of an absence of consent on the patient's part, whereas an emergency (under unauthorised administration or necessity as a defence) can operate as a justification only where the patient cannot or does not consent to the intervention in question (see Van Oosten "Some reflections on emergencies as justification for medical intervention" in *Festschrift für Erwin Deutsch* (1999) 673 681–682); and (ii) he concedes that experimentation will so seldom be justified by unauthorised administration or necessity that they are inapplicable; cf Burchell 1978 *SALJ* 197–198, who seems to indicate that emergency may operate as a ground of justification for therapeutic research intervention (cf Mason and McCall Smith 362 in respect of non-therapeutic interventions; cf, however, Picard and Robertson 87); cf further Nys 360; Leenen 239 240–241, who rejects the notion of so-called "presumed consent" within the context of medical research (240; cf Van Oosten *Deutsch Festschrift* 679–680).

27 The viewpoint that a therapeutic indication should, in addition to effective consent, be present to justify a medical intervention, loses sight of this fact.

28 Cf Picard and Robertson 87–88.

29 See Burchell 1978 *SALJ* 195. As regards non-therapeutic research, some authorities express the view that experimentation on healthy, consenting research subjects is not allowed where ill, consenting research subjects are available: see Strauss and Strydom 256–257; Smit 1975 *THRHR* 261 267.

30 Cf Laufs and Uhlenbruck 362–363. A debate on this issue falls outside the scope of the present discussion, except to point out that the law is frequently faced with difficult but sensible distinctions in many areas and has (rather than taking the easy option of simply abolishing them which creates its own difficulties) usually found ways and means of dealing with them.

31 8 1.

should only be carried out only with their *consent*.[32] Exceptions to these premises are:[33] (a) observational research which is totally without risk or intrusiveness;[34] (b) innocuous research into comprehension;[35] (c) the examination of anonymous specimens;[36] (d) research based on medical records;[37] and (e) research into the management of unexpected overwhelming emergencies.[38] The reason for the qualification "unexpected overwhelming" under the last point is not quite clear: (i) Anticipated emergencies are emergencies none the less; and (ii) emergencies are by their very nature overwhelming.

In addition, "for consent to be valid it should be offered voluntarily and be based on adequate understanding, with due regard to the patient's language and culture".[39]

The term "risk" is material to consent in the sense that the risk attached to research undertaken with consent may, depending on whether such research is therapeutic[40] or non-therapeutic[41] or invasive (intrusive)[42] or non-invasive (non-intrusive),[43] not exceed the limits prescribed by the *Guidelines*. In terms of the so-called "risk/benefit analysis", the risk to which the patient is exposed "must be justifiable in relation to the value of the information sought"[44] and "risk" refers to "both the probability of a harm resulting from an activity and to its magnitude".[45] Risks are divided into the following categories:

(i) "Negligible or less than minimal risk", which is equal to the probability and magnitude of physical or psychological harm normally encountered in the daily lives of people *in a stable society*, or in the routine medical or psychological examination of healthy subjects.[46]

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32 Italics supplied.
33 8 1 1 and 8 12.
34 See also 8 12 1.
35 See also 8 12 2.
36 See also 8 12 3 1–8 12 3 3.
37 See also 8 12 3 4.
38 See also 8 13.
39 8 1 2.
40 Ie "the study of treatment which may benefit the individual patient": 1 3 1, and "benefit" means "any sort of favourable outcome of the research to society or to the individual and is the opposite of harm", and refers to "the *probability of possible* benefit as well as its magnitude": 5 4 5 (italics supplied).
41 Ie "the acquisition of knowledge which may be of no *immediate* benefit to the patient": 1 3 1 (italics supplied).
42 Ie research which involves making observations without any direct interference with the subject (such as research involving the use of personal records): 4 10 3.
43 Ie research which involves interference with the subject (psychological intrusion, including intrusion on privacy or physical invasion): 4 10 3.
44 5 4.
45 5 4 1; the *Guidelines* 5 4 2 point out that even inactivity may be associated with some risk and proceed to distinguish between (i) "risk identification", which is "a qualitative description of the overall physical risks, the emotional or psychological hazards to the subject or his family, the risks to which a subject or his family would not have been exposed had it not been for his participation in the research project"; (ii) "risk estimation", which is "a quantitative description of the probability or relative magnitude of harm"; and (iii) "risk evaluation", which is "the process of combining the results of risk identification and risk estimation with *the perceptions of those involved*", ie the patient or the patient's proxy.
46 5 4 3 1, eg collecting urine specimens or hair samples, developmental assessment, routine physical examinations and the like.

(ii) "Minimal risk", which covers two kinds of situation: (a) where there is *a small chance of a recognised reaction which is in itself trivial*;[47] and (b) where there is *a very remote chance of serious injury or death*.[48] In this regard, it must be observed that the *Guidelines*' characterisation of a risk of "serious injury or death", remote or otherwise, as "minimal", particularly in the realm of medical research, is not only a contradiction in terms but also a cause for concern.[49]

(iii) "More than minimal risk", which has been left undefined but which is illustrated by the following examples: spinal taps, biopsies and behavioural interventions likely to cause psychological stress.[50]

In *therapeutic research*, the benefits likely to accrue to the patient should outweigh the possible risk of harm and the patient should, as a general rule, not be exposed to *greater than minimal risk*.[51] In *non-therapeutic research*, the patient should not be subjected to *more than minimal risk*.[52] In other words, the standard of risk limitation is the same in therapeutic and non-therapeutic research. Likewise, the necessary informed consent is the same in therapeutic and non-therapeutic research.[53]

4 LEGAL CONSEQUENCES OF AN ABSENCE OF CONSENT

The legal consequences of medical research without the patient's effective consent are that the doctor/hospital may incur liability for (i) breach of contract;[54] (ii) civil or criminal assault (a violation of bodily integrity);[55] (iii) civil or criminal *injuria* (a violation of *dignitas*/privacy);[56] or (iv) negligence,[57] as the case

47 5 4 3 2 (italics supplied), eg a mild headache or a feeling of lethargy.
48 *Ibid* comparable to the risk of flying as a passenger on a scheduled aircraft.
49 See in this respect 6 3 1 4 *infra*.
50 5 4 3 3.
51 5 4 4 1 (italics supplied); an exception to the minimal risk standard would be where the research in question would have "great potential benefit" for the patient.
52 5 4 4 2 (italics supplied).
53 5 4 5 1.
54 *Behrmann v Klugman* 1988 (W) (unreported, discussed by Strauss (1991) 41 176–177); *Castell v De Greef* (1994) 425.
55 *Stoffberg v Elliott* 1923 CPD 148ff; *Layton & Layton v Wilcox & Higginson* 1944 SR 48 50; *Lampert v Hefer* 1955 2 SA 507 (A) 508; *Esterhuizen v Administrator Transvaal* 1957 3 SA 710 (T) 718ff; *S v Sikunyana* 1961 3 SA 549 (E) 551; *Richter v Estate Hammann* 1976 3 SA 226 (O) 232; *Burger v Administrateur Kaap* 1990 1 SA 483 (C) 489; *Nell v Nell* 1990 3 SA 889 (T) 895; *S v Kiti* 1994 1 SACR 14 (E) 18; cf *S v Binta* 1993 2 SACR 553 (C) 561–562; *Fowlie v Wilson* 1993 (N) (unreported, discussed by Strauss 1994 (2) *SAPM* 10); *S v D* 1998 1 SACR 33 (T) 39; *Broude v McIntosh* 1998 3 SA 60 (SCA) 67–68; see also Smit 1975 *THRHR* 262, who indicates that non-consensual experimentation will constitute an assault regardless of whether such experimentation caused serious permanent, trivial permanent or serious temporary physical or psychological injury, or no injury at all; cf Kennedy and Grubb 1045, who take the view that where the doctor has the dual intention to treat *and* to do research, failure to inform the patient of *both* intentions and their consequences is tantamount to battery, since, in the absence of such knowledge, the patient will have assented to a procedure which is materially different from that which the doctor intends to perform.
56 *Stoffberg v Elliott* 152; *Seetal v Pravitha* 1983 3 SA 827 (D) 861; *Nell v Nell* 895; *C v Minister of Correctional Services* 1996 4 SA 292 (T); cf *Zurnamer v Thielke* 1914 CPD 176 178.
57 *Lymbery v Jefferies* 1925 AD 236; *Prowse v Kaplan* 1933 EDL 257; *Allott v Paterson & Jackson* 222 224; *Layton & Layton v Wilcox & Higginson* 50; *Dube v Administrator*

continued on next page

may be. This applies regardless of whether or not the research is performed with due care and skill and eventually proves to have been beneficial to the patient.[58]

5 FORM OF CONSENT

5 1 The law

In the absence of a statutory provision to the contrary, consent may be given expressly,[59] either orally[60] or in writing,[61] or tacitly, implied by the patient's conduct.[62] It is submitted that written information and consent forms should be the norm for medical research interventions in the absence of compelling reasons to the contrary.

5 2 The *Guidelines*[63]

The *Guidelines* are anything but clear and consistent as to whether and when written or oral consent is necessary or sufficient: They state that (i) *oral* informed consent *can* be proper for research which is easily comprehended and which involves *less* than minimal risk;[64] (ii) *written* informed consent is *recommended* for all but the most minor research procedures[65] and for research involving *minimal* or *more* than minimal risk or significant discomfort;[66] (iii) where comprehension of the research is not straightforward *or* where participation involves *minimal* risk or significant inconvenience, *oral* consent *may* need to be supported by additional measures such as a subject information sheet,[67] time to reflect[68] and

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Transvaal 269–270; *Richter v Estate Hammann*; *Castell v De Greef* 1993 3 SA 501 (C); cf *Behrmann v Klugman*; *Soumbasis v Administrator of the Orange Free State* 1989 (O) (unreported, discussed by Strauss (1991) 262–263); cf Kennedy and Grubb 1046 ff.

58 See Van Oosten *Informed consent* 31; Smit 1975 *THRHR* 261.

59 Watermeyer J's statement in *Stoffberg v Elliott* 149 that consent to an operation must be express overlooks the fact that tacit or implied consent to medical interventions is usually sufficient: see also Gordon, Turner and Price 155; Strauss and Strydom 187.

60 Strauss and Strydom 187–188 take the view that where the patient verbally consents to the medical intervention but has mental reservations about it, apparent consent must be taken as real consent, and that where the patient for fear of pain or injury verbally refuses a medical intervention but nevertheless undergoes it, tacit consent must be taken to have been given.

61 According to Smit 1975 *THRHR* 267 and Burchell 1978 *SALJ* 207 consent should, as far as possible, be in writing, and according to Burchell *loc cit* consent forms should not include any exculpatory clause which waives the patient's rights or excludes liability for negligence (see also Furrow, Greany, Johnson, Jost and Schwartz 1216). On disclosure and consent forms, see Strauss (1991) 12–13 36 and Van Oosten "Disclosure documents and informed consent: the pros and cons" 1993 *Medicine and Law* 651ff; cf *Fowlie v Wilson*.

62 Cf Nys 361, who points out that Belgian law requires written consent to non-therapeutic medical interventions; Laufs and Uhlenbruck 363–364 759–760; Leenen 237, who points out that Dutch law requires written information (see also 243 248–249); Furrow, Greany, Johnson, Jost and Schwartz 1218.

63 Cf § I 9 of the Helsinki Declaration: "The physician should . . . obtain the subject's freely-given informed consent, *preferably* in writing."

64 8 2 (italics supplied).

65 8 3 1 3 (italics supplied), inclusive of non-therapeutic research on healthy volunteers and subject volunteers (an obvious inclusion and a repetitious statement).

66 Italics supplied; written consent can here be "used as a tool to assist subject and researcher to consider the essential components of consent, point by point": 8 3 1 3.

67 On which see 8 3 1 1.

68 On which see 8 3 1 2, which recommends time to reflect in research involving either more than minimal risk or extended inconvenience or discomfort.

written consent;[69] and (iv) if there is *more* than minimal risk, such additional measures, which *include written* consent, are *mandatory*.[70]

The *Guidelines* recommend that the consent form be kept simple and separate from the information sheet.[71] Research involving minimal risk or more than minimal risk should be described in the information sheet, which should be couched in easily comprehensible terms and which should explain, *inter alia*, the purpose of the investigation, the nature of the procedures, the risks (inclusive of psychological distress) and the potential benefits to the individual or to society.[72] The *Guidelines* also warn that written consent "in no way reduces the responsibilities of an investigator and of itself does not remove the ordinary rights of the subject", nor does it "constitute a legally binding contract between subject and investigator".[73] The first warning probably means that written consent is no substitute for oral information[74] and the second states the obvious.

6 REQUISITES FOR CONSENT[75]

6 1 Legally recognised consent

Consent must be recognised by law, that is it must accord with the *boni mores* or public policy. Factual consent to wanton experimentation which does not carry the stamp of approval of research ethics committees will be *contra bonos mores* or contrary to public policy.[76]

6 2 Legal capacity to consent

Both law and ethics require that consent be given by someone who is legally and factually[77] capable of consenting,[78] and that where the patient is absolutely or

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69 8.3.1 (italics supplied).
70 *Ibid.*
71 8 3 1 3.
72 8 3 1 1.
73 8 3 1 3.
74 Cf the statement that an information sheet is not a substitute for talking to the subject: 8 3 1 1; see also Van Oosten 1993 *Medicine and Law* 655–656; cf further the same paragraph and 8 2, 8 3 1 and 8 3 1 4, where the need for oral communication is repeatedly emphasised in one way or another.
75 See Schwär, Loubser and Olivier 9–10; Van Oosten *Informed consent* 15ff; Strauss (1991) 4ff; Claassen and Verschoor 59ff.
76 See Strauss and Strydom 246 256, who take the view that consent may be given to therapeutic research procedures and to research procedures which involve a risk of trivial harm, but not to research procedures which involve a risk of serious harm; Smit 1975 *THRHR* 260–261 264, who takes the view that consent to death or serious bodily injury which would not have resulted from standard treatment cannot justify experimentation; *aliter*, probably, temporary physical injury or permanent trivial injuries and *aliter*, possibly, temporary trivial injuries on healthy volunteers; cf Smit 1977 *SAMJ* 155, who requires that the research subject must have the exclusive right of disposal over the legal interest that will or may be affected by the experiment; Nys 348–349, who points out that consent will justify a purely scientific medical experiment only if it is useful, necessary and the risk it creates is reasonably proportionate to the importance of its purpose; Picard and Robertson 90, who point out that there appears to be no Canadian authority which supports the proposition that if the potential risks outweigh the potential benefits, (voluntary and fully informed) consent is automatically invalid; Deutsch 392.
77 Cf Leenen 241, who distinguishes between *de facto* and *de jure* incompetency to consent.
78 Cf Smit 1975 *THRHR* 259 263 267; Nys 356 357 360; Furrow, Greany, Johnson, Jost and Schwartz 1205.

relatively incapable of consenting to the proposed research procedure because of his or her status or physical or mental condition,[79] proxy consent must be procured.[80] As regards competency to consent and proxy consent, two broad categories of patients may be distinguished:

6 2 1 Adults

Provided they are sane and sober, adults have the capacity validly to consent to medical interventions.[81] Categories of adults whose competency to consent may, depending upon the circumstances, be compromised, are the following:

6 2 1 1 The mentally ill or mentally handicapped

6 2 1 1 1 *The law*: Consent to medical interventions by institutionalised mentally ill patients is governed by section 60A of the Mental Health Act,[82] which provides that *where a patient is on account of mental illness*[83] *incapable of consenting to medical treatment or an operation*,[84] the following persons, in order of precedence,[85] may give written consent to the treatment or operation: a curator,[86] the patient's spouse, a major child or a (presumably major) brother or sister.[87] In the absence of such persons or where such persons cannot be found after reasonable inquiry, the superintendent of the hospital where the patient finds himself or herself may give written consent to the required treatment or operation if he or she is on reasonable grounds of the opinion that the patient's life is being endangered or that the patient's health is being seriously threatened by his or her condition and that the patient's condition necessitates the treatment or operation in question.[88]

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79 Cf Leenen 241–242, who distinguishes incompetency to consent due to status and due to illness or abnormality.

80 Cf Nys 360; Laufs and Uhlenbruck 363 760; Mason and McCall Smith 362, who point out that, in terms of the current English and Scottish law, "there can be no legal justification – other than, possibly, that of necessity – for any non-therapeutic invasion of the bodily integrity of an incapacitated person" (cf Kennedy and Grubb 1053–1054); Leenen 241 ff; Picard and Robertson 91 92; Deutsch 518–519 525; Furrow, Greany, Johnson, Jost and Schwartz 1216; the *Guidelines* 4 7 5, which require adequate justification for substitute consent and safeguards to protect the rights of research subjects; § 1 11 of the Helsinki Declaration: "In case of legal incompetence, informed consent should be obtained from the legal guardian in accordance with national legislation. Where physical or mental incapacity makes it impossible to obtain informed consent . . . permission from the responsible relative replaces that of the subject in accordance with national legislation."

81 Cf Nys 356.

82 18 of 1973.

83 "Mental illness" means "any disorder or disability of the mind" and includes "any mental disease and any arrested or incomplete development of the mind" (s 1) and, hence, a mental handicap.

84 Italics supplied.

85 Which stands unless consent is being withheld unreasonably or treatment or an operation is urgent and the person having precedence cannot be found timeously, in which event the person following in precedence may give the necessary consent.

86 Cf *Ex parte Dixie* 1950 4 SA 748 (W).

87 S 60A(1) and (2).

88 S 60A(2) and (3).

Section 60A prompts the following observations:

(i) The italicised passage confirms the viewpoint that whether or not the individual mentally ill patient is competent to consent to medical treatment or an operation will depend upon whether, in fact and in the circumstances, the patient has the ability to appreciate the issues involved.[89]

(ii) The words "medical treatment or operation" appear to refer to medical interventions other than "standard" psychiatric treatment[90] and would hence include therapeutic research.

(iii) It does not cater for consent to the medical treatment of, or an operation on, a mentally ill patient who is not institutionalised but in private care and who has neither a curator nor relatives to consent on his or her behalf, which means that an application should be made to the High Court for the appointment of a curator.[91]

Although mentally ill or mentally defective patients may, in principle and in fact, be capable of consenting to medical research,[92] it is submitted that their capacity to consent should be limited to therapeutic research on account of (i) its potential personal benefit;[93] and (ii) the undeniable potential of undue influence being exerted, wittingly or unwittingly, on such patients. A possible exception would be where the proposed form of non-therapeutic research *involves no risk or danger at all* as, for instance, in cases of an unlinked and anonymous (i) gathering of information about the patient by means of questionnaires or from medical records, or (ii) examination of a specimen taken from the patient.[94]

Should a mentally ill or mentally defective patient be incapable of consenting to medical research, it is submitted that substitute consent should be permissible only where (i) the proposed research pertains, directly or indirectly, to the mental illness or mental defect from which the patient suffers; and (ii) the proposed research is therapeutic. This will effectively render impossible non-therapeutic research on mentally ill or mentally defective patients who are legally incompetent to consent, but the justification for that lies in the potential for abuse of such patients for research purposes.

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89 On which see 6 3 1 4 *infra*.

90 In view of the fact that the reception order issued by a magistrate in terms of s 9, or an urgent admission in terms of s 12, is sufficient to authorise psychiatric treatment: see also Strauss (1991) 3–4 39.

91 See also Strauss (1991) 38; cf *Guidelines* 8 5 2 3: "It is particularly important to protect the vulnerability of mentally handicapped people who have left home to live in residential establishments, including hospitals."

92 Cf Deutsch 397–398; cf, however, Leenen 247, who states that problems with incompetent persons can be avoided by seeking their advance permission (prior to their becoming incapable of consenting) for non-therapeutic research (cf 249; see also Picard and Robertson 93).

93 Cf Kennedy and Grubb 1065ff; Leenen 243, who refers to the importance of the distinction between therapeutic and non-therapeutic medical research when dealing with persons who are incapable of consenting; Picard and Robertson 92–93, who refer to this view as the orthodox one, but who also discuss the alternative view; Deutsch 397.

94 Cf § I 10 of the Helsinki Declaration: "When obtaining informed consent for the research project the physician should be particularly cautious if the subject is in a *dependent relationship* to him ... In that case the informed consent should be obtained by a physician who is not engaged in the investigation and who is *completely independent* of this official relationship" (italics supplied).

6 2 1 1 2 *The* Guidelines: The *Guidelines* sanction research on the mentally ill and the mentally handicapped[95] and proceed from the premise that (i) research should be performed on mentally ill or mentally handicapped patients only where such research cannot "equally well" be undertaken in respect of mentally healthy persons; (ii) research on mentally handicapped patients should be restricted to aspects relating to their mental illness or mental handicap;[96] and (iii) many mentally ill or mentally handicapped patients are capable of consenting, sometimes with the assistance of others.[97]

According to the *Guidelines*, therapeutic research which is "of direct benefit to the patient" is permissible;[98] *aliter* non-therapeutic research on a mentally ill or mentally handicapped patient who is incapable of consenting,[99] unless the Ethics Committee "is convinced that the inclusion of patients who are incompetent to give consent for non-therapeutic research is *acceptable* and that it arises because the research is specifically directed to patients who *might be* incompetent".[100] If the patient refuses, or is incapable of refusing but resists, he or she should not "be included in or continue in research".[101] However, in this respect the *Guidelines* (i) give no indication of the standard that will determine what is ethically acceptable and what is not; (ii) disregard the fact that a mentally ill or mentally handicapped patient *is* either competent or *not* competent to consent; and (iii) overlook the fact that if the patient is capable of consenting, his or her consent should be procured, otherwise non-therapeutic research on mentally ill or mentally handicapped patients *who may be, but are not,* incapable of consenting might be sanctioned.

6 2 1 2 The elderly

6 2 1 2 1 *The law*: Old age, as such, does not render a person incapable of consenting to medical research. In the absence of any indication to the contrary, elderly patients are, therefore, generally assumed to be competent to consent to research.

6 2 1 2 2 *The* Guidelines: In terms of the *Guidelines*, research on the elderly is permissible, but consideration should be given to the possibility of mental deterioration and lessened ability to comprehend in the elderly, and also to their dependence and vulnerability.[102]

6 2 1 3 Pregnant women

6 2 1 3 1 *The law*: Pregnant women are usually competent to consent to medical research, but circumstances may sometimes compromise a rational decision on their part.[103]

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95 See also 6 2 4.
96 8 5 2 1 and 8 6 1.
97 8 5 2 2 and 8 6 3.
98 8 5 2 4.
99 *Ibid* and 8 6 3.
100 8 4 6 (italics supplied).
101 8 6 4.
102 6 2 3 and 8 11. No research that may equally well be done on other adults in order to obtain the same information may be conducted on the elderly: 6 2 3.
103 Cf Nys 359.

6 2 1 3 2 *The* Guidelines: The *Guidelines* make provision for research on pregnant women but prescribe that, where possible and appropriate, the father of the unborn child should also be included in the decision-making process.[104]

6 2 1 4 Unconscious patients

6 2 1 4 1 *The law*: Unconscious persons are obviously absolutely incapable[105] of consenting to anything, but it is submitted that, provided (i) no indication to the contrary on the patient's part exists and (ii) the informed consent of the nearest available relative is procured, therapeutic research on an unconscious patient is legally permissible; *aliter* non-therapeutic research.[106]

6 2 1 4 2 *The* Guidelines: The *Guidelines* take the view that, provided the informed consent of a near relative is procured, research interventions on unconscious patients are allowed.[107]

6 2 1 5 The dying

Although the capacity of the dying to consent to medical research will depend upon the facts and circumstances of each case, special consideration should be given to their vulnerability and dependency in any attempt to procure their consent to medical research.[108]

6 2 2 Minors

6 2 2 1 The law

6 2 2 1 1 *Competent minors*: In terms of section 39(4) of the Child Care Act[109] and in the absence of specific legislative provisions to the contrary,[110] minors who have attained the age of fourteen years are legally capable of consenting to medical treatment of themselves[111] and their children, and minors who have attained the age of eighteen years[112] are legally capable of consenting to medical operations upon themselves provided, of course, the minor is sane and sober. Conversely, parental consent[113] is required for treatment or an operation if the

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104 8 8 and 8 10; research on pregnant women should be undertaken only if pregnancy is an essential part of the research.

105 As opposed to relatively incapable, as in the cases discussed *supra* and *infra*.

106 Cf Nys 358; Deutsch 397.

107 8 9 2; the patient should, upon recovery which is sufficient for him or her to comprehend the information, be informed of his or her participation in the research.

108 Cf Nys 359–360, who takes the somewhat surprising view that (i) the principles applicable to the dying are the same as those applicable to unconscious patients; and (ii) medical experimentation on persons who are brain dead (which must be assumed to refer to brainstem death rather than neocortical death) must be regarded as medical experimentation on corpses; Leenen 250; Deutsch 397.

109 74 of 1983.

110 Eg s 18 of the Human Tissue Act 65 of 1983, which requires the written consent of the parents or guardians of a minor under the age of 21 years for the withdrawal of tissue or gametes from such minor.

111 See eg also s 18 of the Human Tissue Act, which provides for a minor of fourteen years old granting written or oral consent to a removal of tissue that is replaceable by natural process, and to a withdrawal of blood.

112 Cf *G v Superintendent Groote Schuur Hospital* 1993 2 SA 255 (C) 262.

113 Or the consent of a guardian, where appropriate.

minor is under the age of fourteen or eighteen years, as the case may be.[114] In the event of conflicting views between the child's father and mother, it is submitted that the child's best interest will settle the matter. Therapeutic research may, hence, be undertaken with the consent of a minor over the age of fourteen years if it takes the form of treatment[115] and with the consent of a minor over the age of eighteen years if it involves an operation. It is submitted that such minor's competence to consent accordingly extends to medical research which is tantamount to treatment or an operation and, hence, to therapeutic research only.[116] A possible exception would be where the proposed form of non-therapeutic research involves no risk or danger at all; [117] for instance, in cases of an unlinked and anonymous (i) gathering of information about the patient by means of questionnaires or from medical records, or (ii) examination of a specimen taken from the patient.

As regards the right to refuse medical research interventions, Smit takes the view that a parental refusal will override a competent minor's consent[118] to (i) a non-therapeutic research procedure;[119] and (ii) a therapeutic research procedure, unless "the contemplated experiment offers the only possible satisfactory therapy", in which event the minor's consent suffices.[120] These views not only effectively render the competent minor's right to consent and personal autonomy *pro non scripto*, but are also logically inconsistent with Smit's[121] view that a competent minor's refusal will override parental consent to (i) a non-therapeutic research intervention;[122] and (ii) a therapeutic research intervention, unless "the experiment . . . is the only possible therapy for the child's particular illness", in which event parental consent prevails.[123] Elsewhere Smit[124] makes it clear, as does Burchell,[125] that the consent of both the child and its parents is required for non-therapeutic research. However, if the argument is that parental refusal prevails in the child's best interest, parental consent should also prevail where this is in the child's best interest. If the argument is that the minor has a right to refuse a research intervention, the minor should also have a right to consent to a medical intervention, for, without a right to refuse, the right to consent, as the flip side of the same coin, is a legal *castratus*. Thus either the minor's own decision

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114 Cf *Layton & Layton v Wilcox & Higginson*; *Esterhuizen v Administrator Transvaal*; *G v Superintendent Groote Schuur Hospital* 262.

115 Cf, however, Kennedy and Grubb 1043, who raise the point that therapeutic research, because it entails two intentions – to treat and to do research – may arguably amount to more than treatment.

116 See also Smit 1977 *SAMJ* 156, who states the obvious by mentioning that the minor must still be capable of consenting, and who adds the proviso that "the contemplated experiment [may] not endanger [the child's] life or result in *serious irreparable* physical or mental damage" (italics supplied) which, translated into positive terms, seems to mean that the minor can consent to trivial irreparable or serious temporary harm; Burchell 1978 *SALJ* 200; cf Giesen 570; Nys 356; cf, however, Kennedy and Grubb 1055.

117 Cf Giesen 570.

118 Cf, however, Leenen 249.

119 1977 *SAMJ* 155–156.

120 *Idem* 156.

121 *Ibid.*

122 Cf Skegg 70–71.

123 Cf Skegg 68ff, who proposes a reasonable parent test of consent in this context.

124 1975 *THRHR* 267.

125 1978 *SALJ* 206 (cf 201).

concludes the matter, or the minor's best interest, but not both. And since the legislator has deemed fit to confer upon minors over fourteen years of age the right to consent to treatment and upon minors over the age of eighteen years the right to consent to an operation, such minors are also vested with the right to refuse treatment or an operation, as the case may be.

6 2 2 1 2 *Incompetent minors*: It is submitted that the assent[126] of minors under fourteen years of age to treatment or eighteen years of age to an operation, as the case may be, in respect of whom substitute consent to a medical research intervention is required, must also be procured, provided such minors are mentally sufficiently mature to comprehend the issues involved.[127] Moreover, it is submitted that surrogate consent to medical research interventions on incompetent minors[128] should be possible in respect of therapeutic research only,[129] even if this were effectively to render non-therapeutic research on such minors impossible.[130] The opposite view is advocated by Burchell,[131] who argues that

> "non-therapeutic medical research on children would be justified where there is firm medical and ethical support for the research which promises important new knowledge of benefit to science and mankind and where only negligible risk of harm to the child is involved".[132]

Non-therapeutic research procedures that would, according to Burchell,[133] clearly be justified in this context are analysing height, weight,[134] hair and teeth and

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126 Cf, however, Smit 1975 *THRHR* 267, who regards the *consent* of the minor as *desirable* in respect of therapeutic research interventions; Burchell 1978 *SALJ* 206, who considers the *consent* of a minor *who is in fact competent to consent* as *essential* to non-therapeutic research.

127 On which see 6 3 1 4 *infra*; cf Kennedy and Grubb 1052; Leenen 248–249; Picard and Robertson 91.

128 Cf *Esterhuizen v Administrator Transvaal.*

129 See also Smit 1977 *SAMJ* 156, who adds, however, that "[a] parent is unable to give legally valid consent to an experiment involving his child if such an experiment endangers the life of the child or may result in serious and irreparable harm to the child".

130 Burchell 1978 *SALJ* 198 admits that "[t]he jurisprudential basis of the defence of consent . . . is not easily transferred to consent given by a parent or guardian to a non-ther[a]peutic procedure . . . If a child could never be allowed to be the subject of medical research then, clearly, informed parental consent could not provide the answer, because, even though parents are presumed to act in the best interests of their children, the non-therapeutic procedure is *a fortiori not* for the direct benefit or health of the child"; cf Giesen 569; Skegg 59, who complicates the issue by making a distinction between "the situation in which a minor is *extremely likely to benefit* from the knowledge gained from a non-therapeutic experimental procedure, and that in which there is *no likelihood of his benefiting*" (italics supplied); Nys 356, who points out that in Belgian law non-therapeutic research interventions on minors is not allowed, regardless of whether a parent or guardian has consented to it (see also Picard and Robertson 91); Kennedy and Grubb 1052, who require that the proxy must reasonably be satisfied that the therapeutic research involved is in the best interest of the child (cf 1061ff; see also Picard and Robertson 91); Leenen 243, who distinguishes between non-therapeutic research interventions in which the research subject may have an interest and non-therapeutic research interventions in which the research subject may not have an interest (see further 243ff in respect of non-beneficial non-therapeutic research interventions).

131 1978 *SALJ* 213–214 (see also 196–197 and cf 199).

132 Adding: "Furthermore, the necessary free and informed consent is essential"; cf Skegg 63ff; cf, however, Giesen 570.

133 1978 *SALJ* 214 (see also 208); cf Skegg 63ff, who refers in this context to a "reasonable parent" test of consent to medical procedures which are not for the child's benefit but also not against the child's interests (66–67), and who states that "[t]he reasonable parent might well distinguish between pain and risk" (67 fn 88).

134 Cf Leenen 247.

dietary and physical exercise regulation,[135] because here the element of harm is virtually non-existent. Smit[136] postulates an essentially similar approach:

> "[A] parent is unable to give legally valid consent to non-therapeutic experiments on his child when such experiments entail a danger, however slight, to the child's life or when there is a possibility, however remote, of temporary serious harm or slight but permanent harm."[137]

Translated into positive terms, this means that parents are authorised to give consent to non-therapeutic research procedures on incompetent minors where the harm (which must, presumably, be physical and/or psychological) is both "slight" and "temporary". However, the problem with Burchell's view is that (i) he concedes[138] that the questions of what constitutes a "negligible risk of harm" and who or what determines whether such harm exists are difficult to answer (incidentally, the same applies to Smit's criteria of "temporary" and "slight" harm); and (ii) there seems to be no reason why the information sought in the examples furnished cannot be obtained from incompetent minors who are subjected to therapeutic research procedures.

Smit[139] takes the view that experimentation on *infantes* should not be allowed. Opposing this view, Burchell[140] argues that (i) this would unduly hamper the progress of paediatric medicine and deny *infantes* the benefit of new advances; and (ii) non-therapeutic research on children below the age of seven years is permissible, provided it will result in negligible harm only and that the parents give their free and informed consent.[141] Smit's view is unacceptable in so far as it fails to distinguish between therapeutic and non-therapeutic research and does not allow therapeutic research on children below the age of seven years. Burchell's view is unacceptable inasmuch as it permits non-therapeutic research on children who are incompetent to consent.

6 2 2 2 The *Guidelines*[142]

6 2 2 2 1 *Therapeutic research*: The *Guidelines*, with reference to section 39(4) of the Child Care Act,[143] sanction therapeutic research on minors, provided (i)

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135 Cf Leenen 245, who demonstrates the danger of formulating and applying arbitrary criteria in this context by stating that the taking of one blood sample is permissible, but not the taking of ten blood samples or one a week for three months (cf 247; Picard and Robertson 92).

136 1977 *SAMJ* 156.

137 Italics supplied.

138 1978 *SALJ* 209.

139 1975 *THRHR* 267.

140 1978 *SALJ* 201.

141 Burchell 1978 *SALJ* 196–197 (cf 213–214) emphasises the need for non-therapeutic child and foetal research (on which cf Picard and Robertson 93ff), "provided always that there are stringent safeguards and the risk of harm to the child or foetus is minimal".

142 The *Guidelines* prescribe that research on children should be undertaken only if there is "a specific and demonstrable need to perform the research on children, and *no other route* [eg research on adults or animals or *in vitro* research: 1 4 1; cf 6 2 2 2] to the relevant knowledge is possible" (1 4 1; cf Smit 1975 *THRHR* 267; Burchell 1978 *SALJ* 195–196; Deutsch 398) on the basis that children, as a vulnerable group, need added protection, especially regarding risk/benefit assessment and consent (1 4 2); cf § I 11 of the Helsinki Declaration: "In case of legal incompetence, informed consent should be obtained from the legal guardian in accordance with national legislation . . . [W]hen the subject is a minor, permission from the responsible relative replaces that of the subject in accordance with national legislation. Whenever the minor child is in fact able to give a consent the minor's consent must be obtained in addition to the consent of the minor's legal guardian."

143 See 6 2 2 1 *supra*.

requisite consent has been obtained;[144] (ii) the minor is ill; and (iii) the minor may derive direct benefit from the procedure.[145] Under the last point it is required that "the benefits likely to accrue to a child participating outweigh the possible risk of harm".[146]

The *Guidelines* contain dissimilar instructions as regards the involvement of parents in the process of consenting to therapeutic research on minors. On the one hand they state[147] that children should be included in research with parental consent only if "they do not object or appear to object in either words or action", and on the other hand[148] that where there is doubt about the minor's powers of comprehension, "good professional practice" may seek the minor's permission to explain the research proposals to its parents and if the latter object, to give such objections "considerable weight".

6 2 2 2 2 *Non-therapeutic research*: Provided the requisite consent has been procured, non-therapeutic research on minors is likewise sanctioned by the *Guidelines*.[149] According to the *Guidelines*, a minor who has attained the age of fourteen years may independently consent to non-therapeutic research,[150] provided (i) it holds no possibility of physical or psychological harm[151] for the minor; and (ii) the minor is intellectually sufficiently mature to understand the nature of the procedure and to give voluntary and informed consent.[152] In such cases the consent of, or consultation with, the parents may, according to the *Guidelines*, be dispensed with,[153] particularly where "obtaining parental consent might impede the research", in which case the approval of an ethics committee could be sought to dispense with parental consent. In the absence of any express statutory provision which authorises a minor to consent to non-therapeutic research, this stance is difficult to reconcile with the common-law principle requiring the consent of the minor's parents[154] to medical interventions which do not amount to treatment or an operation.[155]

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144 6 2 2 1.

145 8 4 2; cf 4 14 4. Of course these provisos merely reiterate, and add nothing new to, the content of the term "therapeutic research", which is defined by the *Guidelines* as "the study of treatment which may benefit the individual patient" (2).

146 1 4 3.

147 *Ibid.*

148 8 4 2.

149 6 2 2 2.

150 "Needless to say, the younger the child, the more desirable it would be to seek parental consent": 8 4 3.

151 According to Burchell 1978 *SALJ* 206, the child should be informed of such harm.

152 8 4 3.

153 The bold statement in the *Guidelines* that parental consent is in such cases "not legally required" is inaccurate and inconsistent with its correct statement that "[t]here are no express provisions in South African law concerning consent by children themselves to non-therapeutic research", and its cautionary statement that "[t]he prudent course of conduct where non-therapeutic research is contemplated would be to seek the consent of a parent or guardian *where this is available*" (italics supplied, whatever the italicised words are supposed to mean). The point is that in the absence of direct authority the legal position is unclear, but that the course of action recommended by the *Guidelines* will more probably than not be lawful.

154 Or a guardian, where appropriate.

155 *Inclusio unius est exclusio alterius.*

Moreover, the formulations of the two qualifications for valid consent by a minor to non-therapeutic research are anything but uniform and consistent: As regards the phrase "no possibility of physical or psychological harm", the *Guidelines* elsewhere require "*no worse than minimal risk*",[156] "*minimal risk*"[157] and "*negligible*[158] *or less than minimal risk*".[159] What makes this particularly noteworthy, is the fact that the *Guidelines* (i) pertinently differentiate between categories of risk and specifically define the terms "negligible or less than minimal risk", "minimal risk" and "more than minimal risk", giving practical examples of each;[160] and (ii) take the stance that "[i]n non-therapeutic research the person must be subject to no more than minimal risk".[161] As regards the child's capacity "to give voluntary and informed consent", the *Guidelines* elsewhere merely require that the child is "capable of giving assent" in the sense of "a willingness that does not necessarily carry the greater understanding and legal implications that are generally understood by consent".[162]

Where the minor is mentally handicapped, the *Guidelines* recommend that "the principles which apply to *all children* should be followed",[163] which presumably means all minors under the age of fourteen years.

6 3 Informed consent[164]

6 3 1 The law

6 3 1 1 Reason for the requirement

Ordinarily, lawful consent is out of the question unless the consenting party knows and appreciates what it is that he or she is consenting to.[165] Since the patient is usually a layperson in medical matters, knowledge and appreciation on the patient's part can be effected only by appropriate information. In this way, adequate information becomes a requisite of knowledge and appreciation and therefore of lawful consent as well.[166] In the absence of information, real consent

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156 1 4 3 (italics supplied); see also 6 2 2 2: "no greater than minimal risk".
157 4 14 4 (italics supplied); cf Burchell 1978 *SALJ* 201.
158 Cf Burchell 1978 *SALJ* 201 207ff 213, who favours this test.
159 5 4 3 1 (italics supplied).
160 5 4 3 1, 5 4 3 2 and 5 4 3 3 respectively: see 3 2 *supra*.
161 5 4 4 2.
162 4 14 4.
163 8 5 1 (italics supplied).
164 On informed consent to medical interventions generally and the courts' approach to the matter, see Van Oosten "*Castell v De Greef* and the doctrine of informed consent: medical paternalism ousted in favour of patient autonomy" 1995 *De Jure* 164ff. No reported South African case law on medical research could be traced.
165 *Rompel v Botha* 1953 (T) (unreported, discussed in *Esterhuizen v Administrator Transvaal* 719); *Esterhuizen v Administrator Transvaal* 719 720; *Castell v De Greef* (1994) 425; *C v Minister of Correctional Services* 300 301. The question whether or not there was knowledge and appreciation on the patient's part, does not depend upon what the patient *must* have understood, as Wessels JA stated in *Lymbery v Jefferies* 240, but upon what the patient *did* understand: see also Strauss and Strydom 214.
166 Van Oosten *Informed consent* 20ff; cf Smit 1975 *THRHR* 258–259 263 266 267; Burchell 1978 *SALJ* 197: "From both an ethical and a legal point of view, free and informed consent, based as it is upon the individual's free will, is the most important justification for medical procedures, whether they be therapeutic or non-therapeutic" (see also Mason and McCall Smith 359; cf Leenen 237 238, who adds that (i) neither the interests

continued on next page

will be lacking. In turn, this means that the doctor, as an expert, is burdened with the legal duty to provide the patient with the necessary information to ensure knowledge and appreciation and, hence, real consent on the patient's part.[167]

6 3 1 2 Patient autonomy

The requirement that consent in the medical context must be informed consent is customarily associated with the so-called "doctrine of informed consent",[168] which espouses patient autonomy as a fundamental (human/patient's) right[169] and which rejects medical paternalism.[170] According to the doctrine, the ultimate decision to undergo (informed consent) or refuse (informed refusal) a medical intervention lies with the patient and not with the doctor.[171] This applies even if, from the point of view of the medical profession, a refusal by the patient to undergo the proposed intervention would be grossly unreasonable and may result in the patient's death, and even if the medical profession takes the view that disclosure of the risks and dangers in such circumstances is unnecessary or undesirable.[172] In the absence of other grounds of justification, medical interventions without the patient's informed consent on the basis of the "patient's-best-interest" and the "doctor-knows-best" criteria constitute a violation of the patient's autonomy.[173]

Within the context of medical research, however, the "patient's-best-interest" and the "doctor-knows-best" criteria are even more obviously inappropriate. Moreover, the undeniable inherent potential of abuse of research subjects render a stricter adherence to the informed consent requirement necessary in medical research than in standard practice. In addition, the absence of any personal benefit for the patient who consents to non-therapeutic research renders a stricter adherence to the informed consent requisite necessary in non-therapeutic research than in therapeutic research.

6 3 1 3 Self-determination disclosure and therapeutic disclosure

It is evident that so-called "self-determination disclosure", which serves the purpose of (i) ensuring the patient's right to self-determination and freedom of choice; and (ii) encouraging rational decision-making by enabling the patient to

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of science nor the interests of the researcher justify non-consensual medical research on patients; and (ii) if the research project is too complicated for a patient to comprehend, that patient may not be used as a research subject; Furrow, Greany, Johnson, Jost and Schwartz 1216).

167 Cf besides the cases cited *infra*, *Edouard v Administrator Natal* 371 383 385; *Mtetwa v Administrator Natal* 604; *Pringle v Administrator Transvaal* 1990 2 SA 379 (W) 381 384 393 397; *Administrator Natal v Edouard* 585; *Van Rensburg v Millener* 1990 (W) (unreported, discussed by Strauss 1991 (2) *SAPM* 12); *Applicant v Administrator Transvaal* 1993 4 SA 733 (T) 739; *Fowlie v Wilson*.

168 *Castell v De Greef* (1994) 420, rejecting *Castell v De Greef* (1993) 518; *C v Minister of Correctional Services* 300ff.

169 *C v Minister of Correctional Services* 300.

170 *Castell v De Greef* (1994) 420–421 425 426.

171 *Phillips v De Klerk* 1983 (T) (unreported, discussed by Strauss (1991) 29ff); *Castell v De Greef* (1994) 420–421.

172 *Castell v De Greef* (1994) 420–421; cf *Phillips v De Klerk*.

173 *Stoffberg v Elliott* 149–150; *Ex parte Dixie* 751; *Esterhuizen v Administrator Transvaal* 718 720; *Castell v De Greef* (1994) 420–421.

weigh and balance the benefits and disadvantages of the proposed intervention in order to come to an enlightened choice either to undergo or refuse it,[174] is central to the notion of medical research, be it therapeutic or non-therapeutic. Although so-called "therapeutic disclosure", which has nothing to do with patient autonomy but serves the purpose of protecting the patient's health,[175] is conceptually excluded from the notion of non-therapeutic research, it is clearly relevant to instances of therapeutic research.

6 3 1 4 Nature, scope and limitations

As regards the nature and scope of, and limitations to, the information that must be disclosed, the doctor is obliged to give the patient a general idea in broad terms[176] and in a layperson's language[177] of the nature,[178] scope,[179] consequences,[180] risks, dangers, complications,[181] benefits, disadvantages and prognosis[182] of, as well as the alternatives[183] to, the proposed intervention.[184] More

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174 Van Oosten *Informed consent* 58 449; cf *Castell v De Greef* (1994) 420–421 426; Claassen and Verschoor 62–63.

175 Thus a failure to inform the patient clearly and unambiguously, subsequent to having set his fractured arm in plaster, that should he notice any abnormal symptom, immediately to return to the hospital, and of the consequences of failing to do so, resulted in the hospital's incurring liability for negligence (*Dube v Administrator Transvaal* 268ff; cf *Soumbasis v Administrator of the Orange Free State*), and a failure to advise a diabetes patient with a foot injury not to use his foot but to rest it, resulted in the doctor incurring liability for negligence: see *Ramsaroop v Moodley*. Moreover, a failure to inform the patient to have a sperm count before resuming intercourse with his wife without contraception after having undergone a vasectomy (cf *Behrmann v Klugman*), and a failure correctly to advise the patient of a greater than normal risk or danger of giving birth to a handicapped or disabled child in order to enable her to make an informed choice whether to proceed with or terminate her pregnancy (*Friedman v Glicksman*), may render the doctor liable for damages; cf *Edouard v Administrator Natal* 383 385; *Gibson v Berkowitz* 1996 4 SA 1029 (W) 1052; *Broude v McIntosh* 64.

176 There is no obligation to disclose in detail all the complications that may arise: *Lymbery v Jefferies* 240; *Rompel v Botha*; *Esterhuizen v Administrator Transvaal* 721; *Castell v De Greef* (1993) 518.

177 There is no obligation to educate the patient up to the standard of the doctor's medical knowledge: *Castell v De Greef* (1993) 518; cf Burchell 1978 *SALJ* 206.

178 Cf *Stoffberg v Elliott*, in which the patient, who had contracted cancer of the penis, submitted to an operation to treat his condition, only to discover upon regaining consciousness that the impaired member had been amputated.

179 See *Esterhuizen v Administrator Transvaal*, in which the doctor had failed to disclose the fact that, unlike previous treatments consisting of superficial radiotherapy, the proposed treatment involved radical radiotherapy; cf *Fowlie v Wilson*, in which the patient alleged that the doctor had failed to disclose that cancer surgery may follow a laparotomy.

180 See *Prowse v Kaplan* (a jaw dislocation and subsequent fracture due to a tooth extraction and remedial action); *Allott v Paterson & Jackson* (an arm injury during a tooth extraction).

181 On consequences, risks, dangers and complications, see *Lymbery v Jefferies* (sterility and burns as a result of radiotherapy); *Rompel v Botha* (a bone fracture as a result of electroconvulsive shock treatment); *Esterhuizen v Administrator Transvaal* (severe irradiation and ulceration of tissues, disfigurement, necrosis, cosmetic changes, and amputation of limbs); *Verhoef v Meyer* 1975 (T) and 1976 (A) (unreported, discussed by Strauss (1991) 35 36) (failure of an operation to remedy a retinal detachment); *Richter v Estate Hammann* (loss of control of the bladder and bowel, loss of sexual feeling and loss of power in the right leg and foot); *Castell v De Greef* (discolouration of the areolae, necrosis of the tissues, a discharge with an offensive odour, a *staphylococcus aureus* infection, pain, embarrassment and trauma, and further surgery to repair the damage); cf *Broude v McIntosh* (paralysis of the left side of the face as a result of a cochlear vestibular neurectomy); *C v Minister of Correctional Services* 300.

182 Which may include the necessity of subsequent interventions.

183 Which may include no treatment at all; on alternatives, see *Castell v De Greef*.

184 See Van Oosten *Informed consent* 406ff 449–450 457–458; cf Claassen and Verschoor 63–64 74.

particularly, all serious and typical risks and dangers should be disclosed,[185] but not unusual or remote risks and dangers,[186] unless they are serious[187] or typical, respectively, or the patient makes enquiries about them. The test of disclosure is whether or not the risk or danger inherent in the intervention in question is material: a risk or danger is material if in the particular circumstances (i) a reasonable patient,[188] if warned of the risk or danger, would be likely to attach significance to it; or (ii) the individual patient,[189] if warned of the risk or danger, would be likely to attach significance to it.[190] The latter approach clearly eschews a clinical judgment or "reasonable doctor" test of disclosure.[191]

At the same time, the doctor is expected to avoid causing the patient anxiety and distress by the unnecessary disclosure of the adverse consequences of the proposed intervention.[192] In addition, no duty of disclosure exists, *inter alia*, where (i) the patient expressly or impliedly waives his or her right to information;[193] or (ii) the defence of a so-called "therapeutic privilege" or "contra-indication",[194] in terms of which the harm caused by disclosure would be greater than the harm caused by non-disclosure, is applicable.[195]

Within the context of medical research, however, it is submitted that the minimum standard of disclosure in both therapeutic and non-therapeutic research should be so-called "full disclosure",[196] even if this causes the patient anxiety and

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185 See *Esterhuizen v Administrator Transvaal* 720 721; *Castell v De Greef* (1993) 518; cf *Lymbery v Jefferies* 240; *Rompel v Botha*.

186 See *Lymbery v Jefferies* 240; *Richter v Estate Hammann* 233 (cf 230).

187 Cf *Castell v De Greef* (1994) 421.

188 So-called "basic" or "objective disclosure".

189 So-called "individual" or "subjective disclosure".

190 *Castell v De Greef* (1994) 426.

191 *Idem* 418–419, rejecting *Richter v Estate Hammann* 232 and *Castell v De Greef* (1993) 517–518; the "reasonable doctor" test was apparently also applied in *Fowlie v Wilson*.

192 Cf *SA Medical & Dental Council v McLoughlin* 1948 2 SA 355 (A) 366; *Richter v Estate Hammann* 232; *Seetal v Pravitha* 864–865; *Castell v De Greef* (1993) 518; Strauss (1991) 12; Van Oosten "The doctor's duty of disclosure and excessive information liability" 1992 *Medicine and Law* 633 ff. Strauss (1991) 19 ff takes the view that the doctor cannot be held legally liable for the harmful consequences of (i) disclosure which results in the patient's refusing the proposed intervention, provided there was no negligence on the doctor's part; and (ii) disclosure against the patient's express wishes, where disclosure can save the patient's life, arguably on the basis of the necessity defence.

193 Cf Claassen and Verschoor 36 39. This exception is, in principle, irreconcilable with the knowledge-and-appreciation requisite of effective consent, but to force unwanted information upon a patient would also constitute a violation of his or her freedom of choice: Van Oosten *Informed consent* 438–439.

194 See Van Oosten "The so-called 'therapeutic privilege' or 'contra-indication': its nature and role in non-disclosure cases" 1991 *Medicine and Law* 31 ff, where it is also submitted that "therapeutic necessity" is a more appropriate term for the defence (34ff); cf Strauss (1991) 10–11 15 18–19 92, who refers to a *duty* to forego disclosure in the circumstances; Claassen and Verschoor 70–71 78.

195 See also *Castell v De Greef* (1994) 426, which leaves precious little scope for the defence; cf *SA Medical & Dental Council v McLoughlin* 366; *Richter v Estate Hammann* 232; *Seetal v Pravitha* 864–865.

196 Cf Smit 1977 *SAMJ* 155; cf, however, Burchell in *Genetics and society* 77, who requires disclosure of all risks only in respect of non-therapeutic research interventions (cf Giesen 339–340 573–574; Skegg 85 92–93; Picard and Robertson 149ff; Deutsch 382 398). Nys 361–362 states that in the light of the complexity of the issues involved and the predictability of the consequences of the investigation, full disclosure is wellnigh impossible (cf Leenen

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distress. The reasons for this are the following: (i) The possibility of abuse of research subjects; (ii) the fact that standard medicine is available as an alternative to therapeutic research; (iii) the fact that, compared to standard medicine, therapeutic research almost invariably involves increased risks or dangers; (iv) the absence of personal benefit for the patient who consents to non-therapeutic research; (v) the fact that a conflict of interests between the patient's autonomy and the patient's health is unlikely to arise in medical research;[197] and (vi) the principle that the scope of the information which must be imparted to the patient increases in proportion to the measure in which the proposed research is novel and untried, must be observed.[198]

In turn, full disclosure should include[199] the following:

(i) The patient should be informed that the proposed medical intervention involves research and must be furnished with comprehensive and detailed information about (a) the precise nature, scope, purpose and duration of the proposed research project[200] (that is, whether it is therapeutic, non-therapeutic,[201] invasive, non-invasive, a pilot study,[202] controlled,[203] randomised,[204] single-blind, double blind, triple blind or quadruple blind,[205] and whether or not placebos[206] are involved);[207] (b) the nature, scope and consequences of the proposed research intervention;[208] (c) the anticipated benefits and disadvantages, if any, of the

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238). However, he overlooks the fact that, since the law cannot and does not expect the impossible (*lex non cogit ad impossibilia*), full disclosure refers to disclosure of all possible information about the research intervention in question. Cf further Laufs and Uhlenbruck 364 373; Mason and McCall Smith 362, who take the view that "[t]he standard of information provided must certainly be that of the 'reasonable subject' (see also Leenen 238) – if not that of the actual subject – rather than that of the 'reasonable doctor'. Even so, there are many and variable difficulties which make it almost impossible to lay down hard and fast rules – these include the essential need for some measure of ignorance in the trial, the seriousness of the condition being treated, the psychology of individual patients and so on" (359); Kennedy and Grubb 1052, who require *at least* as full a disclosure to proxies as to competent patients, and full disclosure of all information a volunteer to non-therapeutic research would subjectively want to know.

197 Cf Picard and Robertson 86, who state: "The concept of consent . . . plays as vital a role in medical research as it does in therapeutic treatment . . . as a means of promoting personal autonomy and protecting the bodily integrity and human dignity of the subject."

198 See Van Oosten *Informed consent* 178 322 and the authorities cited there; cf Giesen 339; Laufs and Uhlenbruck 373 760.

199 Cf Furrow, Greany, Johnson, Jost and Schwartz 1216, who also require, *inter alia*, disclosure of information about the maintenance of confidentiality, the availability of compensation and treatment should injury occur, contact persons for further information, the termination of the research subject's participation in the project without his or her consent and any additional costs to the research subject resulting from participation in the project.

200 Cf Burchell 1978 *SALJ* 206; Giesen 574; Laufs and Uhlenbruck 363 760; Mason and McCall Smith 360; Leenen 237; Picard and Robertson 152; Deutsch 518ff; Furrow, Greany, Johnson, Jost and Schwartz 1205 1216.

201 Cf Burchell 1978 *SALJ* 203 206; Leenen 237–238.

202 Cf Deutsch 385.

203 Cf Kennedy and Grubb 1045 1057; Deutsch 388 518.

204 Cf Kennedy and Grubb 1045–1046 1057; Deutsch 386.

205 Cf Laufs and Uhlenbruck 362.

206 Cf Nys 362–363; Deutsch 390.

207 Cf Leenen 239–240.

208 Cf Giesen 561; Kennedy and Grubb 1047; Deutsch 376; Furrow, Greany, Johnson, Jost and Schwartz 1216.

proposed research intervention for the patient and society,[209] and where the proposed research intervention is therapeutic, its benefits and disadvantages as compared to those of available standard therapy;[210] and (d) the foreseeable prognosis and all foreseeable[211] and additional[212] risks, dangers and complications, as well as the possibility of unforeseen risks,[213] dangers and complications, regardless of whether the proposed research is therapeutic or non-therapeutic.[214] In a different context, the research subject should also be informed that participation is voluntary and that he or she is (i) under no obligation to consent to the research procedure and that a refusal will not adversely affect future treatment;[215] and (ii) free to withdraw his or her consent at any time.[216] In addition, the research subject should be given sufficient time to contemplate and decide on participation in the research project.[217]

(ii) There is (a) precious little room for therapeutic necessity and waiver as defences to non-disclosure in cases of therapeutic research;[218] and (b) conceptually no room at all for the therapeutic necessity defence; and, in principle, no room at all for the waiver defence in cases of non-therapeutic research.[219]

6 3 2 The *Guidelines*

The *Guidelines* repeatedly emphasise, in a variety of contexts, the need for (i) respecting the autonomy of the patient who is the subject of research;[220] and (ii) obtaining voluntary and informed consent[221] by (a) making research subjects fully aware of their position and the nature of the research;[222] (b) informing research subjects of the objectives and consequences of their involvement; (c) informing research subjects of identifiable risks and inconvenience;[223] (d) explaining the concept of risk/benefit analysis to patients; (e) giving the patient enough information to make his or her own choice;[224] (f) stressing the importance

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209 Cf Mason and McCall Smith 360; Furrow, Greany, Johnson, Jost and Schwartz 1216.

210 Cf Mason and McCall Smith *loc cit*; Leenen 237–238; Picard and Robertson 151; Deutsch 383 386 392; Furrow, Greany, Johnson, Jost and Schwartz *loc cit*.

211 Cf Giesen 560 574; Kennedy and Grubb 1046–1047 1057, who require disclosure of material risks of which the particular patient would wish to be informed; Deutsch 376 386 392; Furrow, Greany, Johnson, Jost and Schwartz 1205 1216.

212 Cf Picard and Robertson 151.

213 Cf Burchell 1978 *SALJ* 205 206; Giesen 560 574; Furrow, Greany, Johnson, Jost and Schwartz 1217.

214 Cf Mason and McCall Smith 360; Leenen 237–238.

215 See Burchell 1978 *SALJ* 202; cf Kennedy and Grubb 1045 1057; Furrow, Greany, Johnson, Jost and Schwartz 1217.

216 See Burchell 1978 *SALJ* 203 206; cf Giesen 575; Kennedy and Grubb 1045 1057; Leenen 241, who adds that if withdrawal could be harmful, the patient should be informed accordingly in advance (see also Furrow, Greany, Johnson, Jost and Schwartz 1217).

217 Cf *C v Minister of Correctional Services* 304; Van Oosten *Informed consent* 352ff; Leenen 237 241; Furrow, Greany, Johnson, Jost and Schwartz 1216.

218 Cf Giesen 339 560–561 563–564; Leenen 238–239.

219 Cf Giesen 339–340 564 573 576; Leenen 238; Picard and Robertson 150–151.

220 1 5.

221 4 7 4, 4 11 1, 4 12 13, 4 14 1 and 8; cf 7 6 2, 7 6 3, 10 3 2–10 3 6, 15 1, 16 9, 18 5 and 21 3.

222 4 2, emphasising the need for truthfulness and frankness (4 3) .

223 4 7 4; cf 21 3.

224 5 4 8 2, on the basis that the patient's assessment of the risk is sometimes more relevant to himself or herself than that of the expert. The *Guidelines* suggest that the members of

continued on next page

of clear and understandable verbal communication;[225] and (g) an invitation to the research subject to ask for more information.[226]

It is worthy of note that the *Guidelines* make no provision for not informing the patient on account of therapeutic necessity or a waiver by the patient of his or her right to information.[227]

6 4 Free and voluntary/clear and unequivocal/comprehensive/revocable

It goes without saying that consent to medical research must be free and voluntary, clear and unequivocal, comprehensive and revocable:

6 4 1 Free and voluntary consent

6 4 1 1 The law

Consent may not be induced by fear, force, threats, duress, coercion, compulsion, deceit, fraud, undue influence, perverse incentives or financial gain.[228] Categories of persons in respect of whom the voluntariness of consent may be compromised, include prisoners and soldiers, as well as students and employees.

As regards prisoners and soldiers, the mere fact that someone is incarcerated or a subordinate does, of course, not render him or her legally incapable of consenting to medical research. However, the potential for abuse of the incarcerated and subordinates, who are either involuntarily detained or subjected to a hierarchical and authoritarian dispensation, as the case may be, raises serious doubts about the required voluntariness of any consent given by prisoners and soldiers.[229] It should be noted that the reluctance of the law to recognise a prisoner's or soldier's consent as valid relates to *voluntariness* rather than *competence* as a requisite of effective consent. What this means, is that a prisoner or soldier may be capable of consenting in the sense that he or she may be able to appreciate the issues involved[230] and to form a will, but a prisoner's or soldier's freedom of choice may be compromised by his or her very status and, in that sense, *incapable of giving voluntary consent.* Obviously, a prisoner or soldier may in a given case be incapable of consenting in the traditional sense, but then

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the Ethics Committee ask themselves whether they would consent to research if they or their relatives were eligible patients: 5 4 9 1.

225 1 5.

226 8 3 1 1; see also Burchell 1978 *SALJ* 203 206–207; cf § I 9 of the Helsinki Declaration, which already embodies these proposals to some extent – albeit in general and relatively meek and mild language – in the following terms: "In any research on human beings, each potential subject must be *adequately* informed of the aims, methods, anticipated benefits and potential hazards of the study and the discomfort it may entail" (italics supplied).

227 Cf, however, § II 5 of the Helsinki Declaration: "If the physician considers it essential not to obtain informed consent, the specific reasons for this proposal should be stated in the experimental protocol for transmission to the independent committee."

228 Cf Smit 1975 *THRHR* 259 262 266; Burchell 1978 *SALJ* 202 206, who adds that the research subject should not be made to feel guilty if he or she refuses to participate; Skegg 97–98; Nys 356; Kennedy and Grubb 1044 1052 1056; Leenen 240; Picard and Robertson 88 ff; Deutsch 376; Furrow, Greany, Johnson, Jost and Schwartz 1205 1216.

229 Cf Giesen 571–572; Nys 359–360; Kennedy and Grubb 1056; Leenen 250, who takes the view that prisoners should be excluded from non-therapeutic medical research; Picard and Robertson 89–90; Deutsch 398.

230 On which see 6 3 1 4 *supra.*

such incapacity relates to his or her status as a youth or to mental illness or mental handicap rather than to his or her status as a prisoner or soldier.[231]

As regards students and employees, due care should also be taken that their voluntary participation in medical research is in no way compromised by their position.[232]

6 4 1 2 The *Guidelines*

The *Guidelines* stress the importance of an absence of any overt or covert coercion[233] and state,[234] with specific reference to prisoners that (i) research into medical and psychological disturbances affecting prisoners may be beneficial (without specifying to whom); (ii) there is evidence that prisoners may wish not to be excluded from participation in worthwhile research; and (iii) research conditions in prisons should, however, be subjected to careful scrutiny and monitoring.[235]

6 4 2 Clear and unequivocal consent

The expression is self-explanatory and needs no amplification.

6 4 3 Comprehensive consent

Consent must extend to the entire transaction, inclusive of its consequences.[236]

6 4 4 Revocable consent

6 4 4 1 The law

Consent may be withdrawn without prejudice, in any form, and at any time, prior to the proposed intervention.[237]

6 4 4 2 The *Guidelines*

The *Guidelines* stress the right of research subjects to withdraw from the research project without prejudice.[238]

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231 Cf Nys 360, who points out that in Belgian law non-therapeutic medical research on prisoners is not allowed, which means that they cannot consent to non-therapeutic medical research.

232 Cf Kennedy and Grubb 1056; Leenen 251; Picard and Robertson 90.

233 6 1, 6 2 5 and 6 2 6 5; cf 7 6 3, 8 3 1 1, 9, 10 3 6, 17 5, 18 8 and 18 9; cf the Helsinki Declaration: (i) "[The patient] should be informed that he or she is at liberty to abstain from participation in the study . . . The physician should then obtain the subject's freely-given informed consent" (§ I 9; see also § II 4: "The refusal of the patient to participate in a study must never interfere with the physician-patient relationship"); (ii) "When obtaining informed consent for the research project the physician should be particularly cautious if the subject . . . may consent under duress. In that case the informed consent should be obtained by a physician who is not engaged in the investigation and who is completely independent of this official relationship" (§ I 10).

234 See also 6 2 5.

235 8 7.

236 Cf *Castell v De Greef* (1994) 425.

237 Cf Smit 1975 *THRHR* 262 266; Burchell 1978 *SALJ* 203; Laufs and Uhlenbruck 364 760; Leenen 241.

238 4 7 7, 6 2 6 2, 7 7, 7 8 and 8 3 1 1; cf 7 6 2, 8 8 2, 10 3 7 and 19 2 6; cf § I 9 of the Helsinki Declaration, which provides that "[the patient] should be informed that he or she is . . . free to withdraw his or her consent to participation at any time".

7 PARTIES INVOLVED

Finally, the *Guidelines* express the view that investigators are responsible for procuring the research subject's informed consent, but add that it may sometimes be appropriate to appoint "a special informed person to act as an independent source of information and advice".[239] The services of witnesses may also be obtained, especially with elderly research subjects and research subjects who are capable of consenting but who have intellectual or cultural difficulties in understanding or speech.[240]

8 CONCLUSION

It is clear from the aforegoing that consent and information are fundamental to and essential for lawful and ethical medical research. Since medical research impacts most directly on the research subject's rights and freedoms, this is how it should be. And since the potential benefit of therapeutic research for the research subject may be seen as some form of compensation for the latter's participation in the research project, and the potential for abuse in medical research, particularly in instances of non-therapeutic research, can hardly be denied, the distinction between therapeutic and non-therapeutic research has a role to play in ensuring and protecting the research subject's personal autonomy. What is less than clear, however, are the detailed rules of informed consent in medical research, which are often as controversial as they are inconsistent, vacillating as they do between concern for and emphasis on individual autonomy, the research subject's best interest, the interests of society and the advancement of science. With the revision of both the Declaration of Helsinki and the MRC's *Guidelines* under way, one hopes that the medical profession will succeed in ironing out the most pressing problems in, and removing the most glaring anomalies from, the current versions' provisions on informed consent to medical research. Clearer and more consistent guidelines on informed consent in the aforementioned codes of conduct will not only render the task of medical researchers an easier one, but will also assist, as a manifestation of the mores of the medical profession, in shaping the law of informed consent in medical research.

BUTTERWORTHS-PRYS 1999

Die Butterworths-prys vir die beste eerstelingbydrae is toegeken aan E Bonthuys *vir haar artikel "Familiar discourses of parenthood".*

239 8 3 1 and 8 3 1 4; cf, however, Burchell 1978 *SALJ* 204, who rejects the proposition that the best person to procure the research subject's informed consent is an independent investigator, because "the mere fact of his objectivity, desirable as it may be, could mean that the quality of his information concerning the investgation is imperfect"; Furrow, Greany, Johnson, Jost and Schwartz 1205.

240 8 3 1 and 8 1 3 5.

Ontwikkeling: 'n "reg" daarop as moontlike aandrywing vir die Afrika-*renaissance*?*

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> "Our country is going through a revolution. It is experiencing a national renaissance. . . . we are charged with the responsibility of safeguarding an accelerated as well as sustainable social, economic and cultural renaissance . . ." (Thabo Mbeki, 1995)

SUMMARY

Development: a "right" to development to drive the African *renaissance*?

This contribution contains some thoughts on the question of development as a possible stimulus for an African *renaissance*. Among the difficulties facing any renascence of the African continent are the contradictions of globalisation. Although the process of globalisation moulds interaction between people and countries across borders, it has a highly destabilising side as well. Under discussion as well is the extremely nuanced nature of the concept of "development". The purpose of the Constitution of the Republic of South Africa 1996 was the creation of a democratic socio-political order. The Constitution is a value-laden document and the question is posed whether the values inscribed in the Constitution can act as an instrument for development towards social justice and security for the people of South Africa. These thoughts lead as a matter of course to a discussion of the question whether one should not argue that a separate (independent) right to development is indispensable for the notion of development. The position in international law provides the backdrop for the answer to the question. Although one finds a reference to the right to development in the South African bill of rights (as a corollary to environmental rights) the conclusion is nevertheless that a separate right to development is uncalled for and that development as such should be subsumed under the traditionally known fundamental rights.

1 KONTEKS: DIE TEENSTRYDIGHEDE VAN GLOBALISERING EN DIE IMPAK OP MENSLIKE ONTWIKKELING

> "The real wealth of a nation is its people. And the purpose of development is to create an enabling environment for people to enjoy long, healthy and creative lives. This simple but powerful truth is too often forgotten in the pursuit of material and financial wealth."

Met dié enigsins idealistiese gedagte het die Verenigde Nasies sy heel eerste *Human development report* tien jaar gelede ingelui.[1] Hierdie opmerking behoort beoordeel te word teen die dramatiese veranderinge op feitlik alle lewensterreine wat die laaste dekade van die twintigste eeu kenmerk. Op die geo-politieke terrein byvoorbeeld het

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1 *Human Development Report* (1990) 1.

die "demokratiese revolusies"[2] in sentraal- en oos-Europa gelei tot die ineenstorting van kommunistiese/marxistiese regeringstelsels en die vestiging van demokrasie. Volgens Klare het sodanige postkommunistiese demokrasieë 'n duidelike "institusionele struktuur" bestaande uit vier basiese komponente: verteenwoordigende politieke instellings, vrye markte en fundamentele regte waarborge, wat op hulle beurt almal gegrondves is op die outonome heerskappy van die reg ("rule of law").[3] Demokratiese revolusies was ook aan die orde van die dag in Latyns-Amerika, Asië en Afrika.[4] Trouens, daar is al gesê dat demokrasie of 'n proses van demokratisering die sentrale element is in die poging om die nuwe politieke orde te bevestig en te regverdig.[5] Maar demokrasie is nog altyd 'n kontensieuse begrip en kontroversie ontstaan veral rondom die vraag of daar 'n natuurlike verband is tussen demokrasie en menslike ontwikkeling. Die vraag word dus gestel of demokrasie 'n onontbeerlike voorwaarde vir ontwikkeling is of "do the causal processes run the other way?"[6] Die kontroversie word op die spits gedryf deur die argument dat die demokratiseringsproses deur ekonomiese markkragte gedryf word, dus deur kapitalistiese vryemarkbeginsels:

> "[W]e are not dealing here with an abstract or broad concept of democracy but rather a particular type of democracy which facilitates rather than challenges the machinery of domination of the new world order, with the latter based on the free market and global economic integration."[7]

Hierdie globalisering is nie net beperk tot 'n internasionalisering en integrering van die ekonomie nie, maar ook van die tegnologie (insluitende inligtingstegnologie), kultuur en (staats)bestuur en regering ("governance").[8] Die globaliseringsproses fatsoeneer toenemend die interaksie tussen lande en mense oor nasionale grense heen. In dié opsig is globalisering positief, vernuwend en dinamies. Maar hierdie proses het ook 'n skadukant – negatiewe, ontwrigtende en marginaliserende aspekte wat hulself manifesteer in toenemend gefragmenteerde produksieprosesse, arbeidsmarkte, politieke entiteite en gemeenskappe.[9] Van hierdie negatiewe implikasies van globalisering skryf Rosemary Coombe as volg:

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2 Klare "Legal theory and democratic reconstruction: reflections on 1989" 1991 *University of British Columbia Rev* 69.

3 Klare (vn 2) 70.

4 Potter "The democratization of third world states" in Allen en Thomas *Poverty and development in the 1990s* (1992) 273–290.

5 Bartolomei "The globalization process of human rights in Latin America versus economic, social an(d) (sic) cultural diversity" 1997 *Int J of Legal Information* 156 158. Ook Slinn "Guest editor's introduction: law, accountability and development" 1992 *Third world legal studies* ix x en 1999 *Human Development Report* 9 30 ev. Sien ook Chua "Markets democracy, and ethnicity: toward a new paradigm for law and development" 1998 *Yale LJ* 1 9–10 vn 28.

6 Leftwich (red) *Democracy and development* (1996) 5. Die betrokke publikasie word juis grootliks gewy aan die verwikkelde verhouding tussen demokrasie en ontwikkeling. Sien ook Barsh "Democratisation and development" 1992 *HRQ* 120 en die bronne deur hom aangehaal. Asook Roederer "'Living well is the best revenge' – if one can: an invitation to the creation of justice off the beaten path: a review of James McAdams (ed) *Transitional justice and the rule of law in new democracies*" 1999 *SAJHR* 75 veral 77 vn 5.

7 Bartolomei (vn 5) 158.

8 (Staats)bestuur en regering ("governance") tel onder die aspekte van 'n demokratiseringsproses. Ook regering ("governance") is 'n betwiste begrip. Die Wêreldbank bv omskryf "governance" as "the manner in which power is exercised in the management of a country's economic and social resources for development" *Governance and development* (1992) 1.

9 Oor die negatiewe en positiewe aspekte van die globaliseringsproses sien veral "Human development in this age of globalization" in *Human Development Report 1999* (1999) 25–56.

> "The global restructuring of capital and the intensified flows of capital, goods, imagery, people, and ideas has shaken the authority of nation states, cast cultural differences into sharp relief, and undermined the capacity of governments to deal with social welfare concerns ... Globalisation *takes place* [haar beklemtoning]: it is a process with spatial co-ordinates that links and relates particular places through flows of people, information, capital, goods and services ... globalisation has effectively marginalised and excluded millions of people."[10]

Hierdie marginalisering en uitsluiting van mense word geopenbaar in 'n skeiding tussen 'n kerngroep van professionele persone "who are 'hooked up' to the global corporate economy" en 'n etniese en kulturele diverse buitekant/rand/marge van persone vir wie dit al hoe moeiliker en selfs onmoontlik word om polities en op ander wyses te organiseer ten einde die kern waarvan hulle "limited forms of security" afhanklik is, te beïnvloed.[11] Ook in interstaatlike verhoudings word dieselfde marginalisering teëgekom en wel in die "noord-suid skeiding"; in die kloof tussen die ontwikkelde, geïndustrialiseerde lande en die ontwikkelende lande (tradisioneel bekend as die sg derdewêreldlande) wat die afgelope dekade steeds dieper geword het.[12]

Maar die vraag is: Wat moet onder (menslike) ontwikkeling teen hierdie agtergrond verstaan word?

2 DIE GENUANSEERDHEID VAN DIE BEGRIP "ONTWIKKELING"

Soos alle begrippe met 'n normatiewe, waardegelade komponent is dit moeilik om aan die begrip "ontwikkeling" inhoud te verskaf – dit beteken verskillende dinge vir verskillende mense en die konteks waarin die begrip "ontwikkeling" gebruik word, beïnvloed die betekenis daarvan en die benadering daartoe wesenlik. Die problematiek rondom die begrip word besonder raak saamgevat in die volgende stelling: "[B]ecause of the diversity of actors and cultural differences in the development process, development is a complex and, in many ways, an ambiguous term."[13] In die sielkunde is die gedagte van die ontwikkeling van die persoonlikheid (dus individuele ontwikkeling) dié grondbegrip. Jung, die Switserse psigo-analis, lig die

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10 "The cultural life of things: anthropological approaches to law and society in conditions of globalisation" 1995 *Am Univ J of Int L and P* 791 796. Vir Coombe is "global capitalrestructuring" ten beste 'n ondeursigtige ("opaque") frase wat poog om 'n veelheid van fenomene in te sluit, fenomene soos die opkoms van 'n wêreldwye onderling verbinde ekonomie, die verspreiding van fabrieksprodusering na aanhoudende verskuiwende gebiede in die wêreld (grootliks vanaf eerste- na derdewêreld-gebiede), die vermenigvuldiging van uitvoerprosesseringsgebiede in state met groot skuldelaste wat onder druk is van beide die Wêreldbank en die IMF, die toenemende "vervrouliking" ("feminisation") van die wêreld se vervaardigingsarbeidsmark, nuwe migrasiepatrone en die ontwikkeling van 'n wêreldwye netwerk van fabrieke, dienspunte ens. Boonop word hierdie prosesse bestuur vanuit toenemend minder plekke – die stede wat die vloei van arbeid, goedere, inligting en kapitaal wat die "ekonomie" genoem word, domineer (797–801).

11 *Idem* 803. Sien ook Bartolomei (vn 5) 158 ev. Mary Robinson, die VN kommissaris vir menseregte plaas hierdie werklikheid van globalisering in reliëf: "We still have widespread discrimination on the basis of gender, ethnicity, religious belief or sexual orientation and there is still genocide – twice in this decade alone. There are 48 countries with more than one fifth of the population living in what we have grown used to calling 'absolute poverty'". *The Times* 1997-11-06.

12 Sien *infra* meer hieroor by die bespreking van die betekenis van die begrip "ontwikkeling".

13 Nanda "The right to development: an appraisal" in Nanda *et al* (reds) *World debt and the human condition: structural adjustment and the right to development* (1993) 41 47.

grondbegrip soos volg toe: "The achievement of personality means nothing less than the optimum development of the whole individual human being" en verder: "Personality is the supreme realization of the innate idiosyncracy of a living being."[14] Dit is egter sy kwalifisering van die ontwikkeling van die persoonlikheid, naamlik: "Personality as the complete realization of our whole being, is an unattainable ideal. But unattainability is no argument against the ideals, for ideals are only signposts, never the goal",[15] wat moontlik dié belangrikste insig is vir die ondersoek na ontwikkeling.

Hoeseer die psigiese welsyn en behoeftes van die mens vir die ontwikkeling van sy/haar persoonlikheid belangrik is, is sy/haar fisiese behoeftes en welsyn noodsaaklik vir oorlewing. Dit is in hierdie konteks dat 'n magdom omskrywings van en teorieë oor ontwikkeling, veral op die terrein van die ekonomie, teëgekom word. Ontwikkeling word byvoorbeeld in die "hoofstroomekonomie" gelykgestel aan ekonomiese groei, dus basiese materiële welstand.[16]

Een van die punte van kritiek teen die beskouing van ontwikkeling as ekonomiese groei is dat dit so 'n eendimensionele siening van ontwikkeling is. Die praktyk het byvoorbeeld getoon dat ekonomiese groei nie outomaties lei tot 'n algemene verhoging in individuele lewenstandaard nie. Deur slegs op ekonomiese groei te konsentreer, word 'n normatief/etiese moment in ontwikkeling negeer. Ontwikkeling is oneindig meer kompleks as net ekonomiese groei. Hierdie basiese feit word juis bewys deur die beskrewe proses van globalisering met al hoe meer mense op die marge, ten spyte van ekonomiese groei. Selfs 'n breër benadering tot die ekonomie (onder die vaandel van die ontwikkelingsekonomie waardeur ekonomiese ontwikkeling in samehang met veral politieke faktore beoordeel word), plaas steeds te veel klem op ekonomiese groei en ekonomiese produktiwiteit ten koste van die mens.[17] Haq (die ontwerper van die *Human Development Report*) artikuleer hierdie waarheid gepas:

> "In country after country, economic growth is being accompanied by rising disparaties, in personal as well as in regional incomes. In country after country, the masses are complaining that development has not touched their ordinary lives. Very

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14 "The development of personality" *Collected works 17* in Storr *Jung: selected writings* (1983) 191. In *Memories, dreams, reflections* (1974) skryf hy: "I have frequently seen people become neurotic when they content themselves with inadequate or wrong answers to the questions of life. They seek position, marriage, reputation, outward success or money, and remain unhappy and neurotic even when they have attained what they were seeking. Such people are usually confined within too narrow a spiritual horizon. Their life has not suffient content, sufficient meaning. If they are enabled to develop into more spacious personalities, the neurosis generally disappears. For that reason the ideal of development was always of the highest importance to me." (162). Terloops, dat juis Jung se siening van die ontwikkeling van die persoonlikheid gekies is, is miskien ironies. In Masson se *Against therapy* (1988) wat 'n skerp aanval teen psigiatrie en psigiaters is, word in "Jung among the Nazis" 134 ev 'n baie bleek prentjie van Jung as psigiater geskets. Nietemin, vir die nodige konteks vir die begrip van ontwikkeling is Jung se verduideliking steeds geldig.

15 *Collected works* (vn 21) 196.

16 Ekonomiese welstand word gesien as 'n verhoging in welvarendheid wat gemeet word dmv standaardmaatstawwe soos die bruto nasionale produk (BNP) en bruto huishoudelike produk (BHP). Sien Thomas en Potter "Development, capitalism and the nation state" in Allen en Thomas (vn 4) 116 117–118.

17 Sien in die algemeen vir 'n oorsig van hierdie denkrigting Meier (red) *From classical economics to development economics* (1994) veral sy eie bydrae "From colonial economics to development economics" 173 en ook Reynolds "Government and economic growth" 226.

> often, economic growth has meant very little social justice. It has been accompanied by rising unemployment, worsening social services and increasing absolute and relative poverty."[18]

In reaksie op hierdie werklikheid[19] (die onvermoë van ekonomiese groei om die armoede in ontwikkelende lande te lenig) sien die laat sewentigerjare 'n klemverskuiwing ten aansien van ontwikkeling by ekonome wat getipeer kan word as "menslike-behoeftesgerigte ontwikkeling" of soos Haq dit beskryf "need-oriented strategies".[20] Oorvereenvoudig, kom die basiese behoeftes strategie/benadering daarop neer dat ontwikkeling fokus op die noodsaaklikheid om te verseker dat elkeen in 'n bepaalde samelewing toegang het tot voldoende basiese benodigdhede en dienste ten einde 'n lewenstandaard bo 'n basiese minimum te handhaaf.[21] 'n Weerklank van hierdie benadering word ook gevind in die internasionale verdrag oor ekonomiese, maatskaplike en kulturele regte ("International Covenant on Eeonomie, Social and Cultural Rights" (ICESCR)) wat deel uitmaak van die "internasionale menseregte-akte".[22] Wat belangrik is ten aansien van dié klemverskuiwing is dat prominensie aan die mens-in-ontwikkeling verleen word – "the ultimate objective of development must be to bring about sustained improvement in the well-being of the individual and bestow benefits to all".[23]

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18 *The poverty curtain: choices for the third world* (1976) 24.

19 Haq se stelling moet beskou word in die geopolitieke, ideologiese en ekonomiese konteks van die vestiging van 'n nuwe wêreldorde ná die Tweede Wêreldoorlog, nl die kapitalistiese "eerste wêreld", die sosialistiesc (kommunistiese) "tweede wêreld", (ontwikkelde lande) en die "derdewêreld" – die sg onverbonde oftewel ontwikkelende lande. Hedendaags word die begrippe "noord" en "suid" geredeliker gebruik as die "ontwikkelde" en "ontwikkelende" lande. Dus het die verwysing na die noord-suid skeiding en botsing grootliks die tradisionele onderskeid tussen die sg eerste wêreld en derde wêrcld vervang. Sien hieroor McGrew "The third world in the new global order" in Allen en Thomas (vn 4) 255 ev vir 'n bespreking van die "end of the third world" agv die beëindiging van die koue oorlog in 1990 en die impak van globalisering. Ginther "The domestic policy function of a right of peoples to development: popular participation a new hope for development and a challenge for the discipline" in Chowdhury, Denters en De Waart (reds) *The right to development in international law* (1992) 61 wys daarop dat geargumenteer is dat die oorbrugging van die gapende kloof tussen die ontwikkelde en ontwikkelende lande in die sestigerjare beskou is as 'n ekonomiese aangeleentheid "of transfer of financial and technical resources from North to South". Ontwikkeling is dus gelykgestel met ekonomiese groei (62). Die redenasie word ook gereflekteer in die aanname van 'n VN-resolusie wat die dekade sestig tot eerste *UN Decade of Development* verklaar het. VN Res A/1710 (XVI) en A/1715 (XVI), 1961-12-19. Worsley "How many worlds?" 1979 *Third World Quarterly* 100 beskryf die oorspronklike kenmerk(e) van die "derde wêreld" as volg: "What the Third World was, then, is clear: it was the non-aligned world. It was also a world of poor countries. Their poverty was the outcome of a more fundamental identity: that they had all been colonised" (102).

20 (Vn 18) 68 ev.

21 Vir 'n volledige uiteensetting van die basiese behoeftes-benadering tot ekonomiese groei sien die ILO-publikasie *Employment, growth and basic needs, a one-world problem* (1976). Ook Streeten *et al First things first: meeting basic needs in developing countries* (1981) 3–45. Dit is onduidelik oor presies wat basiese behoeftes is, maar dit is nietemin moontlik om die wesentlikes onder hulle te identifiseer: voedsel, water, gesondheidsdienste, onderwys en beskutting. Die ooreenkoms met sosio-ekonomiesc regte is van meer as verbygaande belang.

22 (1966). Saam met die "Universal Declaration of Human Rights" ("UDHR") van 1948 en die International Covenant on Civil and Political Rights" van 1966 ("ICCPR"). Die basiese behoeftes wat in die ICESCR geïdentifiseer is, sluit in voedsel, beskutting en onderwys.

23 Par 7 van die VN *International Strategy for Development* (VN Res 2626 (XXV). 1970-12-24) waardeur die sewentigerjare as tweede internasionale ontwikkclingsdekade verklaar is. In die

vervolg op volgende bladsy

Inderdaad kan geargumenteer word dat dié benadering 'n brug is na volledige mensgerigte ontwikkeling ("people-centred development").[24] Die fundamentele doel van mensgerigte ontwikkeling word omskryf as 'n proses om die omvang van die mens se keuses te verbreed – hoewel

> "[i]n principle, these choices can be infinite and can change over time. But at all levels of development, the three essential ones are for people to lead a long and healthy life, to acquire knowledge and to have access to the resources needed for a decent standard of living. If these essential choices are not available, many other opportunities remain inaccessible".[25]

Drie noodsaaklike voorwaardes staan egter sentraal tot die gedagte van mensgerigte ontwikkeling: gelyke geleenthede vir alle mense van 'n gemeenskap, volhoubaarheid van sodanige geleenthede van een geslag tot die volgende en veral bemagtiging van die mense sodat hulle deelneem aan en voordeel trek uit die proses van ontwikkeling.[26]

Dus is die begrip "ontwikkeling" veel meer uitgebreid en hou dit veel meer in as óf die grondgedagte van die sielkunde (die ontwikkeling van die menslike persoonlikheid) óf teorieë oor en benaderings tot ekonomiese ontwikkeling (oa die voldoening aan die mens se fisieke behoeftes). Dié gedagte word erken in die volgende uitgebreide omskrywing van ontwikkeling:

> "[D]evelopment is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom . . ."[27]

3 SUID-AFRIKA: DEMOKRATISERING EN DIE WEKROEP TOT 'N *RENAISSANCE*

Suid-Afrika staan nie langer geïsoleerd van al die verwikkelinge nie. Trouens, ná Suid-Afrika se eerste demokratiese verkiesing en daarstelling van 'n demokratiese regering in 1994 kan gesê word dat die land dieselfde demokratiese revolusie ondergaan het as die lande van oos- en sentraal-Europa, Latyns-Amerika, Asië en sekere Afrikastate.[28] Die nalatenskap van apartheid intensiveer egter die probleme

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sewentigerjare het die VN ook, bedag op die ekonomiese probleme van die ontwikkelende lande, die *Declaration on the Establishment of a New International Economic Order* (Res 3201 (S-VI), 1974-05-01), die *Programme of Action on the Establishment of a New International Economic Order* (Res 3202 (S-VI), 1974-05-01) en die *Charter of Economic Rights and Duties of States* (Res A 3281 (XXIX)) aangeneem.

24 Sien oa Ginther "The domestic policy function of a right of peoples to development: popular participation a new hope for development and a challenge for the discipline" in Chowdhury *et al The right to development in international law* (1992) 60 73 ev. Ook Owen en Sampson "The role of the African voluntary development organization within a new development paradigm" *Latitudes – African Voluntary Development Organizations* (1999) 2 ev.

25 *Human Development Report 1995* 1 11 ev. In die verslag word bygevoeg: "[H]uman development thus has two sides. One is the formation of human capabilities – such as improved health, knowledge and skills. The other is the use people make of their acquired capabilities – for productive purposes, for leisure or for being active in cultural, social and political affairs. If the scales of human development do not finely balance the two sides, much human frustration can result" (*ibid*).

26 (Vn 25) 1.

27 "Voorrede" tot die VN *Declaration on the Right to Development* aangeneem op 1986-12-04. UN GA Res 41/128.

28 Oor die Suid-Afrikaanse demokratiseringsproses is al volumes geskryf. Sien daaroor oa Van Wyk "Introduction to the South African Constitution" in Van Wyk *et al Rights and constitutionalism:*

vervolg op volgende bladsy

geassosieer met globalisering. Die diverse buitekant of marge van persone op wie globalisering 'n negatiewe impak het of selfs geen impak het nie, is besonder wyd. Dié waarheid word in skerp reliëf geplaas wanneer die 1999 *Human Development Report* bestudeer word. Volgens die verslag beklee Suid-Afrika wat menslike ontwikkeling betref die 101ste plek (uit 174 lande).[29] Dié statistiek vertaal in 'n beklaenswaardige gebrek aan menslike ontwikkeling in die land. Daarbenewens plaas die verspreiding van VIGS 'n haas ondraagbare las op die Suid-Afrikaanse regering, gemeenskap en huishouding op die sosio-ekonomiese terrein en hou dit 'n gevaar in vir die nuwe demokrasie.[30]

President Thabo Mbeki se wekroep vir die oplossing van die veelvuldige probleme wat die Suid-Afrikaanse samelewing (trouens die hele Afrikakontinent) konfronteer, is 'n Afrika-*renaissance*.[31] Presies wat onder hierdie *renaissance*

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the new South African legal order (1994) 131–171 en die bronne daarin aangehaal. Vir 'n beoordeling van die proses uit die hoek van die politieke wetenskap, sien Giliomee "Democratization in South Africa" 1995 *Pol Sci Q* 83. Vir die demokratiseringstendense in die res van Afrika sien Kwakwa "Governance, development and population displacement in Africa: a call for action" 1995 *African Yearbook of Int Law* 17 21 ev. Ook Quashigah "Protection of human rights in the changing international scene: prospects in sub-saharan Africa" 1994 *RADIC* 93 99 ev.

29 *Human Development Report 1999* (vn 3). Ten einde menslike ontwikkeling te monitor, is 'n sg "human development index (HDI)" ontwikkel wat "achievements in the most basic human capabilities – leading a long life, being knowledgeable and enjoying a decent standard of living" reflekteer (127). Kortom, "[t]he HDI measures the overall achievements in a country in three basic dimensions of human development – longevity, knowledge and a decent standard of living. It is measured by life expectancy, educational attainment (adult literacy and combined primary, secondary and tertiary enrolment) and adjusted income" (*Human Development Report 1998* 15). Saam met die "HDI" word sedert 1997 'n "human poverty index (HPI)" wat armoede in beide geïndustrialiseerde en ontwikkelende lande meet, gepubliseer. Van die "HPI" word gesê: "[It] is a multidimensional measure of poverty. It brings together in one composite index the deprivation in four basic dimensions of human life – a long and healthy life, knowledge, economic provisioning and social inclusion" (*Human Development Report 1999* 130). Die veranderlikes wat gebruik word om die verwaarlosing ("deprivation") in ontwikkelende lande (aangedui as "HPI-1") te bepaal, is: die persentasie mense wat 'n lewensverwagting van minder as 40 jaar het; die persentasie ongeletterde volwassenes asook die persentasie mense sonder toegang tot gesondheidsdienste en veilige water én die persentasie ondergewig kinders onder die ouderdom van vyf jaar (*ibid*). Vir ontwikkelende lande lei die afwesigheid van 'n "suitable indicator and lack of data" daartoe dat die indeks nie verwaarlosing in "social inclusion" (dit is langtermyn werkloosheid) kan reflekteer nie (*ibid*). Die verskil tussen HDI en HPI word as volg beskryf: "The HDI measures progress in a community or country as a whole. The HPI measures the extent of deprivation, the proportion of people in the community who are left out of progress" (*Human Development Report 1998* 25). Sien hieroor Ersson en Lane "Democracy and development: a statistical exploration" in Leftwich (vn 6) 45 55–57. Ook Sen "Assessing human development" wat van mening is dat die "HDI" 'n meer sinvolle alternatiewe vorm van die kru bruto nasionale produk (BNP) is (*Human Development Report 1999* 23).

30 *Human Development Report 1999* (vn 3) 20. 1 Desember is jaarliks wêreldvigsdag. Volgens statistiek het 150,000 mense vanjaar in SA aan vigs gesterf en minstens 160,000 is met die HI-virus besmet. Teen 2008 kan die lewensverwagting van mense in SA van 60 jaar tot onder 40 jaar verlaag het. Sien bv "Vigs se ergste nog op pad" *Beeld* 1999-12-01.

31 In *Africa – the time has come* (1998) ('n bloemlesing van 42 van die president se toesprake) is die Afrika-*renaissance* die *leitmotiv* vir die groot verskeidenheid temas wat in die toesprake aangespreek word. Sy wekroep eggo die wense en versugtinge van die grondlegger van die ANC, Pixley ka Isaka Seme. Seme het oa, terwyl hy 'n student aan die Universiteit van Columbia in die VSA was, die George William Curtis-medalje ('n toekenning vir redeneerkuns) in 1906 verwerf met die onderwerp van sy toespraak: "The regeneration of Africa". Vir die teks van hierdie toespraak sien *Seme* by http://www.anc.org.za/ancdocs/history/people/seme.htm

verstaan moet word, lewer sy kwota probleme. Afhangende van die graad van sinisme kan óf gesê word dat dit bloot politieke retoriek is (om die aandag af te lei van al die probleme van veral sub-Sahara Afrika)[32] óf dat dit 'n verbintenis is tot die ontwikkeling, heroplewing en regenerasie van die land en kontinent op alle lewensterreine – nie net ekonomies nie, maar ook maatskaplik, polities en kultureel.[33] Wat ook al die stand van menings gehuldig oor die betekenis en sin van 'n *renaissance* van/vir Afrika, is dit nogtans ongewens om juis as gevolg hiervan die idee van 'n Afrika-*renaissance* nie met erns te bejeën nie. In wese is enige *renaissance* heropbloei, herstel en weeroplewing. Kortom, geen ontwikkeling en vooruitgang, geen *renaissance*.

Die vraag wat daarom krities betrag moet word is, is die volgende: As 'n heroplewing (*renaissance*) in groot mate sinoniem met ontwikkeling en vooruitgang is, behoort 'n reg op ontwikkeling nie daarom dié dryfkrag vir en aandrywing van 'n Afrika-*renaissance* te wees nie? Die Grondwet van Suid-Afrika[34] word noodwendig as invalshoek gebruik. Op stuk van sake is die aanname, sertifisering en inwerkingtreding van die 1996-Grondwet die einddoel van die proses om 'n demokratiese sosio-politieke orde in Suid-Afrika tot stand te bring. Staatsregtelik

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32 Sien bv Parmanand "The African renaissance, morality and law: messianic manna or political pipe-dream?" lesing gelewer by die SA kongres van regsdosente: *African renaissance and the teaching of law* (1999). Ook Egan "Fear and philosophising in SA" *Mail and Guardian* 1999-03-12 wat geskryf het: "But some might argue that such a project could simply be a 'front': a comfortable and comforting discourse to plaster over socioeconomic cracks; a way of bolstering the interests of a 'patriotic bourgeoisie', a new ruling elite whose only difference from the former is that they are black."

33 Dat die heropbloei van Afrika 'n wydlopige en holistiese proses moet wees, blyk veral uit die Chantilly-toespraak gelewer in die VSA in April 1997. Onder die titel "Africa's time has come" gepubliseer in *Africa* (vn 16) 200 ev maak Mbeki gewag van die *renaissance* op politieke gebied. Dit vereis die vestiging van werklike en stabiele demokrasieë met die gepaardgaande uitroei van korrupsie en die aandrang op die gedagte van deursigtigheid en toerekenbaarheid. Op die ekonomiese gebied moet Afrika 'n proses van ekonomiese hervorming in die werk stel ten einde buitelandse beleggings te lok. Op die maatskaplike terrein vra die mense van Afrika 'n "beter lewe" – die voldoening aan die mens se basiese behoeftes (werk, maatskaplike hulp, opvoeding, gesondheid en boweal die verligting van armoede). "We should no longer allow the situation where the world records growth and development, and Africa communicates a message of regression and further underdevelopment" (204). Egan (vn 17) stel die positiewe aspekte van die Afrika-*renaissance* as volg saam: "[I]nevitably this means both building greater self-esteem among all Africans (black and white) and restoring the values of liberty, community and democracy." Sien ook Qwelane "Will the sleeping giant that is Africa ever awaken?" *Sunday Times* 1999-11-28. Dit is interessant om daarop te let dat koerantberigte, simposia en konferensies gewy aan die een of ander aspek van die Afrika-*renaissance* vanaf vroeg in 1994 tot hede ± 1,500 optekeninge beloop (inligting verkry van die Instituut vir Eietydse Geskiedenis, Bloemfontein – 1999-09-27).

34 108 van 1996. Die (finale) Grondwet het op 1997-01-24 in werking getree (Prok R6/1997 in *RK* 17737 1997-01-24). Sien Chaskalson en Davis "Constitutionalism, the rule of law, and the first certification judgment: *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)" 1998 *SAJHR* 430 vir 'n bespreking van die konstitusionele proses aan die hand van die *First Certification*-saak. (In die artikel verskyn ook 'n bibliografie van inligting oor die geskiedenis van die grondwetlike transformasieproses.) Slegs die Engelse teks van die Grondwet is formeel deur die grondwetgewende vergadering aanvaar. Die gevolg is dat net die Engelse teks van die Grondwet die gesaghebbende weergawe van die Grondwet van Suid-Afrika is. Botha *Wetsuitleg: 'n inleiding vir studente* (1997) 87. In hierdie artikel word die nie-amptelike vertaling wat deur die grondwetgewende vergadering aangevra en goedgekeur is, gebruik.

het die 1996-Grondwet Suid-Afrika omvorm tot 'n ware grondwetlike staat oftewel (materiële) regstaat.[35]

Hoe akkommodeer die Grondwet egter ontwikkeling? Vrae wat in die verband na vore tree. is die volgende:

- Is daar enige ontwikkelingsdoelwitte in die Grondwet "ingebou"? Anders gestel, kan daar geargumenteer word dat 'n noodsaaklike voorwaarde vir die vergestalting van die waardes ingebed in die Grondwet ontwikkeling is?
- Lê die Grondwet 'n plig op die regering om aktief betrokke te wees of te raak by ontwikkeling?
- Kan uit die Grondwet 'n reg op ontwikkeling afgelei word? Trouens, hoef daar sprake te wees van 'n reg op ontwikkeling?

4 ONTWIKKELING EN DIE GRONDWET VAN DIE REPUBLIEK VAN SUID-AFRIKA

4 1 Waardes beliggaam in die Grondwet as instrument vir ontwikkeling en positiewe pligte op die staat

Kenmerkend van enige regstaat is dat dit gestut word deur fundamentele waardes (dit is ook moontlik om hierdie waardes as die ideale te beskryf waartoe die politieke gemeenskap homself/haarself verbind het) en 'n inherente gebondenheid van die staatsgesag aan hierdie waardes.[36] Hierdie waardegelade bepalings dien terselfdertyd as "guiding principles for the state's self-realisation and the promotion of the common weal of its people".[37] Noodwendig beteken dit ook dat by die uitleg van die Grondwet enige hof en ander interpreteerder van die Grondwet nooit meer neutraal kan wees nie – waarde-oordele moet gemaak word (dus 'n doeldienende benadering tot die Grondwet).[38] Die waardes wat in die 1996-Grondwet ingeskryf is, vind hulle samehang en bestaansreg in "die ongeregtighede van ons verlede" soos dit eufemisties in die voorrede gestel word, asook die aanvaarding van erkende internasionale regsnorme.[39] Dit is waardes wat weliswaar op die oog af diametraal

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35 Wiechers "Grondslae van die moderne *Rechtsstaat*/foundations of the modern *Rechtsstaat*" 1998 *THRHR* 624 630 wys daarop dat dit nie uitdruklik in die 1996-Grondwet gestel word nie. Sien ook CJ Botha *Waarde-aktiverende grondwetuitleg: vergestalting van die materiële regstaat* ongepubliseerde LLD-proefskrif Unisa (1997) 48–52 vir die onderskeiding tussen die formele en die materiële regstaat.

36 Sien H Botha "The values and principles underlying the 1993 Constitution" 1994 *SAPR/L* 233. Ook CJ Botha "Maatskaplike geregtigheid, die 'animering' van fundamentele grondwetlike waardes en regterlike aktivisme: 'n nuwe paradigma vir grondwetuitleg" in Carpenter (red) *Suprema lex: Essays on the Constitution presented to/opstelle oor die Grondwet aangebied aan Marinus Wiechers* (1998) 57 59.

37 Wiechers (vn 35) 625.

38 Ferreira "Grondwetlike waardes en sosio-ekonomiese regte met verwysing na die reg op 'n skoon en gesonde omgewing" 1999 *TSAR* 285 en die bronne deur hom aangehaal. Ook CJ Botha (vn 36). Ook Liebenberg "Socio-economic rights" in Chaskalson *et al Constitutional law for South Africa* (1998) 41 met verwysing na 'n "purposive approach" 14–12.

39 Oa die internasionale menseregte-akte. Sedert Suid-Afrika se "hertoetrede" tot die wêreldgemeenskap het die land van die belangrikste internasionale menseregte-instrumente ratifiseer, oa die *International Covenant on Civil and Political rights (ICCPR), International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Prevention and Punishment of the Crime of Genocide, Convention on the Rights of the Child, Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Convention Against*

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in opposisie tot mekaar staan (bv gelykheid teenoor vryheid, die individu teenoor die groep, beperkte regering teenoor meer uitgebreide regering, sentralisasie teenoor desentralisasie, ens) en dus potensieel tot konflik tussen dié kompeterende waardes kan lei.[40] Nietemin, as 'n "kollektief" is die waardes gerig op die transformasie van die Suid-Afrikaanse samelewing tot 'n "oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid".[41] Dus dié waardes wat daarop gerig is om

> "[d]ie verdeeldheid van die verlede te heel en 'n samelewing gegrond op demokratiese waardes, maatskaplike geregtigheid en basiese menseregte te skep; . . .
>
> [d]ie lewensgehalte van alle burgers te verhoog en die potensiaal van elke mens te ontsluit; . . ."[42]

Gegewe dat die *leitmotiv* van die Grondwet die heling van die ongeregtighede van die verlede is, is dit dan ook verstaanbaar dat die uitskakeling van alle vorms van benadeling in die Grondwet resoneer.[43] Die klem van die waardes beliggaam in die Grondwet val dus ten sterkste op die algemene welsyn van al die mense van Suid-Afrika, juis om "die lewensgehalte van alle burgers te verhoog en die potensiaal van elke mens te ontsluit". Dié aspekte wat aansluiting vind by die onmisbare voorwaardes vir mensgerigte ontwikkeling: gelyke geleenthede vir almal, volhoubaarheid van sodanige geleenthede en veral bemagtiging van die mense sodat hulle deelneem aan en voordeel trek uit die proses van ontwikkeling.

Die verbintenis tot die transformasie van die Suid-Afrikaanse samelewing tot een waarin "menswaardigheid, gelykheid en vryheid" aan die orde van die dag is, verg 'n bepaalde "werkswyse/taktiek" (of soos Klare dit noem, 'n "transformative constitutionalism").[44] Hy bepleit in die verband 'n "postliberale" interpretasie van die Grondwet, omdat (so skryf hy) die Grondwet juis kenmerke besit wat skerp

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Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention Relating to the Status of Refugees. Hoewel SA die *International Covenant on Economic, Social and Cultural Rights (ICESCR)* onderteken het, is die *ICESCR* nog nie geratifiseer nie. Vir 'n bespreking van die belang van die internasionale menseregte-akte in die besonder en volkereg in die algemeen vir die "nuwe" Suid-Afrika sien Dugard "Public international law" in Chaskalson *et al* (vn 38) 13–1–13–12.

40 H Botha (vn 36) 238–241. Ook Swanepoel "Dialectical tensions in the Constitution" in *Constitution and Law Seminar Report* (1997) 13–15.

41 A 1 (hfst 1 van die Grondwet, die "grondliggende bepalings") lui: "Die RSA is een, soewereine, demokratiese staat gegrond op die volgende waardes: (a) Menswaardigheid, die bereiking van gelykheid en die uitbou van menseregte en vryhede. (b) Nie-rassigheid en nie-seksisme. (c) Die oppergesag van die grondwet en die heerskappy van die reg. (d) Algemene stemreg vir volwassenes, 'n nasionale gemeenskaplike kieserslys, gereelde verkiesings en 'n veelparty-stelsel van demokratiese regering, om verantwoordingspligtigheid, 'n responsiewe ingesteldheid, en openheid te verseker." Sien ook a 7(1) wat bepaal dat die handves van regte 'n hoeksteen van die demokrasie in SA is en die demokratiese waardes van menswaardigheid, gelykheid en vryheid bevestig. Ook a 36(1) (die beperkingsbepaling) wat oa bepaal dat enige reg in die handves slegs beperk kan word in die mate waarin die beperking redelik en regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid. Ook a 39(1)(a) (die uitlegbepaling) wat vereis dat die waardes wat 'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid ten grondslag lê, by die uitleg van die handves reg bevorder moet word.

42 Voorrede van die Grondwet.

43 Liebenberg "Socio-economic rights" in Chaskalson *et al* (vn 39) 41–12.

44 "Legal culture and transformative constitutionalism" 1998 *SAJHR* 146. Sien ook H Botha *The legitimacy of law and the politics of legitimacy: beyond a constitutional culture of justification* ongepubliseerde LLD-proefskrif UP (1998) 401 ev.

afwykings toon van 'n tradisioneel liberale grondwet. Die Grondwet is naamlik "*social, redistributive, caring, positive,* at least partly *horizontal, participatory, multicultural*, and *self-conscious* (sy beklemtoning) about its historical setting and transformative role and mission".[45] Die verbintenis tot transformasie is onder meer veranker in die uitdruklike erkenning van sosio-ekonomiese regte en kulturele regte[46] in die menseregte-akte, benewens die tradisionele politieke en burgerlike regte. Dié erkenning van "maatskaplike" regte is ten nouste verbind aan 'n "substantiewe opvatting van gelykheid".[47] 'n "Substantiewe opvatting van gelykheid" kom, oorvereenvoudig gestel, neer op gelyke geleenthede vir almal en is in die naskrif tot die Interimgrondwet beskryf as "'n toekoms wat gevestig is op die erkenning van . . . ontwikkelingsgeleenthede vir alle Suid-Afrikaners, ongeag kleur, ras, klas, geloof of geslag". In die taal van ontwikkeling en globalisering kom dit dus neer op bemagtiging van mense op die marge. Klare verwoord sy insig in substantiewe ("herverdelende") gelykheid as volg:

> "The Constitution envisages equality across the existential space of the social world, not just within the legal process. Implicit is an understanding that foundational law is not and cannot be neutral with respect to the distribution of social and economic power and of opportunities for people to experience self-realization."[48]

Ten einde bestaansbeveiliging en bestaansekerheid, dit wil sê maatskaplike geregtigheid én menswaardigheid (én, kan 'n mens byvoeg, uiteindelik ontwikkeling) van die individu te realiseer, is dit eintlik vanselfsprekend dat die Grondwet op die staat positiewe of bevestigende ("affirmative") pligte lê:

> "These values [substantiewe menswaardigheid, gelykheid en vryheid] have a hollow ring when divorced from their economic and social context. Concern for the material and social context of human life is thus integral to the development of a jurisprudence that gives effect to the underlying purposes and values of the Constitution."[49]

Die Grondwet maak ook uitdruklik voorsiening vir positiewe onderneming. So lui artikel 2 byvoorbeeld: "Hierdie Grondwet is die hoogste reg van die Republiek; enige regsvoorskrif of optrede daarmee onbestaanbaar, is ongeldig, en *die verpligtinge daardeur opgelê, moet nagekom word* (my beklemtoning)." Kortom, die Grondwet maak daarvoor voorsiening dat die staat as ondernemer èn voorsiener optree, en derhalwe dat die staat 'n aktiewe rol behoort te en moet speel in die transformasie van die gemeenskap deur byvoorbeeld toegang tot regte te verwesenlik. Dit verteenwoordig 'n wegbeweeg van die "tradisionele" opvatting oor regte; dat hulle slegs negatief afdwingbaar is daar die individu net beskerm word teen enige inbreukmaking op sy/haar regte eerder dat enige positiewe aanspraak op regte

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45 153.

46 Bv aa 22 (vryheid van bedryf, beroep en professie), 23 (arbeidsverhoudinge), 24 (omgewing), 26 (behuising), 27 (gesondheidsorg, voedsel, water en maatskaplike sekerheid), 29 (onderwys), 30 (taal en kultuur) en 31 (kultuur-, godsdiens- en taalgemeenskappe).

47 Klare skryf "By *substantive equality* I mean equality in lived, social and economic circumstances and opportunities needed to experience human self-realization." (vn 44) 154 vn 15. Sien ook Van der Vyver "Gelykberegtiging" 1998 *THRHR* 370 en H Botha (vn 44) 401ev met oa verwysing na a 9(2) (die regstellende-aksie-bepaling as kwalifikasie van gelykheid).

48 154.

49 Liebenberg (vn 43) 41–13. Ook Klare wat skryf: "It (die Grondwet) imposes positive or affirmative duties on the state to combat poverty and promote social welfare, to assist people in authentically exercising and enjoying their constitutional rights, and to facilitate and support individual self-realization" (154).

ter sprake is.[50] Pieterse skryf byvoorbeeld oor 'n positiewe plig van die staat (in die konteks van die reg op lewe as die mees fundamentele reg van alle regte) : "[I]t can be argued that the right, in order to be meaningful, should also compel a state to create and maintain circumstances in which the right may be exercised to its fullest capacity."[51] Dit kan aangevoer word dat die rol van die staat as ondernemer en bemagtiger verskillende vorme aanneem of in verskillende kategorieë verdeel kan word.[52] Terloops, dié betrokke aspek verdien 'n afsonderlike artikel waarin ondersoek ingestel word na die mate waarin die staat wel sy grondwetlike pligte nakom of nagekom het wat betref die omvorming van die Suid-Afrikaanse samelewing tot 'n "highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private sphere'".[53] Volledigheidshalwe word nietemin 'n voorbeeld of twee verskaf om die punt te illustreer aan die hand van die grondwetlike voorskrif van artikel 7(2) wat vereis dat die staat die regte in die handves van regte moet eerbiedig, *beskerm, bevorder en verwesenlik* (my beklemtoning).[54] Eerstens kan gewys word op die regstellende aksie-bepaling (die kwalifisering van die reg op gelykheid).[55] Subartikel 9(2) lui:

> "Gelykheid sluit die volle en gelyke genieting van alle regte en vryhede in. Ten einde die bereiking van gelykheid te bevorder, kan wetgewende en ander maatreëls getref word wat ontwerp is vir die beskerming of ontwikkeling van persone, of kategorieë persone, wat deur onbillike diskriminasie benadeel is."[56]

Dus plaas die regstellende aksie-bepaling 'n sterk positiewe verpligting op die staat ten einde gelykheid te verseker. Daar word verder ook van die staat vereis om "redelike wetgewende en ander maatreëls" te tref om: die omgewing te beskerm[57] binne sy beskikbare middele; toestande te skep wat burgers in staat stel om op 'n billike grondslag toegang tot grond te verkry;[58] toegang tot geskikte huisvesting vir

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50 Carpenter "The right to physical safety as a constitutionally protected human right" in Carpenter (red) *Essays* (vn 36) 139 143 en die bronne daar aangehaal.

51 "Cases and comments: A different shade of red: socio-economic dimensions of the right to life in South Africa" 1999 *SAJHR* 372 373. Ook Metz "Turning religion's shield into a sword" 1998 *Yale LJ* 271.

52 Sien Carpenter (vn 36) 143–145, Liebenberg (vn 39) 41–31 ev, H Botha (vn 36) 401 vn 6–9. Sien ook De Waal, Currie en Erasmus *The bill of rights handbook* (1999) 417 (oor sosio-ekonomiese regte).

53 Klare (vn 44) 150.

54 Liebenberg verskaf die volgende indeling van pligte van die staat: (a) die plig om die regte te "beskerm"; (b) die plig om die regte te "bevorder en te verwesenlik"; (c) verpligtinge wat betref optrede en wat betref gevolge ("obligations of conduct and result"); (d) regte wat verpligtinge oplê wat betref gevolge ("rights imposing obligations of result"); (e) regte wat verpligtinge wat betref optrede oplê ("rights imposing obligations of conduct") 41–31 ev.

55 A 9.

56 Die Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 is na intense openbare debat deur die Parlement aangeneem op 2000-02-02.

57 A 24(b). Wetgewing hieroor aangeneem is die Wet op Nasionale Omgewingsbestuur 107 van 1998. Die lang titel lui: "Om voorsiening te maak vir samewerkende omgewingsbestuur deur die daarstelling van beginsels vir die besluitneming oor aangeleenthede rakende die omgewing, instelllings wat samewerkende bestuur sal bevorder en prosedures vir die koördinering van omgewingswerksaamhede wat deur staatsorgane uitgeoefen word . . ." Sien *infra*.

58 A 25(5). Wetgewing hieroor aangeneem is die Wet op Ontwikkelingsfasilitering 67 van 1995. Die lang titel bepaal oa: "Om buitengewone maatreëls in te voer om die implementering van

vervolg op volgende bladsy

burgers in toenemende mate binne sy beskikbare middele te verwesenlik;[59] en toegang tot gesondheidsorgdienste, voldoende voedsel en water asook maatskaplike sekerheid, met inbegrip van gepaste maatskaplike bystand.[60] Liebenberg kategoriseer dié laasgemelde groep as sou hulle 'n verpligting tot sekere optrede op die staat oplê – om redelike stappe te doen om in toenemende mate die regte te realiseer.[61] In hierdie opsig aard hierdie bepalings na beleidsriglyne (die sg "directive principles" soos teëgekom in die grondwette van onder meer Indië en Namibië). Dié ooreenkoms met beleidsriglyne lê die probleem bloot wat tradisioneel met "maatskaplike" regte (trouens, ook wat betref waardes) geassosieer word, naamlik dat wanneer 'n hof 'n oordeel oor hulle vel, op onaanvaarbare wyse in die domein van die uitvoerende en wetgewende gesag betree word – dat dit neerkom op die skending van die leerstuk van skeiding van magte:

> "Because they are positive rights – claims by individuals and groups to the delivery of goods by government – it has been argued that their application requires the courts to direct the way in which the government distributes the state's resources and is thus beyond the scope of the judicial function."[62]

Word Klare se pleidooi vir 'n "transformative constitutionalism" egter in herinnering geroep, word dit duidelik dat 'n rigiede aanhang van die gedagte van onaanvaarbare betreding van die wetgewende en uitvoerende domein wanneer 'n oordeel oor waardes gevel word, eenvoudig nie langer standhou nie. Dieselfde standpunt geld ten aansien van beleidsoorwegings.[63] Mureinik se voorstel was dat die regering se optrede altyd hersienbaar moet wees ten einde te bepaal of (tav sosio-ekonomiese regte) regeringsoptrede rasioneel én regverdigbaar is.[64] Só 'n werkwyse verteenwoordig en reflekteer die konstitusionale werklikheid wat deur die Grondwet in die vooruitsig gestel word.

Uiteindelik kan volstaan word met die gevolgtrekking dat die Grondwet as sodanig ontwikkelingsgerig[65] en 'n "instrument" vir ontwikkeling is via sy transformerende aspirasies want ontwikkeling is 'n onontbeerlike vereiste vir die regstel

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heropbou- en ontwikkelingsprogramme en -projekte met betrekking tot grond te fasiliteer en te bespoedig . . ."

59 A 26(2). Wetgewing hieroor aangeneem is die Behuisingswet 107 van 1997. Die lang titel lui: "Om voorsiening te maak vir die fasilitering van 'n volhoubare behuisingsontwikkelingsproses . . ." Volgens die aanhef van die wet word erken dat behuising, as voldoende beskutting, 'n basiese menslike behoefte bevredig; dat behuising 'n deurslaggewende deel van geïntegreerde ontwikkelingsbeplanning is; dat behuising 'n sleutelsektor van die nasionale ekonomie is en dat behuising deurslaggewend is vir die sosio-ekonomiese welstand van die nasie. Sien ook Wet op Beskermingsmaatreëls vir Behuisingsverbruikers 95 van 1998.

60 A 27(2).

61 41–34 en sien vn (54) bo. Sy skryf verder: "Sections 26(2) and 27(2) thus play the dual role of defining and limiting the state's positive duties to fulfil the relevant rights. Conceived in this way, these provisions generate constitutional claims to reasonable measures that progressively improve and advance access to the rights" (41–38).

62 De Waal, Currie en Erasmus (vn 52) 420. Ook Liebenberg (vn 39) 41–6.

63 Sien Ferreira (vn 38) 293; Liebenberg (vn 39) 41–8 ev.

64 "Beyond a charter of luxuries: economic rights in the constitution" 1992 *SAJHR* 464 473–474. Ook Michelman "The Constitution, social rights and reason: a tribute to Etienne Mureinik" 1998 *SAJHR* 499 503–504. Sien ook Van Bueren "Alleviating poverty through the constitutional court" 1999 *SAJHR* 52 57–59, 65 ev.

65 Sien bv die opmerking van Chaskalson P in *S v Makwanyane* 1998 1 SA 765 (KH), 1997 (12) BCLR 1696 (KH) para 8–9.

en herstel van veral die sosio-ekonomiese en kulturele skade van die verlede. Die teenkant geld natuurlik ook: 'n noodsaaklike voorwaarde vir die vergestalting van die waardes ingebed in die Grondwet is ontwikkeling. So 'n standpunt bring egter 'n netelige kwessie te berde. Word ontwikkeling as 'n onlosmaaklik mensgerigte allesomvattende proses gesien, word gevra of ontwikkeling noodwendig dan ook moet of kan "vertaal" in 'n gepaardgaande fundamentele reg op ontwikkeling.

5 'N AFSONDERLIKE REG OP ONTWIKKELING?

5 1 Die internasionale perspektief

In die volkereg is ontwikkeling as sodanig al sedert die middel van die sestigerjare die onderwerp van debat en die literatuur daaroor onder die oorhoofse rubriek van "internasionale ontwikkelingsreg" is wyduiteenlopend en omvangryk.[66] Kenmerkend aan die internasionale ontwikkelingsreg is dat dit sterk beïnvloed is deur die realiteit van 'n verdeelde wêreld tussen ryk en arm lande. Die debat het dus 'n sterk morele/normatiewe onderbou gerig op die uitwissing van die ongelykhede tussen lande.[67] Om dié rede argumenteer Slinn dat dit nodig is om internasionale ontwikkelingsreg te verstaan as 'n stelsel wat nie bloot 'n neutrale regulerende raamwerk vir die verhouding tussen state daarstel nie, maar wat terselfdertyd die ontwikkeling van die internasionale samelewing bevorder en verseker deur middel van 'n holistiese, dinamiese en teleologiese benadering tot ontwikkeling. Kortom, die internasionale ontwikkelingsreg is nie neutraal nie, maar 'n proses vir die "constant improvement of the well-being of the entire population and of all individuals . . ."[68] Dat mettertyd ook oor ontwikkeling in die konteks van 'n reg op ontwikkeling gespekuleer sou word, is 'n logiese uitvloeisel van die internasionale reg-en-ontwikkelingsdebat.

In die lig van Afrika se swak ontwikkelingsrekord kan die feit dat stemme vir die erkenning van so 'n reg uit Afrikageledere opgegaan het (weer eens na gelang van die graad van sinisme) óf as logies óf as ironies beskou word. In 1972 het die Senegalese juris, Keba M'baye, die moontlikheid van 'n reg op ontwikkeling geopper en 'n eerste tentatiewe omskrywing van so 'n reg verskaf. Oorvereenvoudig gestel, argumenteer hy dat alle fundamentele regte en vryhede noodwendig aaneenskakel met die reg om te bestaan, met 'n toenemend hoër lewenstandaard en derhalwe met 'n reg op ontwikkeling. Die reg op ontwikkeling is 'n fundamentele reg omdat die mens nie sonder ontwikkeling kan bestaan nie.[69] M'baye se standpunt is slegs sinvol as ingesien word dat daar 'n noue verband tussen regte en

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66 Vir 'n oorsig van ontwikkelinge op hierdie terrein sien bv Tamanaha "The lessons of law-and-development studies" 1995 *Am J of Int Law* 470–486. Vir 'n bestekopname van die huidige stand van sake op die terrein van die volkereg en ontwikkeling (internasionale ontwikkelingsreg) sien Slinn se bydrae in die huldigingsbundel vir Konrad Ginther "The international law of development: a millennium subject or a relic of the twentieth century?" (gepubliseer te word in 2000).

67 Okafor "The status and effect of the right to development in contemporary international law: Towards a south-north 'entente'" 1995 *RADIC* 865 866. Sien ook Flory "Adapting international law to the development of the third world" 1982 *JAL* 12 15 wat skryf : "[I]nternational law for development consists of the principles, rules and institutions for the promotion of harmonious development of international society."

68 Slinn (vn 66) 4–5. Slinn se deurlopende verwysing na die "constant improvement" van die bevolking verwys na die aanhef van die VN se Declaration on the Right to Development.

69 "Le Droit du Developpement comme un Droit de l'Homme" 1972 *Revue des Droits de l'Homme* 503 528–530 en sien ook De Vey Mesdagh "The right to development" 1981 *NILR* 30 33 ev.

ontwikkeling bestaan. Inderdaad vul fundamentele regte en ontwikkeling mekaar in so 'n mate aan dat gesê kan word dat fundamentele regte en ontwikkeling in 'n simbiotiese verhouding tot mekaar staan. Dit is hierdie insig wat ook die samehang behoort te verskaf vir die beoordeling van die Verenigde Nasies se 1986 verklaring oor die reg op ontwikkeling (Declaration on the Right to Development), die primêre volkeregtelike bron vir die erkenning van die reg op ontwikkeling.[70] Daar moet egter in gedagte gehou word dat die deklarasie geen bindende regskrag het nie.

Die verklaring (deklarasie) bepaal: "The human person is the central subject of development and should be the active participant and beneficiary of the right to development."[71] Aan elke persoon word 'n aanspraak verleen om deel te neem aan, by te dra tot en die genot te hê van ekonomiese, maatskaplike, kulturele en politieke ontwikkeling waardeur "all human rights and fundamental freedoms can be fully realized".[72] Dié formulering versterk die gedagte dat 'n noue band tussen ontwikkeling en fundamentele regte bestaan.[73] Trouens, die formulering slaan 'n bres vir 'n argument dat die begrippe ontwikkeling en fundamentele regte in so 'n mate met mekaar verweef en ineengestrengel is dat dit onnodig herhalend is om hoegenaamd 'n reg op ontwikkeling te verklaar. Die gedagte word versterk as daar verder gekyk word na die enigste bindende menseregteverdrag wat die reg op ontwikkeling erken het, naamlik die *African Charter on Human and Peoples' Rights* (*AfCHPR*, ook bekend as die *Banjul Charter*).[74] Artikel 22 van die Banjul Charter lui:

> "1 All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
>
> 2 States shall have the duty, individually or collectively to ensure the exercise of the right to development."

Die argument dat die verklaring van 'n reg op ontwikkeling toutologies is, verkry groter oortuigingskrag langs die weg van die erkenning van die beginsel van die interafhanklike en ondeelbare aard van fundamentele regte in die deklarasie self.[75]

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70 GA Res. 41/120 (1986), aangeneem op 1986-12-04. Altesaam 146 lande het tgv die verklaring gestem, een daarteen (die VSA) en daar was ses weerhoudings.

71 A 2.1.

72 A 1.1.

73 Barsh "The right to development as a human right: results of the global consultation" 1991 *HRQ* 322 325. Ook Quashigah "Protection of human rights in the changing international scene: Prospects in sub-saharan Africa" 1994 *RADIC* 93 99 ev.

74 Sien Patel en Watters *Human rights: fundamental instruments and documents* (1994) 141 vir die teks van die Banjul Charter. Sien ook Rosas "The right to development" in Eide *et al Economic, social and cultural rights: a textbook* (1995) 247 248.

75 In die laat sewentigerjare was die idee in omloop om regte in drie generasies te kategoriseer. Die tradisionele politiek-burgerlike regte is as eerste geslagregte ("blou"-regte) geklassifiseer terwyl die sosio-ekonomiese as tweede geslagregte ("rooi" regte) geklassifiseer is. 'n Reg op ontwikkeling saam met oa die reg op die omgewing en vrede (ook die regte van minderheidsgroepe) is as sg derdegeslag ("groen" regte) byeengebring onder die versamelbegrip "solidariteitsregte". Daar is van die veronderstelling uitgegaan dat hierdie regte nie net die individu toekom en behoort te bevoordeel nie, maar ook groepe individue en dat die realisering van hierdie regte wêreldwye samewerking gebaseer op die gedagte van internasionale solidariteit, vereis. Karl Vasak word allerweë beskou as die "vader" van die gedagte van generasies van regte. Sien oa sy "A 30-year struggle: the sustained efforts to give force of law to the Universal Declaratation of Human Rights" *Unesco Courier*, Nov 1977 29. Ook Rosas "So-called rights of the third generation" in Eide *et al Economic, social and cultural rights* (1995) 243 en die bronne deur hom aangehaal.

Artikel 6(2) bepaal naamlik dat alle fundamentele regte ondeelbaar en interafhanklik ("indivisible and interdependent") is en dat gelykwaardige aandag en dringende oorweging aan die implementering, bevordering en beskerming van burgerlike, politieke, ekonomiese, maatskaplike en kulturele regte geskenk behoort te word.[76] Die idee van die ondeelbaarheid en interafhanklikheid van fundamentele regte verteenwoordig 'n erkenning dat ten einde die "constant improvement of the well-being" van die individu te koester en te realiseer regte nooit geïsoleer van mekaar kan staan nie.

Die interafhanklikheid en ondeelbaarheid van regte reflekteer die aanvaarding van die feit dat daar nie werklik enige konsepsuele verskil tussen burgerlike, politieke, sosio-ekonomiese en kulturele regte is nie. Boonop opereer verskillende regte ook in ondersteuning van mekaar, aangesien die verwesenliking van een reg altyd afhanklik is van die realisering van die ander.[77]

Dit is teen hierdie agtergrond dat die bestaanbaarheid van die reg op ontwikkeling as 'n onafhanklike reg sterk betwyfel moet word. Dit bly steeds 'n vraag in watter mate 'n onafhanklike reg op ontwikkeling kan toevoeg aan bestaande regte. Daarom moet onwikkeling eerder as 'n program gesien word – as 'n sambreelbegrip wat al die ander regte "aandryf".[78] Paul plaas die kwessie van die bestaansmoontlikheid van 'n onafhanklike reg op ontwikkeling in perspektief wanneer hy skryf:

> "While the Declaration is cast in terms of a "Right to Development", it should *not* be read as an assertion of some kind of "right" of states and peoples to enjoy some undefined kind of "development". Rather the right declared is the "inalienable *human* right" of peoples affected by "development processes" to realize existing, universally recognized human rights "*in and through development processes*" and it is the duty of those who control those processes to protect and promote those rights. In this way the doing of development, like the conduct of other public affairs, must be made accountable to the people."[79]

5 2 Skep die 1996-Grondwet 'n reg op ontwikkeling?

In die 1996-Grondwet word "ontwikkeling" gewis in die taal van fundamentele regte gegiet en wel in 'n jukstaposisie van ontwikkeling en die omgewing. Die plasing naas mekaar van ontwikkeling en die omgewing is nie vreemd nie. Die verband is byvoorbeeld beklemtoon in die *Rio Declaration on Environment* wat uitgereik is by

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76 "[A]ll human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political rights, as well as economic, social and cultural rights." Die beginsel van die ondeelbaarheid en interafhanklikheid van regte is bevestig in die "Vienna declaration and programme of action", aangeneem deur die "World conference on human rights" (1993-06-14/25) op 13-06-25 (UN Doc A/Conf 157/23 (1993)). Sien deel I par 5 wat ook die beginsel byvoeg dat fundamentele regte in onderlinge verband met mekaar staan (die "interrelatedness" van regte). Dié siening van regte (die sg "interdependency principle") vervang die konvensionele standpunt dat burgerlike en politieke regte die "hart" van regte vorm, terwyl sosio-ekonomiese en kulturele regte hoofsaaklik geassosieer kon word met normatiewe, ideologiese en leerstellige verwikkelings wat neerslag gevind het in die bevordering en verwesenliking van oa sosiale doelwitte.

77 De Vos "Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution" 1997 *SAJHR* 67 81.

78 Rosas (vn 75) 254–255.

79 "The human right to development: its meaning and importance" 1992 *Third World Legal Studies* 17 33.

die Rio Conference on Environment and Development.[80] Beginsel 3 lui: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

Artikel 24 van die Grondwet (die beskerming-van-die-omgewingsbepaling) lui:

"Elkeen het die reg–

(a) op 'n omgewing wat nie skadelik vir hul gesondheid of welsyn is nie; en

(b) op die beskerming van die omgewing, ter wille van huidige en toekomstige geslagte, deur redelike wetgewende en ander maatreëls wat

(i) besoedeling en ekologiese agteruitgang voorkom;

(ii) bewaring bevorder; en

(iii) die ekologies volhoubare ontwikkeling en aanwending van natuurlike hulpbronne verseker, terwyl dit regverdige ("justifiable") ekonomiese en maatskaplike ontwikkeling bevorder."

Die betrokke artikel is 'n meer genuanseerde weergawe van artikel 24 van die "Banjul Charter"[81] wat bepaal dat alle mense (dus 'n kollektiewe reg) die reg het op 'n "general satisfactory environment favourable to their development". Verder herhaal die artikel ook die sentimente van die Rio Declaration.

Anders as die bepaling in die Banjul Charter is die eerste deel van die reg op die omgewing uitdruklik as 'n individuele reg bepaal. Verder is dit in die ortodokse tradisie van 'n "afweerreg" bepaal – elke persoon het naamlik die reg op 'n omgewing wat nie skadelik vir sy/haar gesondheid of welsyn is nie.[82] Artikel 24(b) dui die noue verband tussen omgewing en ontwikkeling in die gees van die bewoording van die Banjul Charter en die Rio Declaration aan. Hoewel subartikel (b) voorsiening maak vir die beskerming van die omgewing as sodanig[83] word die beskerming voorwaardelik gestel. Daar word naamlik billike (redelike) wetgewende en ander maatreëls vereis vir die beskerming van die omgewing "ter wille van huidige en toekomstige geslagte".[84] By die aanname van wetgewende en ander maatreëls[85] moet die doelwitte geïdentifiseer in die subartikel in ag geneem word: onder meer die bereiking (versekering) van ekologies volhoubare ontwikkeling en

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80 A/Conf.151/Rev.1 1992-06-13. Oor die belang van die Rio Summit sien Beukes "'From destruction to recovery': environmental law, the final Constitution and the impact of international law" 1996 *SAYIL* 96 104.

81 (Vn 77).

82 A 24(a). Oor die trefwydte en inhoud van die reg op die omgewing as sodanig, sien Glazewski en Du Bois "The environment and the bill of rights" *Bill of rights compendium* (1998) 2B–1 2B–16 ev.

83 Glazewski en Du Bois stel dit dat sub-a (b) 'n aanspraak op (vry vertaal) "sekere voorgeskrewe maatreëls vir die beskerming van die omgewing" verskans (vn 82) 2B–16.

84 Die voorsiening vir die beskerming van die omgewing "ter wille van huidige en toekomstige geslagte" bring die gedagte van trusteeskap ("stewardship") van die mens oor die omgewing na vore. Dit is naamlik een van die kenmerke van volhoubare ontwikkeling dat 'n morele plig op elke geslag rus om in die belang van toekomstige geslagte te handel as "opsiener" "ouditeur" van die natuurlike omgewing. Sien Bray "Sustainable development: its significance in the South African legal context" in *Suprema lex* (vn 36) 117 125–127 en bronne deur haar aangehaal. Ook Glazewski en Du Bois (vn 82) 2B–29 ev.

85 Liebenberg "Environment" in Davis *et al Fundamental rights in the constitution: commentary and cases* (1997) 256 261 is van mening dat die "ander maatreëls" oa maatreëls van 'n administratiewe, tegniese, finansiële en opvoedkundige aard insluit. Bray (vn 68) 130 is op haar beurt van mening dat hoewel dit nie duidelik is wat "ander maatreëls" is nie, dit blykbaar nasionale en provinsiale omgewingsbeleid insluit. Sien nou Wet op Nasionale Omgewingsbestuur 107 van 1998.

aanwending van natuurlike hulpbronne, terwyl dit regverdigbare ekonomiese en maatskaplike ontwikkeling bevorder. Met ander woorde, redelike maatreëls moet getref word om regverdigbare ekonomiese en maatskaplike ontwikkeling op so 'n wyse te bevorder dat die volhoubaarheid van die omgewing en die gebruik van natuurlike hulpbronne terselfdertyd verseker word. Soos Liebenberg verduidelik: "This requires a delicate balance which is not always easy to attain, but it is essential to avoid the destruction of the natural bases of human existence and development."[86] Of, om Glazewski en Du Bois te parafraseer, in besluitneming moet sosio-ekonomiese- en omgewingskwessies geïntegreer word deur te vereis dat regverdigbare ekonomiese en maatskaplike ontwikkeling slegs nagestreef kan word as die ontwikkeling met die gestelde doelwitte gepaard gaan.[87] Gegewe die Suid-Afrikaanse werklikheid, is die onbetwisbare spanningsverhouding tussen enersyds die beskerming van die omgewing, en andersyds sosio-ekonomiese ontwikkeling, potensieel problematies. Die uitwys en aanspreek van potensiële probleme is egter nie nou hier ter sake nie. (Dit hou oa verband met die impak van die beperkingsbepaling (a 36) en die vraag of dit moontlik is om 'n hiërargie van waardes in die Grondwet uit te wys.[88]) Die vraag is steeds of die verwysing na "ontwikkeling" in die handves van regte, weliswaar in jukstaposisie met die omgewing, outomaties nou 'n onafhanklike reg op ontwikkeling daarstel. En die antwoord bly negatief, veral as die verwysing na ekonomiese en maatskaplike ontwikkeling in gedagte gehou word. Waarom? Die rede word raak deur O'Manique saamgevat:

> "I would suggest, however, that the term "right" be reserved for entitlements to what is necessary for development. Development as a process is the exercise of the full range of rights; as a goal it is the self-actualization of people through the exercise of their rights."[89]

Dus kan en moet ontwikkeling deurentyd by fundamentele regte inbegryp en onderbring word ten einde onder meer die realisering en uitlewing van fundamentele regte te verseker.

6 SLOT

Wat is uiteindelik te sê? Dit is dikwels te maklik om die "verborge bronne" van 'n land – die mense – te misken. Die daarstelling van 'n regstaat en 'n demokratiese orde het nie, en kon ook nie, oornag die nalatenskap van die apartheidsverlede ophef nie. Onder die talle probleme wat steeds 'n verreikende impak op vele lewensterreine in Suid-Afrika het, is die skromelike ongelykheid en wanbalans wat betref menslike ontwikkeling.[90] "The 'new' South Africa is battling with the problems of

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86 (Vn 31) 261.

87 (Vn 80) 2B–29.

88 Sien Ferreira (vn 40) veral 296 ev, asook Venter "A hierarchy of constitutional values" *Seminar Report: Constitution and the Law* (1997) 17.

89 "Human rights and development" 1992 *HRQ* 78 101.

90 Die regering se eerste *Intergovernmental Fiscal Review 1999* is in September bekendgemaak en dui dramatiese verskille aan. Ingevolge 'n menslike ontwikkelingsindeks wat 'n kwantitatiewe meting van lewenskwaliteit is (dit sluit oa in lewensverwagting by geboorte, onderwys en lewenstandaard) het die Wes-Kaap 'n indeks baie na aan Singapoer en nie ver benede Kanada nie. Daarteenoor is die land se armste provinsie, die Noordelike Provinsie, se menslike ontwikkelingsindeks laer as dié van Zimbabwe (1.7). Sien ook *Business Day* 15-9-1999 se hoofblad-

vervolg op volgende bladsy

the past, the present and the future. Liberation has brought democracy to our country, but has not lessened our problems" stel Wiechers dit raak.[91] 'n Belangrike voorwaarde is dat die eiesoortige behoeftes van die mense van Suid-Afrika en dié van die Afrikakontinent as geheel immer in gedagte gehou moet word. Vir die herlewing/oplewing (regenerasie) van Afrika is ontwikkeling noodsaaklik, maar die doel van hierdie ontwikkeling moet beoordeel word in die lig van die behoeftes van die Afrikakontinent. Weliswaar is die doel van ontwikkeling vir baie geleë in die proses van self-verwesenliking. Vir die oorgrote meerderheid van die bewoners van die Afrikakontinent is die doel van ontwikkeling egter op die basiese vlak van oorlewing en die voldoening aan basiese behoeftes. Om hierdie rede is 'n voortdurende gesprek deur die verskillende rolspelers rondom en oor ontwikkeling deurslaggewend vir 'n werklike besef van die eise, aansprake en veral slaggate wat ontwikkeling tot gevolg het.

[To] justify recourse to the source material of Roman-Dutch law as an indispensable tool to develop the common law in the interests of justice . . . the institutional imagination of this source of law must . . . analyse the source material of Roman-Dutch law, not as "the retrospective rationalisation of law as an intelligible scheme of policy and principle" – the project of rationalising legal analysis in respect of the received body of law and legal understanding – but rather as "the prospective history of law as a history of conflicts among groups, interests and visions".

Professor Derek van der Merwe "Roman-Dutch law: from virtual reality to constitutional resource" in Meaning in legal interpretation *1998* Acta Juridica *117 131–132, quoting from Unger "Legal analysis as institutional imagination" 1996* MLR *1 18*

verslag oor hierdie oorsig. Let daarop dat die *Business Day*-verslag nie meld dat die menslike ontwikkelingsindeks wat verskaf is uit 1991 dateer en dus nie aandui welke veranderings sedert 1994 plaasgevind het nie.

91 1998 *THRHR* 624 631.

Foreigners and socio-economic rights: Legal entitlements or wishful thinking?

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OPSOMMING

Sosio-ekonomiese regte vir vreemdelinge: Afdwingbare regte of wensdenkery?
Menseregte kan nie totaal van geografiese ligging afhanklik gemaak word nie, anders word menslikheid in die toedeel van regte deur burgerskap ('n bloot politieke kategorie) vervang. Hierdie artikel ondersoek die menseregte van vreemdelinge in Suid-Afrika en konsentreer spesifiek op sosio-ekonomiese regte in die nuwe Grondwet.

Dit is 'n erkende internasionale regsbeginsel dat 'n staat burgerskap na goeddunke kan toeken of weier. State kan ook sekere regte alleenlik vir hul burgers reserveer, soos die Suid-Afrikaanse Grondwet inderdaad doen. Ander regte in die Grondwet word egter aan "elkeen" gewaarborg en ons kan aanneem dat sodanige regte ook tot vreemdelinge se beskikking is.

Die sosio-ekonomiese regte in die 1996 Grondwet is geen uitsondering nie. Hierdie regte kan almal op vreemdelinge van toepassing wees en mag verreikende implikasies inhou. Die moontlikheid bestaan egter dat die beperkingsklousule in artikel 36 van die Grondwet strenger teen vreemdelinge ingespan kan word met die gevolg dat 'n direkte beroep op sosio-ekonomiese regte waardeloos sal wees. In sodanige geval kan vreemdelinge steeds op die reg op gelykheid in artikel 9 van die Grondwet staatmaak. Alhoewel burgerskap nie as 'n grondslag van verbode diskriminasie in artikel 9 voorkom nie, beteken dit nie dat daar sonder meer teen vreemdelinge gediskrimineer kan word nie. soos onder andere blyk uit die beslissing van die Grondwetlike Hof in *Larbi-Odam v Member of the Executive Council for Education (North-West Province).*

Hoewel Suid-Afrika 'n arm land is waarin baie burgers in groot ekonomiese nood verkeer, word betoog dat vreemdelinge op ten minste 'n mate van sosio-ekonomiese beskerming aanspraak behoort te kan maak, omdat menseregte inherent die mens weens sy menslikheid, en nie sy burgerskap nie, toekom.

1 INTRODUCTION

Human beings have since the beginning of time chosen to migrate for various reasons.[1] Especially in Africa, there is a long history of migration, dating back to before colonisation and continuing across borders after it. Migration is a feature of international reality which cannot be ignored, and which must not lead to violations of those rights essential to humanity. We cannot make all fundamental

* The author would like to thank Frans Viljoen, who supervised the dissertation upon a chapter of which this article is based.

1 Boswell "Restrictions on non-citizens' access to public benefits: Flawed premise, unnecessary response" 1995 *UCLA LR* ("Boswell") 1505.

rights dependent on geographic location, for if we do, then we run the risk of replacing humanity with citizenship, a mere political category.[2]

Citizenship is an abstract political term used to denote an essential link between a state and its permanent inhabitants.[3] Those who are citizens of a state have a more privileged legal position in that state than those who are not. They enjoy political participation as well as certain civil and political rights which non-citizens do not.[4] In turn, citizenship requires the taking on of obligations and commitments towards the community, which are "difficult to describe but felt and understood by most citizens".[5]

Immigration law and policy around the world generally refer to non-citizens as "aliens". The law futher distinguishes between "legal" and "illegal" aliens. "Legal" aliens are those foreigners who have obtained permanent residence in a country or visiting status to it through official channels, even though they are still not deemed to be part of the general community. "Illegal" aliens, on the other hand, are mostly those who enter a country undocumented or are admitted into the country for a temporary period, but remain there after the period has lapsed.[6] Their "illegality" generally places them in a much more vulnerable position than that of their legal counterparts.[7]

The issue of immigration has in recent years become a very controversial topic in South Africa, where illegal immigration is said to have reached crisis proportions.[8] A wave of xenophobia[9] is sweeping through the country. Aliens are accused of taking away jobs and resources, of contributing significantly to ever-growing rates of unemployment, overpopulation and crime, and of hindering the implementation of the Reconstruction and Development Programme.[10]

There are, in the main, three kinds of foreigner crossing the South African borders: immigrants, refugees and migrants. Immigrants are people who wish to settle in South Africa permanently and who normally follow lawful channels in order to do so. Refugees are people fleeing persecution in their own countries and seeking asylum in South Africa. Migrants, the largest and most problematic

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2 Clarke *Deep citizenship* (1996) ("Clarke") 123.

3 De Waal, Currie and Erasmus (eds) *The Bill of Rights handbook* 2 ed (1999) ("De Waal, Currie and Erasmus") 349. A distinction is sometimes made between the terms "citizenship" and "nationality". "Nationality" is said to imply merely a formal indication of state membership from an international perspective, whereas "citizenship" refers more specifically to the municipal relationship between the individual and his or her state. See Strydom "The theory of citizenship: A reappraisal" 1985 *CILSA* 103 ("Strydom").

4 Strydom 103.

5 *Law Society of British Columbia v Andrews* (1989) 56 DLR (4th) 29 (*per* McIntyre J). Clarke describes citizenship as using personal autonomy and directing it towards the common good in the public terrain.

6 Neuman "Aliens as outlaws: Government services, proposition 187, and the structure of equal protection doctrine" 1995 *UCLA LR* ("Neuman") 1440.

7 Neuman 1452.

8 There are an estimated 3 to 5 million illegal immigrants in South Africa. See Department of Home Affairs *White paper on international migration* GN 529 *GG* 19920 1999-04-01 ("*White paper*") 18.

9 Defined as "[e]xaggerated hostility towards or fear of foreigners" (*Collins dictionary of sociology* (1991) 709, as quoted by Neuman 1428).

10 Reitzes "Immigration and human rights in South Africa" in Crush (ed) *Beyond control: Immigration and human rights in a democratic South Africa* (1998) ("Reitzes") 37–38.

of these groups, are people who come to South Africa in order to participate in the labour market. They have no intention of settling here permanently and are often here illegally.[11]

This article deals with the human rights of these people in South Africa, focusing specifically on the socioeconomic rights guaranteed by the Constitution.[12] Should foreigners be entitled to such rights in a society where the realisation of the socio-economic needs of many citizens is still little more than aspiration? Is it nothing more than wishful thinking to expect government to extend its benevolence to those who are not its subjects in every sense of the word?

2 CITIZENS' RIGHTS

It is a recognised principle of international law that every state is free to decide to whom it will grant citizenship.[13] Once citizenship is granted, the state has certain duties toward its citizens. The relationship between state and citizen is a contractual one, through which the state is obliged to protect the rights of the citizen in return for the right to determine the rules under which those rights may be exercised.[14]

Citizens' rights in the South African Constitution have particular significance in the light of the previous government's abuse of the entitlement to citizenship. While section 20 of the Constitution states that "[n]o citizen may be deprived of citizenship", section 3 provides:

> "(1) There is a common South African citizenship.
>
> (2) All citizens are –
>
> (a) equally entitled to the rights, privileges and benefits of citizenship; and
>
> (b) equally subject to the duties and responsibilities of citizenship.
>
> (3) National legislation must provide for the acquisition, loss and restoration of citizenship."

These constitutional provisions aim to correct years of arbitrary governmental conduct such as the denial of passports, the forcing of citizens into exile, arbitrary deportation, and the like.[15]

Currently, the South African Citizenship Act[16] contains provisions regarding the acquisition, loss and restoration of South African citizenship, accordingly fulfilling the role of legislation envisaged by section 3 of the Constitution.[17] The

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11 Klaaren "Immigration and the South African Constitution" in Crush *op cit* (fn 10) ("Klaaren 'Immigration' ") 56.

12 Constitution of the Republic of South Africa, Act 108 of 1996.

13 Strydom 109–111. Nafziger "The general admission of aliens under international law" 1983 *Am JIL* 804–837 warns that this does not mean that states accordingly have the right to exclude foreigners in all circumstances. Nor does it allow states to deny foreigners all privileges normally associated with citizenship.

14 Reitzes 43.

15 Du Plessis and Corder *Understanding South Africa's transitional Bill of Rights* (1994) 162.

16 Act 88 of 1995.

17 South African citizenship can be acquired by birth, descent or naturalisation (ss 2, 3 and 4 of Act 88 of 1995), and lost through renunciation, acquisition of citizenship of another country by a person who is not a minor, service in the armed forces of an enemy of the Republic during wartime, or deprivation by the Minister of Home Affairs (ss 6–10 of Act 88

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Act does not, however, state anything in relation to the rights, privileges and benefits of citizenship. What exactly are these rights and benefits that South African citizens are equally entitled to enjoy? Is there a discrepancy between citizenship rights and human rights? The notion of human rights is rendered nugatory if it is solely up to the state to bestow such rights, on the same principles on which it grants citizenship, upon whomever it wishes. Making entitlement to human rights subject to the holding of citizenship will have the same result.[18] On the other hand, it is internationally accepted practice to reserve certain rights for citizens alone.

In South Africa the right to stand for Parliament, provincial legislatures and municipal councils is reserved exclusively for citizens by sections 47(1), 106(1) and 158(1) of the Constitution, respectively. Furthermore, the Bill of Rights confers political rights,[19] the right to enter, remain and reside in the Republic,[20] the right to a passport,[21] and freedom of trade, occupation and profession[22] upon citizens alone. Unless such rights are conferred upon non-citizens by legislation, foreigners will not be able to demand the protection afforded by those rights.

All other rights in the Bill of Rights are conferred on everyone. The word "everyone", it can be assumed, includes both citizens and aliens finding themselves in South African territory.[23] Though the Department of Home Affairs contends in its *White paper on international migration*[24] that constitutional provisions relating to everyone cannot always apply equally to illegal aliens, legal residents and citizens alike, it is argued in this article that there is no constitutional indication why all aliens should not in principle be equally entitled to all constitutionally entrenched rights other than those reserved for citizens.

3 ALIENS AND SOCIO-ECONOMIC RIGHTS

3 1 General

Modern society is learning to accept that the benefits of citizenship are not limited to civil and political rights, but include social and economic rights. Social resources like health and education are vital for the citizen's economic efficiency and for furthering his and other citizens' civil and political rights.[25] It is argued that welfare rights are "conceived as a core element of citizenship in Western society"[26] and are "integral to the modern sense of citizenship".[27]

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of 1995). Marrying a foreign citizen does not affect South African citizenship. The provisions regarding deprivation of citizenship may conflict with s 20 of the Constitution, although they may be saved by the limitation clause. Similarly, provisions which allow harsher treatment for one class of citizen or former citizen may be held to be inconsistent with the guarantee in s 3 of the Constitution that all citizens shall enjoy equal rights and benefits. See Klaaren "Immigration" 57–58 and Rautenbach and Malherbe *Constitutional law* (1997) 48–51.

18 Reitzes 44.

19 See s 19 of the Constitution.

20 S 21(3).

21 S 21(4).

22 S 22.

23 De Waal, Currie and Erasmus 29 fn 5.

24 *White paper* 12.

25 Twine *Citizenship and social rights: The interdependence of self and society* (1994) ("Twine") 105.

26 Waldron *Liberal rights: Collected papers* (1993) ("Waldron") 273.

27 Waldron 274.

Whether the entitlement to social and economic benefits should extend to non-citizens is polemical. International human-rights documents conferring such rights upon aliens are not widely ratified,[28] and many states are reluctant to include aliens in social-assistance schemes.[29] Because of the nature of socio-economic rights, their realisation is often dependent on the availability of state resources,[30] and they can therefore not always be guaranteed to the same extent as civil and political rights.[31] Many countries are not in a position to provide adequately for the socio-economic needs of their citizens, let alone those of foreigners in their territory. Furthermore, aliens (especially those of the illegal variety) are often blamed for contributing to socio-economic hardship by taking away jobs and public benefits believed to be rightly due to citizens.[32]

Nowhere has this been a more contentious issue than in the United States, where uncontrolled immigration is popularly believed to contribute to over-crowding, displacement of citizens in the workplace and a rising crime rate.[33] Critics point out that these popular beliefs are empirically, socially and legally unfounded, and ignore the contributions aliens make to the economy.[34] This notwithstanding, growing hostility towards aliens finally culminated in the enactment of state propositions and national legislation severely diminishing the social-assistance claims of both legal and illegal aliens in the mid-1990s.[35] The

28 Henckaerts *Mass expulsion in modern international law and practise* (1995) 58. The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is arguably the most progressive human-rights instrument in this regard, guaranteeing amongst other things that migrant workers shall be afforded equal treatment to nationals with regard to social security, the right to emergency health care, access to educational institutions, vocational training and housing schemes. See also art 8 of the United Nations Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, which determines that aliens lawfully residing in a state should enjoy rights to safe and healthy working conditions, health protection, medical care, social security, social services and education.

29 Many states accordingly expressly exclude foreigners from socio-economic benefits in relevant legislation (*White paper* 13).

30 Twine 111; Eide "Economic, social and cultural rights as legal rights" in Eide, Krause and Rosas (eds) *Economic, social and cultural rights: A textbook* (1995) 22.

31 The assumption that socio-economic rights have more severe budgetary implications than civil and political rights may be criticised for being neither factually accurate nor true to the nature of human rights. See Liebenberg "The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa" 1995 *SAJHR* 359 362; De Vos "Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution" 1997 *SAJHR* 67 ("De Vos") 70–71.

32 Johnson "Public benefits and immigration: The intersection of immigration status, ethnicity, gender and class" 1995 *UCLA LR* 1511.

33 Abriel "Rethinking preemption for purposes of aliens and public benefits" 1995 *UCLA LR* 1599.

34 Legomsky "Immigration, federalism and the welfare state" 1995 *UCLA LR* 1453–1474; Reich "Environmental metaphor in the alien benefits debate" 1995 *UCLA LR* 1594.

35 The Personal Responsibility Act of 1996 makes legal immigrants ineligible to receive certain public benefits, and also tightens restrictions affecting illegal aliens. Certain "unqualified" immigrants are excluded from benefits such as food stamps, unemployment compensation and subsidised housing. All future immigrants are barred from receiving any federal aid for a period of five years after arriving in the country. Only refugees and asylum scekers (for a period of five years after the initial granting of refugee status or asylum), active-duty service members and permanent residents who can prove that they have worked for social-security purposes for at least ten years are not affected by these restrictions. See

continued on next page

harsh effect of this legislation was severely criticised,[36] and a marginal number of benefits were consequently restored by the United States government.[37] The debate, however, seems to be far from over.

South Africa's Constitution differs significantly from that of the United States and most other countries of the world, in that it expressly guarantees socio-economic rights. Broadly two categories of socioeconomic rights are constitutionally entrenched: fully justiciable rights, which are phrased imperatively and without qualification, and so-called "access" rights, which are guaranteed progressively and are restricted by the availability of resources.[38] According to the Constitutional Court, these "access" rights provide, at the very least, protection against improper invasion.[39]

Both categories of socio-economic right are conferred upon all people, without any distinction between citizens and non-citizens. In the light of the fact that several rights in the Constitution are conferred upon citizens alone, one can only conclude that the framers of the Constitution intended that aliens should also be bearers of these socio-economic rights.

It would seem, however, that the government – specifically the Department of Home Affairs – is apprehensive about awarding socio-economic rights to foreigners. The extent to which aliens will succeed in relying upon these rights is anything but clear. Furthermore, various groups of aliens will probably have claims of different merit to different rights in different circumstances. For example, it is much more tolerable from the government's point of view to award social-security benefits to permanent residents than to illegal immigrants.

I turn next to a discussion of the entitlement of aliens to the different socioeconomic rights in the Constitution, where necessary criticising current practices and policy decisions in this regard.

3 2 Fully justiciable socioeconomic rights

Section 26(3) of the Constitution provides:

> "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

If this right is extended to aliens (which on an ordinary reading of the subsection it should be), it might have a profound influence on the way in which deportations are administered. Where deportation under immigration legislation involves eviction, a court order under section 26(3) will be required. Although this obviously

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Hing "Don't give me your tired, your poor: Conflicted immigrant stories and welfare reform" 1998 *Harvard Civil Rights – Civil Liberties Review* ("Hing") 162–167 for a discussion of these and other provisions of the Act.

36 Without social-security benefits, immigrants who become disabled and blind after entering the country may lack resources to meet even their most basic needs. By the same token, refugees and asylum seekers who are not able to meet requirements for citizenship after five years of residing in the United States may face the same hardship. Boswell 1506 points out that restricting legal foreigners' rights to public benefits is unlikely to reduce illegal immigration, which is the evil the legislation seeks to eradicate. See also Hing 182.

37 Hing 168.

38 De Vos 87–91.

39 *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) par 78.

does not prevent the deportation of aliens, it ensures that proper attention is given to surrounding circumstances, and might lead to deportees at least being able to take their possessions with them.[40]

Section 27(3) of the Constitution states that "[n]o one may be refused emergency medical treatment". Commendably, the Department of Home Affairs acknowledged in its *Green paper on international migration*[41] that all aliens, legal or illegal, should be afforded the right to emergency medical treatment, although no detailed provisions to this effect are contained in the Department's subsequent White Paper on the same issue.

Socio-economic rights for children are entrenched in section 28(1) of the Constitution, which provides: "Every child has the right – . . . (c) to basic nutrition, shelter, basic health care services and social services". Like the United Nations Convention on the Rights of the Child, which South Africa has ratified, section 28 does not distinguish between children of citizens and children of foreigners. Where alien children are involved, care must thus be taken that section 28(1)(c) is adhered to.

Furthermore, in terms of section 29(1) of the Constitution, everyone has the right to a basic education. The Department of Home Affairs has indicated that it is not opposed to allowing alien children temporary schooling[42] which complies with this constitutional standard. Recent refugee legislation further extends to refugee children the right to receive the same basic primary education to which inhabitants of South Africa are entitled.[43]

Every detained person is afforded the right to

> "conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment"

by section 35(2)(e) of the Constitution. This surely applies to foreigners held in detention. There is, however, disturbing evidence that these rights are not being realised in practice. A Human Rights Watch report[44] reveals appalling conditions in detention facilities for migrants awaiting deportation. Completely inadequate nutrition, sleeping facilities and sanitary facilities are among the conditions canvassed in the report.[45] This is evidently a gross violation of section 35(2)(e), and must be addressed urgently.

3 3 "Access" rights

Section 26(1) of the Constitution affords everyone a right of access to adequate housing, and section 26(2) provides that the state must take reasonable measures

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40 A recent report by Human Rights Watch, *Prohibited persons: Abuse of undocumented migrants, asylum seekers, and refugees in South Africa* (1998) ("Human Rights Watch report") shows that many illegal immigrants are deported without being afforded the opportunity to collect their property, causing many to return to South Africa. See 10 and 106 of the report. This practice might also be in violation of the right to property embodied in s 25 of the Constitution.

41 *Draft green paper on international migration GG* 18033 of 1997-05-30 ("*Green paper*") 28.

42 *Green paper* 28.

43 S 27(*g*) of the Refugees Act 130 of 1998.

44 See fn 40 above.

45 71–98.

to achieve progressive realisation of this right, within its available resources. Similarly, section 27(1) guarantees everyone the right of access to health care, reproductive-health-care services, sufficient food and water, and social security. Section 27(2) qualifies this right in the same way that the right to housing is qualified by section 26(2). The Refugees Act[46] awards refugees equal basic health services to those enjoyed by citizens.[47] This is commendable, and similar provision should be made for all other foreigners.

It would seem from the Department of Home Affairs Green paper that the Department does not wish to extend any social-welfare benefits (apart from emergency medical treatment and temporary schooling) to anyone other than citizens and permanent residents.[48] No authorities or reasons are cited for this stance, and it is doubtful whether this policy is in accordance with the Constitution. The Social Assistance Act[49] accordingly provides social-security benefits only to citizens, excluding even permanent residents from its application,[50] in apparent conflict with section 27(1) of the Constitution.[51]

3 4 Limitation of socio-economic rights, and the likelihood of successful socio-economic claims by aliens

It is difficult to see how aliens can by definition be excluded from the scope of the socio-economic rights embodied in the Bill of Rights. Similarly, the internal limitations to the "access" rights do not amount to an indication that the rights are restricted in their application to certain people, namely citizens.[52] Within the internal limitations, it would not amount to a violation of the "access" rights if the state fails to realise these rights, owing to the fact that there are genuinely no resources available for the purpose.[53] Even where sufficient resources are available, the state will have to justify the non-extension of socio-economic rights to aliens under the limitation clause.[54] Similarly, had legislation like that passed in the United States been enacted in South Africa, the limitation clause would have had to be used to justify its apparent violation of several socio-economic rights.

The possibility exists that the limitation clause may be used more vigorously against immigrants. It is easily foreseeable that, despite aliens' entitlement to socio-economic rights, the courts and the legislature will favour the socio-economic needs of citizens when deciding on policy in this regard. In the only case before the Constitutional Court to deal with socioeconomic rights so far, *Soobramoney v Minister of Health, KwaZulu-Natal*,[55] Chaskalson P, writing for the majority of the court, acknowledged:

> "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high

46 130 of 1998.
47 S 27(*g*) of the Refugees Act.
48 *Green paper* 28.
49 Act 59 of 1992.
50 See ss 3 and 4 of Act 59 of 1992.
51 Tilley "Are non-nationals entitled to socio-economic rights?" 1998 (3) *ESR Review* ("Tilley") 9.
52 Tilley 8.
53 De Waal, Currie and Erasmus 423.
54 Tilley 9; De Vos 93. See s 36(1) of the Constitution.
55 1998 1 SA 765 (CC).

> level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services."[56]

The majority accentuated the commitment expressed in the preamble of the Constitution to "[i]mprove the quality of life of all citizens".[57] This may be an indication that citizens will be favoured above non-citizens in the progressive implementation of socio-economic rights, despite the fact that those rights in principle belong to "everyone". It has to be borne in mind, however, that a limitation on any right in the Bill of Rights must comply with the criteria set out in section 36 of the Constitution. It is difficult to imagine how a blatantly unreasonable and unjustifiable limitation on the rights of aliens will pass constitutional muster.

4 EQUAL BENEFIT OF THE LAW?

In the event that the socio-economic provisions in the Constitution are interpreted or limited in such a way that aliens cannot use them to claim the benefits they entail, there is another constitutional provision which could assist aliens: the right to equality entrenched in section 9 of the Constitution.[58] This right also belongs to "[e]veryone", irrespective of citizenship. Section 9(1) of the Constitution states:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

This means that, as far as the distribution of socio-economic benefits is concerned, the generally accepted point of view that a society has the right to reserve goods for its citizens alone is limited in its application by the guarantee of "equal . . . benefit".[59]

Subsections (3) and (4) of section 9 further provide that neither the state nor any individual may discriminate against any person on one or more of the grounds listed in section 9(3).[60] Citizenship (or alienage) is not mentioned in this list of prohibited grounds of discrimination. This does not mean, however, that it will be constitutionally sound to discriminate against a person on the basis of alienage. The list of prohibited grounds in section 9 is not exhaustive,[61] and the protection afforded by section 9 can be extended to grounds not mentioned in it[62] if the differentiation in question is based on attributes or characteristics which might potentially impair the dignity of a person, or might have a comparably serious effect. The non-inclusion of alienage in the list means that discrimination on the basis of alienage will not be presumed to be unfair under section 9(5).[63]

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56 Par 8.
57 Par 9.
58 Tilley 9–10.
59 Neuman 1427.
60 These are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
61 S 9(3) prohibits discrimination "on one or more grounds, *including* race, gender, [and so on]" (my emphasis).
62 Kentridge "Equality" in Chaskalson *et al* (eds) *Constitutional law of South Africa* 14–26C. In *Brink v Kitshoff* 1996 4 SA 197 (CC) the Constitutional Court regarded marital status as a prohibited ground of discrimination, even though it was not listed in s 8(2) of the Constitution of the Republic of South Africa, Act 200 of 1993.
63 S 9(5) provides: "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Rather, unfairness will have to be established by examining the impact of the discrimination on the people affected.[64]

Aliens, both legal and illegal, are an extremely vulnerable group. They are often victims of governmental mistreatment, owing to their lack of political power, their unrepresented status and xenophobia in general.[65] Surely alienage deserves equal recognition as a ground upon which unequal treatment should not be allowed.

The Bophuthatswana Supreme Court decided in *Baloro v University of Bophuthatswana*[66] that a moratorium imposed on the promotion of non-South African academic staff at a university violated the right to equality in section 8 of the 1993 Constitution, in that it grossly discriminated against foreigners on the basis of their social origin. The court emphasised that international standards require that lawfully admitted aliens should be afforded treatment which accords with ordinary standards of civilisation.[67]

In *Larbi-Odam v Member of the Executive Council for Education*[68] a regulation which prevented non-citizens from being permanently appointed as teachers was challenged under section 8(2) of the 1993 Constitution. The High Court initially found that, although the regulation amounted to unfair discrimination and bias against aliens, such discrimination was justifiable under the limitation clause and therefore not unconstitutional. Applying the limitation clause, the court found that the oversupply of teachers in South Africa and the consequential forced retrenchment of a large number of teachers justified the preferential treatment of citizens by the respondent.[69]

The Constitutional Court unanimously reversed this decision. Mokgoro J found that aliens who are permanently resident should not be treated differently from citizens when it comes to reducing unemployment.[70] She stressed the vulnerability of aliens as a group[71] and found that differentiation on the ground of citizenship, albeit a non-listed ground, seriously impairs the dignity of foreigners and amounts to unfair discrimination.[72] Although finding that securing employment for South African citizens may in certain circumstances constitute a legitimate government interest,[73] Mokgoro J held that to exclude permanent residents from employment opportunities in the circumstances of the case merely because of their nationality did not amount to a reasonable and justifiable limitation on their right to equality.[74]

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64 *Harksen v Lane* 1998 1 SA 300 (CC) (*per* Goldstone J). See also *Pretoria City Council v Walker* 1998 2 SA 363 (CC) pars 29–30.

65 Neuman 1449.

66 1995 4 SA 197 (B).

67 247E–F.

68 1996 12 BCLR 1612 (B).

69 1631G–1632F.

70 *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC) par 31.

71 Pars 19, 23.

72 Par 19.

73 Par 30.

74 Pars 26–31. Generally on the decision in *Larbi-Odam*, see Klaaren "Non-citizens and constitutional equality" 1998 *SAJHR* 286.

The *Larbi-Odam* decision finally confirms that aliens are entitled to demand equal protection and benefit of the law as a marginalised, vulnerable minority group. It indicates that the Constitutional Court is willing to subject differentiation on the basis of alienage to constitutional scrutiny. It does not indicate the extent of this protection. Klaaren[75] points out that factors such as the alien's ties to the community, the nature of the legal instrument involved, the importance of the purpose of differentiation and the obligations expected of aliens in the circumstances will be taken into account when balancing governmental interests against those of a non-citizen, in the determination whether discrimination against a foreigner is justifiable under the limitation clause. It is also possible that the courts may afford certain categories of alien more generous protection than others.

5 CONCLUSION

It has been argued in this article that aliens are equally entitled to the socio-economic rights entrenched in the 1996 Constitution, as is evident from the way in which the constitutional guarantees of those rights are phrased. In the event that socio-economic rights cannot effectively be enforced on behalf of foreigners, the right to equality may be invoked by aliens. Whether or not discriminatory practices against aliens are justifiable in our open and democratic society will be determined on a case-by-case basis,[76] leaving several questions to be answered. To what extent will the courts limit the right of aliens to enjoy equal benefits? Will illegal aliens be able to demand at least a certain degree of the protection afforded to their legal counterparts? Will such protection extend beyond equal opportunity in the workplace? One can only hope that the answers to these questions will be in the affirmative. After all,

> "aliens are an easy target for political scapegoating. Equal protection . . . must be responsive to this dynamic . . . So long as human beings remain within the sphere of government's power, there must be a minimum level of government's benevolence from which they cannot be excluded."[77]

Millions of South African citizens suffer great socio-economic hardship, which creates uneasiness when one suggests that foreigners should also be entitled to some of the human rights guaranteed by the Constitution. But is it not inherent in the nature of human rights that people are entitled to them solely on account of their humanity? Aliens are human too. They also have ties to the community in which they live, they also have needs, and they also experience suffering. We cannot, in focusing on the rights of South African citizens, lose sight of the rights of our country's population of foreigners. As Chaskalson P stated in *S v Makwanyane*:[78]

> "The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected."

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75 Klaaren "Immigration" 69.
76 *Ibid.*
77 Neuman 1452.
78 1995 3 SA 391 (CC) par 88.

Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court

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"Attempts to evaluate [equality and discrimination] according to legal formulas which incorporate rigid inclusionary and exclusionary criteria are doomed to become increasingly complex and convoluted over time as 'hard' cases become the rule rather than the exception." – Madame Justice L'Heureux-Dube[1]

OPSOMMING

Gelykheid vir almal? 'n Kritiese analise van die gelykheidsregspraak van die Grondwetlike Hof

In die lig van Suid-Afrika se geskiedenis is dit nie verbasend dat gelykheid as een van die kernwaardes van die Grondwet geag word nie. Artikel 9 van Suid-Afrika se 1996 Grondwet waarborg dan ook uitdruklik die reg op gelykheid en verbied diskriminasie op enige grond hoegenaamd. Ten einde reg te laat geskied aan hierdie bepaling is dit dus belangrik om die omvang en betekenis van artikel 9 – soos dit in 'n reeks onlangse sake van die Grondwetlike Hof uiteengesit is – te probeer vaspen en te sistematiseer.

Die Grondwetlike Hof se benadering tot die reg op gelykheid is in 'n groot mate gerig op die toepassing van die verbod op diskriminasie in artikel 9(3) van die Grondwet. Die regters van die hof werwerp die tradisionele liberale benadering tot gelykheid en grond hul analise op 'n substantiewe siening van gelykheid. Volgens hierdie benadering moet die historiese konteks van elke geval in ag geneem word wanneer die hof besluit of 'n spesifieke bepaling teen 'n individu diskrimineer al dan nie. Volgens die hof sal 'n spesifieke bepaling diskrimineer as die bepaling die potensiaal het om die applikant se menswaardigheid aan te tas of om hom of haar op 'n vergelykbare wyse te benadeel.

'n Deurdagte analise van die hof se "gelykheidstoets" maak dit egter duidelik dat die hof se skynbare situering van die gelykheidsanalise binne die konteks van die aantasting van menswaardigheid nie 'n belangrike praktiese invloed op die uitslag van 'n spesifieke saak sal hê nie. Dit is so aangesien die hof die idee van menswaardigheid op 'n retoriese wyse gebruik ten einde substansie aan die gelykheidsanalise te gee. In die praktyk speel die historiese konteks 'n veel groter rol in die hof se gelykheidsanalise.

1 *Egan v Canada* (1995) 124 DLR (4th) 609 642a–b.

1 INTRODUCTION

Given South Africa's long history of institutionalised discrimination, oppression and subjugation of certain groups in society – first in the form of missionary and capitalist colonialism, and later through the ideology of Afrikaner Nationalism and apartheid – it hardly comes as a surprise that South Africa's 1996 Constitution is steeped in the language of equality. In reaction to this history of prejudice, exclusion and discrimination, the 1996 Constitution – like its 1993 predecessor – contains a commitment to reject past hatred and prejudices as a basis of public conduct and decision-making. To this end, the Constitution includes an elaborate equality clause.[2] Equality is therefore viewed as a core value underlying the democratic society envisioned by both the transitional and 1996 Constitutions.[3] The preamble to the 1996 Constitution states that the Constitution is adopted as the supreme law of the Republic in order to "[l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law". The founding provisions in Chapter 1 furthermore state that the Republic of South Africa is one, sovereign democratic state founded on, *inter alia*, the achievement of equality and non-racialism and non-sexism.[4] The Bill of Rights itself affirms that it is "the cornerstone of democracy in South Africa" and that it "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".[5] And apart from the specific equality clause in section 9, courts and other tribunals are also urged to "promote the values that underlie an open and democratic society based on human dignity, freedom and equality" elsewhere in the Bill of Rights.[6]

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2 S 9 of the Constitution of the Republic of South Africa Act 108 of 1996 which states:
"(1) Everyone is equal before the law and has the right to 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."

3 See *Fraser v Children's Court, Pretoria North* 1997 2 BCLR 153 (CC) 161F–162D.

4 S 1(a) and (b).

5 S 7(1).

6 S 36(1) and s 39(1)(a). See generally De Waal, Currie and Erasmus *The Bill of Rights handbook 1998* (1998) 153–154. The transitional Constitution was similarly awash with references to equality. The first paragraph of the preamble spoke of the "need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to exercise their fundamental rights and freedoms". Equality was also inscribed in constitutional principles I, II and V of sch 4 to the 1993 Constitution. S 232(4) stated that the schedules, together with the preface and afterword "shall for all purposes be deemed to form part of the sub-

continued on next page

But what does the equality guarantee really mean? How should section 9 of the Constitution be interpreted in the light of the many possible conceptualisations of equality? The Constitutional Court has now delivered a clutch of decisions in which it attempted to set out in some detail how section 9 should be approached. In this article I will analyse the court's approach to equality critically, and set out a comprehensive scheme for dealing with section 9 enquiries.

2 NON-DISCRIMINATION AT THE CENTRE OF EQUALITY

The Constitutional Court has situated the anti-discrimination principle firmly at the heart of its approach to equality.[7] It has indicated that in order for a claimant to succeed with an equality challenge, it will almost always be necessary to frame the matter as one of "unfair discrimination" and not in terms of a general claim to equality. The court therefore seems to view the guarantee of equality in section 9 as little more than a guarantee of non-discrimination. This means that the way in which the court determines whether an impugned provision constitutes unfair discrimination becomes extremely important. The court has justified its support for a structured focus on non-discrimination as the heart of "implementable equality guarantees" with reference to the text of section 9[8] and with reference to policy considerations. These policy considerations include[9] "institutional aptness, functional effectiveness, technical discipline, historical congruency, compatibility with international practice and conceptual sensitivity".[10] The

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stance of the constitution". See Albertyn and Kentridge "Introducing the right to equality in the interim Constitution" (1994) *SAJHR* 149.

7 The Constitutional Court has dealt with equality in a substantive manner in the following cases: *Brink v Kitshoff NO* 1996 6 BCLR 752 (CC); 1996 4 SA 197 (CC); *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC); 1997 3 SA 1012 (CC); *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC); 1997 4 SA 1 (CC); *Harksen v Lane NO* 1997 11 BCLR 1489 (CC); 1998 1 SA 300 (CC); *Larbi-Odam v MEC for Education (North West Province)* 1997 12 BCLR 1655 (CC); 1998 1 SA 745 (CC); *Pretoria City Council v Walker* 1998 3 BCLR 257 (CC); 1998 2 SA 363 (CC); and *The National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC). All but the last of these cases were actually dealt with in terms of s 8 of the transitional Constitution, but when it finally had the opportunity to deal with equality in terms of s 9 of the 1996 Constitution in *The National Coalition for Gay and Lesbian Equality v Minister of Justice* the court proceeded on the assumption that "the equality jurisprudence and analysis developed by this Court in relation to s 8 of the interim constitution is applicable equally to s 9 of the 1996 Constitution, notwithstanding certain differences in the wording of these provisions" (1530F par 15)

8 See eg *National Coalition* 1530–1533 par 15–19. I shall return to these arguments when I deal with the court's specific analysis of s 9.

9 1571 par 122.

10 1571–72 par 123 (footnotes omitted). Further elaborating on these points, Sachs J remarked as follows: "By developing its equality jurisprudence around the concept of unfair discrimination this court engages in a structured discourse centred on respect for human rights and non-discrimination. It reduces the danger of over-intrusive judicial intervention in matters of broad social policy, while emphasising the court's special responsibility for protecting fundamental rights in an affirmative manner. It also diminishes the possibility of the court being inundated by unmeritorious claims, and best enables the court to focus on its special vocation, to use the techniques for which it has a special aptitude, and to defend the interests for which it has a particular responsibility. Finally, it places the court's jurisprudence in the context of evolving human rights concepts throughout the world, and of our country's own special history."

court – perhaps mindful of the criticism of the concept of equality as "empty", "complex" and "elusive"[11] – has thus made a conscious decision to focus its equality jurisprudence on the concept of non-discrimination. This concept may have seemed less open-ended and indeterminable in nature to the court than a broad guarantee of equality and, Judge Sachs suggests, also provides the court with a framework within which it will be allowed to follow a "disciplined" approach to equality matters. Fearful perhaps of being inundated by cases challenging all sorts of purported inequalities and differentiation in our notoriously disparate society, the court seems to have locked onto non-discrimination as a safe and more or less predictable way of dealing with the very difficult issues of equality with which it has been, and no doubt will continue to be, confronted.

3 THE CENTRALITY OF HUMAN DIGNITY

The judges of the Constitutional Court have unanimously embraced the idea that at its core, the equality guarantee protects individuals' "human dignity". The centrality of "human dignity" for equality jurisprudence was first established in *President of Republic of South Africa v Hugo* where Goldstone J – seemingly following the decision of L'Heureux-Dube J in the Canadian Supreme Court case of *Egan v Canada*[12] – placed human dignity at the heart of the court's equality enquiry.[13] On the face of it, Goldstone seems to suggest that the equality guarantee protects individuals from differentiation based on one of the specified grounds in section 9(3) or differentiation which has the potential to infringe on their fundamental human dignity. Conversely, where differentiation is not based on one of the specified grounds and where it does not have the potential to infringe on a person's fundamental human dignity, there will be no unfair discrimination in terms of section 9(3) of the Constitution. This might strike one as a rather narrow conception of the harm of discrimination, until one notes that the court provided quite a broad and expansive definition of "human dignity". It stated that human dignity will be impaired whenever a legally relevant differentiation treats people as "second-class citizens" or "demeans them" or "treats them as less capable for no good reason," or otherwise offends "fundamental human dignity" or where it violates an individual's self-esteem and personal integrity.[14]

This view of equality as inextricably linked to the concept of dignity has been reiterated in subsequent Constitutional Court judgments[15] and has further been

11 See generally Fagan "Dignity and unfair discrimination: A value misplaced and a right misunderstood" 1998 *SAJHR* 220; and Westen "The empty idea of equality" 1982 *Harvard LR* 537.

12 Of the nine judges in the Canadian Supreme Court, five delivered judgments in this case. L'Heureux-Dube J's judgment was one of four which found discrimination in this case and also did not find any justifiable reason to limit the right. Strictly speaking, her judgment can therefore not be interpreted to be the majority judgment in the case.

13 *Hugo* case 728H–729B, where the court remarked: "The prohibition on unfair discrimination in the interim constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. *At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."*

14 Albertyn and Goldblatt 1998 *SAJHR* 260.

15 *Hugo* par 41; *Prinsloo* par 31–33; and *Harksen* par 50.

elaborated on, most notably in *Prinsloo v Van der Linde.* But in this case the court gave an even more expansive interpretation of when treatment will be discriminatory by adding that not only an infringement of human dignity, but also "other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner" could constitute a harm prohibited by the non-discrimination provisions of the Constitution.[16] Viewed thus, the concept of human dignity employed by the court seems to be closely linked to the idea that all human beings have an equal moral worth, regardless of differences between them.[17] Where this equal moral worth is denied by legal provisions the court will find that there has been an impairment of "fundamental human dignity" or that the complainant has been adversely affected in a comparably serious manner. The concept of human dignity then becomes rather open-ended and, I would argue, should be viewed as a rhetorical device used by the court in an attempt to anchor its equality jusrisprudence in a "fundamental value". The concept of "fundamental human dignity" therefore seems not to operate as a rigid litmus test for determining discrimination, but merely acts as a rhetorical guiding light – a catch-all phrase to capture the idea of humans as equally capable and equally deserving of concern, respect and consideration.[18]

4 EMBRACING SUBSTANTIVE EQUALITY

In its analysis of the equality provision of the Constitution, the Constitutional Court has explicitly rejected the traditional, liberal conception of equality based on the notion of sameness and similar treatment. It has therefore implicitly rejected the Lockean notion (on which the traditional equality approach is based) that humans are all born free and equal and that the harm of discrimination is situated in the failure of a government to treat all humans as equally free.[19] Instead, the court has adopted what I can describe as a "contextual approach" to equality in which the actual impact of an alleged violation of the right to equality on the individual within and outside different socially relevant groups must be

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16 773E 774B. See also *Harksen* 1511G–H ("whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner".)

17 L'Heureux-Dube J's judgment in *Egan*, on which Goldstone relied, explicitly stated that the legal guarantee of equality "means nothing if it does not represent a commitment to recognisc each person's equal worth as human beings, regardless of individual differences" (*Egan* 631a–b). And further on she remarked: "[A]t the heart of s 15 [the Canadian equality provision] is the promotion of a society in which all are secure in the knowledge that they are recognised at law as equal human beings, equally capable, and equally deserving."

18 This formulation was first used by the Canadian Supreme Court in *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 171: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognised as human beings deserving of concern, respect, and consideration."

19 See *Hugo* 729G where Goldstone J remarks: "We need, therefore, to develop a concept of unfair discimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting on identical treatment in all circumstances before the goal is achieved." This view is already clear in the court's endorsement of "human dignity" at the heart of equality jurisprudence, since it is based on the notion that all individuals have equal moral worth, not that all individuals are actually born free and equal.

examined in relation to the prevailing social, economic and political circumstances in the country.[20]

This approach to the constitutional problem of equality is often called substantive – as opposed to formal. The formal approach to equality is usually understood to demand the equal treatment of individuals regardless of their actual circumstances. Formal equality presupposes that all persons are equal bearers of rights within a just social order. According to this view, inequality is an aberration which can be eliminated by extending the same rights and entitlements to all in accordance with the same "neutral" norm or standard. For supporters of substantive equality, a formal conception of equality is a dangerous tool in the hands of the *status quo*. They argue that formal equality is blind to entrenched structural inequality. It ignores actual social and economic disparities between people and constructs standards that appear to be neutral, but which in truth embody a set of particular needs and experiences which derive from socially privileged groups. Reliance on formal equality may therefore exacerbate inequality.[21] Substantive equality, on the other hand, requires courts to examine the actual economic and social and political conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld. Such an inquiry reveals a world of systemic and pervasive group-based inequality, which needs to be taken into account in the formulation of jurisprudential approaches to equality rights.[22]

The court suggested that such a remedial or contextual approach would require it to consider the impact of the constitutionally relevant differentiation on the complainant, taking into account the context in which the complainant finds him- or herself. But how is this context determined? In *Brink v Kitshoff*, the first case in which the Constitutional Court had to deal with an alleged breach of the right to equality, it indicated that this context in which equality must be judged is formed, first of all, by the constitutional text in its entirety and, secondly, by the country's recent history, particularly the systematic discrimination suffered by

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20 *Brink* 768G per O'Regan J; and *Hugo* 729G–H where Goldstone J stated: "Each case . . . will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context." See also Sachs J in *National Coalition* 1565H–1566A: "Human rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centred rather than a formula-based position, and analysing them contextually rather than abstractly." See also Albertyn and Goldblatt 1999 *SAJHR* 255; L'Heureux-Dube "Making a difference: The pursuit of equality and a compassionate justice" 1997 *SAJHR* 335 338–341.

21 Albertyn and Kentridge 1998 *SAJHR* 152–153.

22 In elaborating further on the Constitutional Court's substantive approach to equality – or what he called the "remedial" or "restitutionary" approach – Ackermann J stated the following in *National Coalition for Gay and Lesbian Equality v Minister of Justice*: "It is insufficient for the constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied" (1546 par 60).

black people under apartheid,[23] as well as systematic patterns of discrimination on grounds other than race that have caused (and may continue to cause) considerable harm.[24] Any consideration of whether a legally relevant differentiation actually constitutes a breach of section 9 will therefore first have to take into account the history of the impugned provision as well as the history of the group or groups to which the complainant belongs. Where such provisions contribute to the creation or perpetuation of patterns of group disadvantage for groups disfavoured in the past or groups that continue to be disfavoured in society, it will be very difficult for the court to find the measures constitutional. However, where the legally relevant differentiation is aimed not at the creation or perpetuation of patterns of group disadvantage, but instead is aimed at breaking down those structural inequalities and thus at reaching for "true" or "substantive" equality, the court will be reluctant to declare the measures unconstitutional.[25] Because the court's approach requires a contextual analysis, the ongoing structural inequality in society may therefore be taken into account when deciding on the unfairness of the discrimination.[26]

It may be argued that the court's contextual or remedial approach provides the potential for taking into account the role of law in the creation and maintenance of structural inequalities and disadvantages between groups based on perceived or "real" differences. It acknowledges that inequality results from complex power relations in society and seems to view law as having an important role in reordering these power relations in ways which strive to ensure that all individuals are treated as if they have the same moral worth. Disadvantage here, then, is not equated with different treatment of individuals who are born free and equal, but rather with some harmful impact, direct or indirect, which the differentiation might have on the complainant, where a determination of harm can only be made within the historical context of South Africa.

5 THE CONSTITUTIONAL COURT'S ANALYSIS OF SECTION 9

5 1 Basic structure of the analysis

It is in the nature of laws that they can never provide the same treatment for everyone. After all, statutes and regulations invariably employ classifications of one kind or another for the imposition of burdens or the grant of benefits. The starting point of the Constitutional Court's equality jurisprudence has therefore been that the equality guarantee in section 9 cannot mean that the law must treat everyone equally.[27]

Its analysis of section 9 is therefore aimed at identifying "the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal" or discriminatory "in the constitutional sense".[28]At first, the court was hesitant to lay down any "sweeping

23 768H–J. See also *Walker* 271H–I where Langa DP stated that the assessment of discrimination cannot be undertaken in a vacuum, "but should be based both on the wording of the section and in the constitutional and historical context of the developments in South Africa".

24 769B.

25 769C.

26 *Harksen* par 51(b).

27 *Prinsloo* 769C. See also *Harksen* 1506I–1507A.

28 769F–G, relying on a phrase used by Didcott J in *S v Ntuli* 1996 1 BCLR 141 (CC) par 19.

interpretations" of section 9 and expressed the opinion that equality jurisprudence should be allowed to "develop slowly and, hopefully surely" and on a "case-by-case basis with special emphasis on the actual context in which the problem arises".[29] Yet, drawing particularly on the judgment in *Prinsloo v Van der Linde*, Goldstone J, despite affirming this "cautious approach",[30] tabulated the various stages of any equality enquiry in terms of section 9 in *Harksen v Lane*.[31] In the light of the court's focus on discrimination when dealing with equality claims, it held that section 9 [s 8 of the transitional Constitution] refers to equality in two distinct ways in respectively section 9(1) and 9(3) [s 8(1) and 8(2) of the transitional Constitution]. Although the court stated that it would be neither desirable nor feasible to separate subsection 9(1) and 9(3) into watertight compartments, it nevertheless focused on section 9(1) as dealing with mere differentiation while section 9(3) was earmarked as dealing with unfair discrimination.[32] I shall now describe and discuss these two types of differentiation distinguished by the court.

5 2 "Mere differentiation" – section 9(1)

In *Prinsloo v Van der Linde* the court argued that it would be impossible to govern a modern country like South Africa efficiently and to harmonise the interests of all its people for the common good without differentiation and classifications which treat people differently and impact on them differently. Such differentiations which are necessary to regulate the affairs of a country – called "mere differentiation" – will, according to the court, very rarely constitute unfair discrimination in and of themselves.[33] But even in those cases where "mere differentiation" does not constitute unfair discrimination, it may still fall foul of section 9(1) of the Constitution, as this section guarantees both that everyone is equal before the law and that everyone has the right to equal protection and benefit of the law. According to the court, this means, first, that everybody is entitled, at the very least, to equal treatment by our courts of law, and, secondly, that none should be above or beneath the law and that all are subject to law impartially applied and administered.[34] Section 9(1) therefore makes it clear "that both in conferring benefits on persons and by imposing restraints on state and other action, the state had to do so in a way which results in the equal treatment of all persons".[35] "Mere differentiation" will fall foul of both aspects of section 9(1)[36] if it can be shown that the state did not act in a rational manner when differentiating between individuals or groups of individuals. This means that the state "should not regulate in an arbitrary manner or manifest 'naked

29 770E.
30 *Harksen* 1506D–E.
31 See 1506F–1511D for detailed discussion. See 1511E–1512B for a concise summary of the steps.
32 *Prinsloo* 770I–771B.
33 771D–F. It will not constitute unfair discrimination because it will seldom if ever have the potential of impairing an individual's fundamental human dignity or disadvantage an individual in a comparably serious manner.
34 771B, quoting Didcott in *S v Ntuli* 1996 1 BCLR 141 (CC) par 18. See also *City Council of Pretoria* 272E–F.
35 *National Coalition* 1546 par 59.
36 *City Council of Pretoria* 272F.

preferences' that serve to legitimate governmental purpose". What is required is that the state must function "in a rational manner".[37]

When "applied" to actual flesh and blood cases, this requirement of "rationality" emerges as an extremely stringent test which would be very difficult, if not impossible, for any plaintiff alleging discrimination to overcome.[38] This requirement is made even more apparent by the court's insistence that there is no need for the state or other relevant actors to prove that the objective could not have been achieved in a better or different way in such a case.[39] As long as any "rational relationship" (in other words, the absence of arbitrariness)[40] is demonstrated between the purpose sought to be achieved by the impugned provision and the means chosen by the provision, the court will find that the differentiation does not infringe on section 9(1) of the Constitution.[41] The stringent test employed by the court in section 9(1) analysis makes sense if one recalls the court's commitment to "a structured focus on non-discrimination".[42] The stringency of the test then seems to force complainants to frame their case in terms of section 9(3), that is, as a discrimination complaint.

5 3 "Unfair discrimination" – section 9(3)

As the court sees it, even where there is a rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it, the differentiation might still constitute "unfair discrimination" as envisaged by section 9(3).[43] In *Harksen* the Constitutional Court stated that a determination of whether a differentiation amounts to "unfair discrimination" in terms of section 9(3) will require a two-stage analysis.[44] The court must first determine whether the differentiation in fact amounts to "discrimination"; if it does, whether it amounts to "unfair discrimination". The court therefore distinguishes between "discrimination" and "unfair discrimination", arguing that not all forms of discrimination will be unfair and where it can be proven not to be unfair, will therefore not fall foul of section 9(3).[45]

5 3 1 Step 1: Does the differentiation amount to "discrimination"?

In this, the first of the two stages of analysis, the court must determine whether the differentiation in fact constitutes "discrimination". In *Harksen v Lane* Goldstone further subdivided the enquiry (following the arguments first set out in *Prinsloo*), stating that section 9(3) contemplates two categories of "discrimination"

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37 *Prinsloo* 771F–H.

38 See Mendes "The crucible of the Charter" in Beaudoin and Mendes (eds) *The Canadian Charter of Rights and Freedoms* (1996) 3–20; and Tribe *American constitutional law* (1988) 1442–1443.

39 *Prinsloo* 775A–B.

40 *Harksen* 1513F.

41 *Prinsloo* 776F.

42 See eg *National Coalition* 1530–1432 par 15–19.

43 In *National Coalition* 1532 par 18 the court stressed that the two enquiries need not follow one from the other. The rational connection inquiry would be clearly unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable.

44 *Harksen* 1508A.

45 1508. This distinction and the concomitant two-stage analysis were not employed in the cases preceding *Harksen*. In *Prinsloo* eg the court combined the two stages, or at least, did not identify the two stages (773D–E 774B). See De Waal *Bill of Rights handbook* 166–167.

and that each one should be dealt with by the courts in a different way.[46] The first category is differentiation based on one or more of the sixteen grounds specified in section 9(3), in other words, grounds such as race, sex, gender and sexual orientation. The second category is differentiation on a ground not specified in subsection (3) but analogous to such grounds.[47]

According to the court, whether differentiation has occurred on a specified or an unspecified ground must be determined "objectively".[48] I take this to mean that the court will have to decide whether the differentiation is based on one of the specified grounds listed in section 9(3) – whether the plaintiff is black, or a woman, or a homosexual, for example. Once it has established this "fact", it will be assumed that the differentiation is discriminatory.[49] The process will be "objective" inasmuch as the court will use what it considers to be the uncontroversial and generally accepted understanding of the specified grounds and the characteristics an individual must posses in order to belong to any of the groups associated with the specified ground in order to match the differentiation with that ground. The court will therefore assume the position of a neutral arbiter to determine what it believes to be the self-evident truth about whether a person is black or white, a man or a woman, homosexual or heterosexual.

Where the court finds that the differentiation is not based on a specified ground, it will then have to make an "objective" assessment about two important questions. First, it will have to determine whether the differentiation relates to the unequal treatment of people based on other "attributes and characteristics attaching to them" which are not related to the specified grounds but are nevertheless comparable to them.[50] Secondly, it will have to determine whether this differentiation has the effect of treating persons differently in a way which

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46 *Prinsloo* 772D. The difference between *Prinsloo* and *Harksen* is that in the former the court did not make a distinction between "discrimination" and "unfair discrimination" as it did in the latter.

47 *Harksen* 1508D.

48 1508H–I.

49 1511G. Thus the court here seems to say that in this first stage of the analysis, as soon as it has "objectively" established that the differentiation is based on one of the specified grounds, there will be an irrebuttable presumption that the differentiation is discriminatory. This presumption has been "invented" by the court and should not be confused with the rebuttable presumption which can be employed in the second stage of the analysis as set out in s 9(5). Albertyn and Goldblatt 1998 *SAJHR* 268 criticise this view and argue that it "denudes discrimination of its prejudicial connotations by not requiring that such prejudice be demonstrated". In this view they find support from the dissenting opinion of Sachs J in *City Council of Pretoria* 299C–E, who argues that there can only be a finding of "discrimination" (the first stage of the analysis) if the claimant can prove that he or she had been prejudiced – that there had been "actual negative impact" associated with a specified ground – by the differentiation which was based on one of the specified grounds. He concludes: "The core of my argument at this stage is that the complainant has not made out a case of having suffered *prima facie* discrimination at all. In order to invoke the presumption of unfairness contained in s 8(4) [now s 9(5)] some element of actual or potential prejudice must be immanent in the differentiation, otherwise there is no 'discrimination' to be evaluated, and the need to establish fairness or unfairness has no subject matter" (299D–E). This view was, however, explicitly rejected in the same case by the majority judgment of Langa DP as being contrary to the previous equality decisions of the court (275B).

50 *Harksen* 1509D.

"impairs their fundamental dignity as human beings, who are inherently equal in dignity" or affects a person adversely in "a comparable serious manner".[51] Regarding the first aspect of this enquiry, namely whether the differentiation relates to unequal treatment based on attributes or characteristics attaching to individuals, in *Harksen* the court per Goldstone J cautioned against a narrow definition of these attributes and characteristics and stated that when a court is called upon to make such a determination it will look at whether the differentiation is based on attributes and characteristics comparable in some way or another with those specified grounds:

> "What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted."[52]

I have already discussed the second aspect of this enquiry, namely the impairment of human dignity or a comparably serious disadvantage, and noted the broad and open-ended manner in which the court conceptualises the possible infringement of human dignity of a comparably serious disadvantage. It seems, therefore, as if the court had in mind an open-ended process in which it might discover, over time, more and more differentiations which are not based on specified grounds but which, in its opinion, are based on grounds similar to those specified. At this point of the development of the court's jurisprudence it is too early to tell how it will use this discretion and how it envisages to use the discretion in an "objective" way. From the decided cases it does seem, however, that it will not be too difficult for complainants to prove that a differentiation was based on a characteristic which has the potential to impair their fundamental human dignity or to affect them adversely in a comparably serious manner.[53] In *Harksen v Lane,* for example, Goldstone J found that section 21(1) of the Insolvency Act[54] which differentiates between solvent spouses and other individuals and attaches certain disadvantages to this category, does indeed arise from their attributes and characteristics as solvent spouses.[55] The court concluded – without substantiating its finding further – that this differentiation between solvent and insolvent spouses has the potential to demean persons in their inherent human

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51 1508F–G. In *Harksen* the court quoted the judgment in *Prinsloo* (773C–D 774B–C). However, since it did not employ a "two stage" analysis in *Prinsloo*, the quoted passages relate not to determining "discrimination", but to "unfair discrimination". It appears, therefore, as if the court confused or conflated these two terms – which makes one wonder whether the distinction has any relevance at all.

52 1509E–G.

53 See also Freedman "Understanding the right to equality" 1998 *SALJ* 243 249.

54 Act 24 of 1936.

55 This case was decided in terms of the transitional Constitution which did not directly protect individuals against discrimination based on "marital status". In the 1996 Constitution this ground was added to those already listed in s 8(2) of the transitional Constitution.

dignity. From this, the court concluded that section 21(1) of the Insolvency Act discriminated against solvent spouses on the basis of personal intimacy.[56]

In any event, if the enquiry leads to a negative conclusion, in the sense either that the differentiation is not based on a specified ground or that it is not based on an analogous unspecified ground, then, according to the court's analysis, section 9(3) has not been breached and the question falls away.[57] But what happens if the differentiation has been found to constitute discrimination, on either a specified or an unspecified ground? Once again, the steps to be taken by the court will differ depending on whether a finding of discrimination was based on specified or unspecified grounds.

5 3 2 Step 2: Does the "discrimination" amount to "unfair discrimination"?

When it is found that a differentiation is based on one of the specified grounds and is thus irrebuttably presumed to be "discrimination", it will be rebuttably presumed, for the purposes of section 9(5), that "unfair discrimination" has been sufficiently proved, until the contrary is established.[58] In other words, the complainant must establish that the differentiation is based on one or more of the specified grounds for the (rebuttable) presumption of "unfair discrimination" to take effect. Once this has been established, it then becomes the duty of the other party to rebut the assumption of unfairness and to show that the "discrimination" was in fact fair. This may look like a misnomer, but if one recalls that discrimination in this context has a rather technical meaning – that is, differentiation on one of the grounds specified in section 9(3) – the provision in section 9(5) becomes easier to fathom. But how will the party attempting to defend the constitutionality of an impugned provision be able to prove that the "discrimination" was in fact fair? The Constitutional Court's answer is that it will be able to do so by making use of the same criteria it employs when it has to determine whether discrimination on an unspecified ground is unfair.

Recall that in this second situation, where discrimination has been found to be based on an unspecified ground, the onus will rest on the complainant to prove that the discrimination is unfair. According to the court, the complainant will be able to prove the unfairness of the discrimination in the light of the courts' finding that at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of the Constitution and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. As the court remarked in *Harksen*, the prohibition on unfair discrimination "provides a bulwark against invasions which impair human dignity or which affect people in a comparably serious manner".[59] This remark seems to imply that any determination of the "unfairness" of the discrimination will depend on whether the fundamental

56 1515A–C. O'Regan J, in her dissenting judgment, noted that the differentiation was based on marital status and that this ground, which was not included in the transitional Constitution, is indeed one analogous to the specified ones and that there was therefore discrimination in that case (1522G–1524G).

57 1509B.

58 1508C–D.

59 1510D.

human dignity of the complainant has been impaired.[60] However, in *Harksen* the court, quoting L'Heureux-Dubc J in the *Egan* case, acknowledged that "dignity is a notoriously elusive concept" and that "it is clear that it cannot, by itself, bear the weight" of determining whether the discrimination is unfair or not.[61] The court thcrefore stressed that what is important is that the enquiry focuses on the impact of the discrimination on the victim.[62] In order to determine whether the discriminatory provision has impacted on a complainant unfairly, various factors must be considered including:

> "(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether discrimination in the case under consideration is on a specified ground or not;
>
> (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in first instance, at impairing the complainants in the manner indicated, but is aimed at achieving a worthy goal such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether the complainants have in fact suffered the impairment in question . . .
>
> (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature."[63]

The court reiterated that these factors do not constitute a fixed list and that other factors may emerge as our equality jurisprudence continues to develop. The factors have to be assessed "objectively", taking into account their cumulative effect in order to come to a conclusion whether the discrimination has been unfair or not.[64] Proof of intention to discriminate on the part of those who enacted the impugned provision is not required, although such an intention might be relevant to the court when it makes its "objective" finding about the existence of unfair discrimination.[65]

Here the court seems to suggest that the infringement of "human dignity" or a comparably serious disadvantage will be determined in the context of the impact of the differentiation on the complainant. In order to establish this context, the

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60 Such an interpretation would mean that "human dignity" is employed by the court in both step 1 and step 2 in cases where the differentiation is based on one of the unspecified grounds. This would make the process somewhat strange and at least one of the two steps completely superfluous.

61 See the judgment of L'Heureux-Dube J in *Egan* 106, as well as *The National Coalition* case 1536 par 27. In the latter case the court found that the common-law offence of male sodomy was not only an invasion of the right to equality, but also of the right to dignity and privacy. Regarding the invasion of the right to privacy, the court per Ackermann J argued that the common-law offence of sodomy infringed this right because it attached a stigma to homosexuals and exposed individuals to criminal arrest and prosecution. As such it degraded and devalued gay men and this palpably infringed their right to human dignity guaranteed in s 10 of South Africa's 1996 Constitution. This analysis seems to suggest that the invasion of dignity must be viewed separately from the invasion of equality.

62 *Harksen* 1510E: "In the final analysis it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination."

63 1510F–1511B.

64 1511D.

65 *City Council of Pretoria* 278E–H.

court will look at whether the "victim" of discrimination has suffered in the past from *patterns of disadvantage* and whether he or she belongs to a group that can be deemed particularly vulnerable.[66] It will also look at the nature of the interest adversely affected by the differentiation – the more fundamental the interest affected, the more likely that the "discrimination" will constitute "unfair discrimination". This analysis acknowledges that a determination of "unfair discrimination" cannot be made in the abstract, but must take into account the structural inequality in our society which promotes and perpetuates the subordination of certain individuals and groups in a society.[67]

6 CONCLUSION

Despite its cautious start, the Constitutional Court has now set out a sweeping "test" to be applied in equality cases. The way in which this test is devised, makes it almost impossible to succeed with an equality claim unless such a claim is based on the prohibition of discrimination contained in section 9(3). It is therefore imperative to come to grips with the court's section 9(3) analysis and to understand how this analysis is deeply rooted in the court's acceptance of a substantive idea of equality. The substantive idea of equality requires the court to evaluate discrimination claims within a specific historical, social and economic context and any claim which fails to place its claim within such a context will have little chance of succeeding. However, if the court's analysis is firmly placed within this context, it will become easier to convince the court that the requirements of the equality test developed by it have been satisfied.

> *[W]hereas the outlook of legal scholars used to be philosophical, it is now scientific: like the scientist in his laboratory, they isolate their phenomena and study them under artificial conditions as a means of gaining more detailed knowledge. There is nothing to be said against such a procedure and much to be said for it if the investigator remembers to put his phenomena back in their context. But the proviso is vital, and contemporary jurisprudence largely fails to meet it.*
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> *Iredell Jenkins* Social order and the limits of law: a theoretical essay (1980) 67.

66 *Harksen* 1510F–J: "Section 8(2) [now 9(3)] seeks to prevent unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history." This test was again applied in *Walker* by Langa DP (279–280). In his dissenting opinion in the same case Sachs J also reiterated that "equality is envisaged as something to be achieved through the dismantling of structures and practices which unfairly obstruct or unduly attenuate its enjoyment", before applying the factors set out in *Harksen* (305B–309A).

67 See *National Coalition* 1534 par 22 where Ackermann J further stressed that the harm of discrimination is of a structural nature.

Die historiese grondslae en ontwikkelingsgang van die reg op regsverteenwoordiging in Suid-Afrika – Deel 1*

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SUMMARY

The historical principles and process of development on the right to legal representation in South Africa

The right to legal representation in South Africa has a long history, starting with the Greeks. In ancient Athens every person had to conduct his own case. This was possible because of a lack of formalities and the fact that the procedures were known to all. A movement towards professional legal assistance may be detected and this led to specialisation. The Greek contribution to the development of legal representation is of particular importance as it influenced the origin of Roman legal science to a large extent. Roman law, on the other hand, is the starting point of any historical investigation into South African legal institutions. Contact with the Greeks and the discomfort caused by a prohibition on legal representation eventually resulted in legal advice and assistance being accepted. Roman law influenced South Africa in two ways. First of all, Roman-Dutch law is the link between Roman law and South African law as it developed locally. Secondly, Roman law also influenced English law, which in turn influenced South African procedural law to a large extent. The right to legal representation in South Africa is the result of an evolutionary process spanning approximately 3400 years. The historical development of the right to legal representation indicates a process of gradual change rather than spectacular events. The forces that were active in this process of development are divergent and have their origin in different historical periods, but a continuous link between the contributing factors is evident.

1 INLEIDING

Hierdie artikel behels 'n ondersoek na die historiese ontwikkeling van regsverteenwoordiging as regsinstelling in Suid-Afrika. Die doel is om die historiese grondslae en ontwikkelingsgang van regsverteenwoordiging te bepaal, vas te stel of die gebrek aan verteenwoordiging 'n moderne verskynsel is, 'n verklaringsraamwerk binne 'n historiese perspektief vir die huidige regsposisie daar te stel en om te bepaal hoe die howe regsverteenwoordiging as instelling ontwikkel het. Die artikel word as gevolg van die omvang daarvan in twee dele aangebied. In deel 1 word die posisie in

* Die artikel is gebaseer op 'n gedeelte van die navorsing wat die outeur vir die LLD-graad aan die Universiteit van Stellenbosch onder promotorskap van prof Steph E van der Merwe voltooi het. Die titel van die tesis is "Regsverteenwoordiging as element van regstoeganklikheid". Die outeur spreek ook graag sy dank uit teenoor die SWO van die RGN en die Navorsingskomitee van PE Technikon vir die finansiële bystand wat hierdie navorsing moontlik gemaak het. Die menings wat in die artikel uitgespreek word, is dié van die outeur en nie dié van enige van bogemelde instansies nie.

antieke Griekeland en ingevolge die Romeinse, Romeins-Hollandse en Engelse reg in oënskou geneem. In deel 2 word die reg op regsverteenwoordiging sedert 1652, die ontwikkeling van regsverteenwoordiging deur die howe as instelling en die impak van konstitusionalisering van nader beskou.

2 ANTIEKE GRIEKELAND[1]

In antieke Athene is van elke persoon vereis om sy eie saak te hanteer.[2] Daar was hoofsaaklik twee redes hiervoor: ten eerste was dit om professionalisme te verhoed[3] en ten tweede was dit die staat se beleid om niks vir die individu te doen wat hy vir homself kon doen nie.[4] Daar is geen bewys dat daar in die vroegste tye spesiale formules of onduidelike reëls was wat vir die voorlegging van 'n saak voorgeskryf is nie. Daar was ook nie persone wat spesiaal in die tegniese aspekte van prosedures opgelei was nie. Die primêre rede hiervoor was dat die prosedure aan alle lede van die gemeenskap op gelyke voet beskikbaar was.[5] Die vroeë Griekse kodes het van die basiese standpunt uitgegaan dat die substantiewe en prosedurele reg aan almal beskikbaar moet wees en dat almal dit in regsaksies moet kan toepas.

Die waarde van welsprekendheid is terdeë besef.[6] Fynere punte van die reg het wel hulp vereis en vir hierdie doel was daar "interpreteerders", maar die fundamentele beginsel was steeds dat van almal verwag is om hul eie sake te hanteer.[7] 'n Vorm van spesialisasie word egter aangetref in die geval van Deioces,[8] koning van die Mede wat van 728–675 vC regeer het. Voordat hy die eerste koning van die Mede geword het, was hy 'n regter van 'n statjie ("village") wat vir die regverdigheid van sy beslissings bekend was.[9] Nadat hy koning geword het, het hy die regsadministrasie van 'n ope na 'n geslote stelsel hervorm. Dit het beteken dat hy sake in privaatheid beslis het na aanleiding van skriftelike voorleggings wat vermoedelik deur spesiaal opgeleide skrifgeleerdes ("scribes") voorberei is.[10]

Ingevolge die vroegste wetgewing is die meeste misdade soos onregmatige dade hanteer.[11] Op strafregtelike gebied is 'n onderskeid getref tussen gewone strafsake en sake waar belangrike nasionale belange op die spel was. In geval van gewone vervolgings was die klaers ook vir die vervolging verantwoordelik, maar hulle is gereeld vrywillig deur advokate bygestaan.[12] Waar nasionale belange ter sprake was, is advokate aangestel om die staat te verteenwoordig.[13] Hierdie openbare advokate is 'n klein bedraggie betaal. In siviele sake is steeds vereis dat prinsipale hul eie sake moet behartig, maar die reël is nie so streng afgedwing nie en bystand deur advokate is toegelaat. Daar is vereis dat die advokate verwante, vriende of lede van die

1 Volgens Swart en Zietsman *Die Westerse ontplooiing* (1976) 22 het die Griekse beskawing sy hoogtepunt tussen 1400 en 1200 vC bereik.
2 Bonner *Lawyers and litigants in ancient Greece* (1927) v.
3 *Ibid.*
4 *Idem* 135.
5 Gagarin *Early Greek law* (1986) 46.
6 *Idem* 45.
7 *Idem* 133.
8 *Encyclopedia Britannica* vol 21 (1994) 941.
9 *Encyclopedia Britannica* vol 3 (1994) 964.
10 Herodotus 1 96–100 soos aangehaal deur Gagarin.
11 Gagarin 63.
12 Bonner 201.
13 *Idem* 200.

gemeenskap[14] van die gedingsparty moes wees, maar teen die middel van die vierde eeu was die praktyk om die dienste van advokate te bekom stewig gevestig. Litigante het nie meer voorgegee dat die advokaat 'n verwant of 'n vriend was nie. Die reg om op hierdie wyse verteenwoordig te word, is nou as 'n demokratiese reg gesien. Aanklaers het die waarde van advokate gou ingesien en soms die jurie versoek om nie na hulle te luister nie, maar hul reg om te verskyn is nooit bevraagteken nie.

Die reg het advokate verbied om betaling vir dienste te ontvang, maar dié verbod is gereeld verontagsaam. Hierdie ontwikkeling het meegebring dat rykes bo armes bevoordeel is. Plato het hom soos volg hieroor uitgespreek:

> "We are told that by ingenious pleas and the help of an advocate the law enables a man to win a particular cause . . .; and that both the art and the power of speech, which is thereby imparted, are at the service of him who is willing to pay for them."[15]

Die feit dat 'n litigant en sekere lede van sy familie egter nie getuies kon wees nie en dat die advokaat as sy plaasvervanger opgetree het, het die advokate se vryheid om namens die litigant op te tree in die wiele gery. Indien 'n litigant van 'n advokaat gebruik gemaak het, het hy sy geleentheid om aangehoor te word, verbeur. Dit het beteken dat die litigant of iemand wat eerstehandse kennis van die aangeleentheid gehad het, die hof oor die gebeure moes toespreek. Dit was slegs by uitsondering dat 'n advokaat op hierdie kennis kon aanspraak maak en waar hy nie kennis van die aangeleentheid gehad het nie, moes hy noodgedwonge swyg. Die gevolge van die gedingsparty se stilswye was dus van ernstiger aard as die voordele van 'n welsprekende plaasvervanger.[16]

Die gebrek aan intieme kennis van 'n aangeleentheid in geskil en die behoefte aan welsprekendheid het gelei tot die besef dat diegene wat vaardig in die redeneringskuns was voordele bo hul teenstanders gehad het. Die gevolg was dat hierdie "kundiges" toesprake vir hul kliënte geskryf het wat laasgenoemde dan as hul eie weergawe in die howe voorgelees het.[17] 'n Kennis van retoriek het mense in staat gestel om die howe te beïnvloed.[18] Die toespraakskrywer was nie bloot 'n retorikus nie, maar het noodwendig ook kennis van die reg en prosedures opgedoen. Omdat die toespraak so geskryf moes word dat dit gelyk het asof dit die kliënt se woorde was, kon die skrywer nie sy regskennis te duidelik laat blyk nie. Die skrywer se sukses het in 'n groot mate afgehang van sy vermoë om sy styl by dié van sy kliënt aan te pas. Toespraakskrywery was die enigste litigasiediens wat professioneel geword het. Toespraakskrywers is nie verbied nie en kon vergoeding vir hul dienste ontvang. Hierdie beweging na professionele regsbystand het 'n behoefte aan opleiding geskep. Hierdie behoefte het weer gelei tot die ontwikkeling van die Sofiste[19] wat regskole met georganiseerde kursusse in retoriek daargestel het. Ander het gereis en openbare lesings aangebied.

Die idee van reg en geregtigheid wat uit 'n erkenning van die "rule of law" spruit, het sy oorsprong in normatiewe idees. Die antieke Grieke was die eerste beskawing wat deur middel van hul instellings hierdie idees verwensenlik het.[20] Die belang van

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14 Jowett *The dialogues of Plato* (1993) 704.
15 Plato *Laws* soos aangehaal deur Bonner 207.
16 Bonner 208.
17 *Idem* 1.
18 *Idem* 137.
19 Griekse opvoedkundiges van die middel van die vyfde eeu vC.
20 Sealy *The justice of the Greeks* (1984) ix.

die konsep van regsverteenwoordiging in die antieke Griekse reg lê daarin dat die Romeine in die tydperk van die voor-klassieke Romeinse reg op verskeie terreine met die Griekse kultuur kontak gehad het en dat hierdie kontak 'n permanente invloed op die totstandkoming van die Romeinse regswetenskap gehad het.[21] Die rigting wat die Grieke aangedui het, is dus deur die Romeine uitgebou. Die Grieke, saam met die Romeine, word as die intellektueel-geestelike voorouers van die westerse beskawing beskou.[22]

3 DIE ROMEINSE REG

Die Romeinse reg is die beginpunt van enige regshistoriese ondersoek van 'n moderne Suid-Afrikaanse regsinstelling[23] en die funksionele doel daarvan is dat dit dien as instrument om die gemenereg te begryp. Dit het oor 'n tydperk van ongeveer twaalf eeue ontwikkel[24] en dit is dus nie 'n eenvoudige en statiese regstelsel nie, maar 'n komplekse en dinamiese stelsel wat deur die eeue ontwikkel het. Die bespreking van regsverteenwoordiging ingevolge die Romeinse reg word nie tot die klassieke tydperk beperk nie. Die verskillende periodes in die ontwikkeling van die regstelsel word ondersoek. Daar is verskillende raamwerke waarvolgens die tydperke in die ontwikkeling van die Romeinse regsgeskiedenis onderskei word,[25] maar dié van Feenstra[26] word nagevolg.

3 1 Die vroegste Romeinse Reg (753 vC tot 250 vC)

In die vroeë Romeinse reg waartydens die formalistiese *legis actio*-prosedure gevolg is, was litigasie in 'n ander se naam, onderworpe aan 'n aantal uitsonderings soos die *actiones popularis*, nie toegelaat nie.[27] Die reël was dat die partye self moes prosedeer.[28] Verteenwoordiging van die eiser is slegs in enkele gevalle toegelaat.[29] Die *Institute* van Justinianus[30] noem 'n paar uitsonderings, waaronder kuratore, maar die algemene reël was *nemo pro alio lege agere potest*. Die *legis actio* was die proses *in iure* en die feit dat die partye aldaar in persoon moes verskyn, het nie die moontlikheid uitgesluit dat andere *apud iudicem* namens hulle kon optree nie.[31]

3 2 Die voor-klassieke Romeinse reg (250 vC tot 27 vC)

Die feit dat verteenwoordiging nie toegelaat is nie, was baie ongerieflik (veral in geval van siekte, ouderdom en langdurige afwesigheid) met gevolg dat die praktyk om deur middel van verteenwoordiging te litigeer, ontwikkel het.[32] Aanvanklik is regsadvies en -bystand gelewer deur juriste wat politieke doelwitte nagestreef het, maar in die eerste eeu vC het 'n groep juriste wat hulle van die politiek onttrek het

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21 Venter *Regsnavorsing* (1990) 166.
22 Swart en Zietsman 21.
23 Van Zyl "Die regshistoriese metode" 1972 *THRHR* 21.
24 Hosten *et al Inleiding tot die Suid-Afrikaanse reg en regsleer* (1978) 141.
25 Sien oa Hosten 141 en Van Zyl *Geskiedenis en beginsels van die Romeinse privaatreg* (1977) 1–7.
26 Voet *Commentarius ad Pandectas* (1757) 3 1 1 en Feenstra *Romeinsrechtelijke grondslagen van het Nederlands privaatrecht: Inleidende hoofstukken* (1984) 3–6.
27 Seckel en Keubler *The Institutes of Gaius* (1988) 4.84.
28 Van Warmelo *Die oorsprong en betekenis van die Romeinse reg* (1977) 293.
29 Modderman *Handboek voor het Romeinsche reg* (1908) 256.
30 *I* 4 10.
31 Thomas *Textbook of Roman law* (1976) 103.
32 *I* 4 10.

en net op die reg gekonsentreer het, na vore getree. Die beweging na spesialisasie was die gevolg van Griekse invloed.[33]

Onder die juriste is tussen *advocatus* en *patronus* onderskei.[34] Advokate was juriste wat aan vriende regsadvies verskaf het of hulle deur hul teenwoordigheid moreel ondersteun het. Hulle het litigante in siviele gedinge bygestaan deur hulle van advies te bedien met betrekking tot regsvrae, deur hulp te verleen ten opsigte van prosedurele aspekte en deur namens hulle te praat.[35] *Patroni* het die belange van hul kliënte beskerm deur mondeling en sonder vergoeding vir beskuldigdes op te tree. Die gebruik om juriste vir hul dienste te vergoed, het mettertyd ontwikkel. Nadat hierdie gebruik gevestig was, is die waarde van regsverteenwoordiging in die vorm van *patroni* nie net besef nie, maar is *patroni* ook deur die howe aangestel. Daar was hoofsaaklik twee oorwegings wat gegeld het by oorweging of *patroni* deur die hof aangestel moes word, naamlik:

(a) waar advies benodig is as gevolg van die invloed waaroor 'n party se opponent beskik; en

(b) waar die vermoë van die *patronus* van die een party soveel groter was as dié van die ander party dat die ongelykheid tot gevolg kon hê dat die kliënt sy saak as gevolg van die gebrek aan ervaring van sy verteenwoordiger kon verloor.[36]

Daar word ingevolge die siviele prosesreg na die aanstelling van regsverteenwoordigers verwys, maar Greenidge[37] is van mening dat die tekste van die tyd die indruk skep dat dit ook op strafregtelike aangeleenthede betrekking gehad het.

3 3 Die klassieke Romeinse reg (27 vC tot 250 nC)

Die funksies van *advocatus* en *patronus* het in hierdie tydperk ineengevloei en die advokate het "die bij een rechtseollege zijn ingeschreven (statuti), vormen min of meer geslote corporatiën."[38] Daar is aanduidings van spesialisasie in hierdie tydperk. Voet[39] vermeld spesifiek die regsreëls met betrekking tot belasting en bedrog en sê dat dit gebeur dat advokate kliënte na kollegas verwys wat in hierdie aspekte spesialiseer.

In die klassieke periode, waartydens die *formula*-prosedure toegepas is,[40] kon die partye by 'n siviele geding namens hulself of ten behoewe van 'n ander optree.[41] So 'n persoon kon as agent of verteenwoordiger in die hof optree.

'n Agent het bekend gestaan as 'n *procurator* en was 'n persoon wat nie formeel aangestel is nie.[42] Sy bevoegdheid om op te tree het hy aan mandaat ontleen.[43] 'n *Procurator* moes sekerheid stel dat 'n ongunstige beslissing gehonoreer sou word.[44] Die *Corpus iuris civilis* maak ook melding daarvan dat 'n slaaf in strafsake deur sy

33 Spiller *A manual of Roman law* (1986) 6.
34 Spiller 7 en Van Zyl (1977) 368 verwys na *patroni* as *oratores*.
35 Selikowitz "Defence by legal counsel in criminal proceedings under South African law" 1965/1966 *Acta Juridica* 55.
36 *Idem* 55–58.
37 Greenidge *Procedure in Cicero's time* soos aangehaal deur Selikowitz 56.
38 Modderman 258.
39 Voet 39 4 32.
40 Van Zyl (1977) 375.
41 *I* 4 10.
42 Thomas *The Institutes of Justinian: Text, translation and commentary* (1975) 309.
43 *G* 4 84.
44 Thomas (1975) 309.

eienaar verdedig kon word[45] en desnoods ook deur die eienaar se *procurator*.[46] 'n *Procurator* is as 'n baie noodsaaklike instelling gesien aangesien dit dit moontlik gemaak het om teen diegene wat nie na hul eie belange kon of wou omsien nie op te tree.[47]

'n Verteenwoordiger in die hof het bekend gestaan as 'n *cognitor* en kon deur sowel 'n eiser as 'n verweerder aangestel word. Die aanstelling is soos volg formeel in die hof gedoen: "QVOD EGO A TE verbi gratia FVNDVM PETO, IN EAM REM LVCIVM TITIVM TIBI COGNITORUM DO" (Omdat ek byvoorbeeld van jou 'n plaas eis, stel ek Lucius Titius as my verteenwoordiger in die hof in hierdie saak aan).[48] Die verweerder was geregtig om op soortgelyke formele wyse 'n verteenwoordiger aan te stel. Dit was nie vir die *cognitor* nodig om sekerheid te stel nie, maar waar hy vir 'n verweerder opgetree het, moes die verweerder sekerheid stel.[49] As 'n *cognitor* namens 'n eiser opgetree het, het hy die eiser se reg op aksie oorgeneem.[50] 'n Verteenwoordiger wat sonder opdrag as eiser of verweerder opgetree het, is 'n *defensor* genoem.[51] Die formeel aangestelde *cognitor* het mettertyd van die toneel verdwyn sodat slegs die *procurator* tydens Justinianus se tydperk aangetref is. Vroue en soldate kon nie as *procurator* optree nie. In die prosesfase *apud iudicem* van die *formula*-prosedure was die partye teenwoordig, maar het nie formeel aan die verrigtinge deelgeneem nie.[52] Hulle is normaalweg deur bekwame sprekers verteenwoordig wat die hof in breë trekke oor die meriete van die saak toegespreek en betoë gelewer het voordat inspraak gegee is.[53]

3 4 Die na-klassieke Romeinse reg (250 nC tot 550 nC)

Die *formula*-prosedure is teen die middel van die vierde eeu nC deur die *cognitio*-prosedure vervang. Dit was 'n direkte uitvloeisel van die behoefte aan 'n eenvoudiger en geriefliker wyse van gedingvoering. Waar die verweerder aanspreeklikheid ontken het, is die verhoor steeds begin met toesprake deur regsverteenwoordigers van die onderskeie partye waarin die meriete van die eis en die verweer kortliks uiteengesit is.[54]

3 5 Die tydperk van Justinianus se regering (527 nC tot 565 nC)

Die *Corpus iuris civilis*, wat in 'n groot mate uittreksels van die werke van die klassieke juriste bevat, is 'n gesaghebbende bron van hierdie tyd. Trouens, dit is die basis van die Romeinse reg soos dit ontwikkel het tot aan die einde van die agtiende eeu in Holland en dus ook 'n kenbron by die beskouing van 'n instelling van die moderne Suid-Afrikaanse reg.[55] Seiler[56] is van mening dat die klassieke geskrifte gewysig en aangepas is om voorsiening te maak vir die omstandighede van die tyd.

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45 *D* 48 1 9.
46 *D* 48 1 11.
47 Mommsen *et al The Digest of Justinian* (1985) 86.
48 *I* 4 83.
49 Thomas (1975) 309.
50 *G* 4 97 98.
51 Modderman 258 en van Warmelo (1970) 295.
52 Thomas (1975) 310 en Spiller 37.
53 Van Zyl (1977) 379.
54 *Idem* 386–387.
55 Van Zyl (1972) 23–24.
56 Seiler "Roman law in Germany today" 1978 *TSAR* 61.

Gedurende Justinianus se tyd was daar weinig onderskeid tussen straf- en siviele sake met die gevolg dat verteenwoordigers in strafsake vir 'n beskuldigde kon optree op 'n soortgelyke wyse as in siviele sake.[57] Van der Berg[58] maak die stelling dat die reël dat prokureurs nie hul kliënte in strafsake kon verteenwoordig nie, sterk toegepas is. Hierdie stelling moet egter gekwalifiseer word omdat die *procurator* of *cognitor* as sy kliënt se agent in al die kliënt se sake opgetree het. Die uitwerking hiervan was dat die prinsipaal se teenwoordigheid dan nie vereis is nie. Dit is hier waar die onderskeid tussen straf- en siviele sake duidelik na vore gekom het. In strafsake moes sowel die beskuldiger as die beskuldigde persoonlik voor die hof verskyn. In hierdie stadium is verteenwoordiging nie toegelaat nie, maar na *litis contestatio* kon albei partye verteenwoordig word, onderworpe aan die voorwaarde dat die beskuldigde in sommige gevalle[59] persoonlik teenwoordig moes wees. Gedurende hierdie tydperk word gevind dat reëls met betrekking tot fooie ontwikkel is[60] en dus dat die professie van advokatuur daargestel is. Die Romeinse praktyk was dat verteenwoordigers vanuit die geledere van advokate aan persone toegewys is waar verteenwoordiging ontbreek het.[61] Advokate kon slegs weier waar hulle 'n geldige rede gehad het en dit is as 'n openbare plig gesien om op te tree.[62] Dit was ook die plig van voorsittende beamptes om te verseker dat die vermoë van die advokate by 'n geding teen mekaar opweeg sodat die minder kundige advokaat nie deur sy gebrek aan ervaring sou veroorsaak dat 'n party sy saak verloor nie.[63]

In die derde eeu nC is 'n hoogsontwikkelde strafreg en strafprosedure ontwikkel wat tot vandag as uitgangspunt vir Europese regstelsels dien.[64] Die belang van die Romeinse reg blyk duidelik uit die feit dat dit 'n groot invloed uitgeoefen het en steeds uitoefen, lank nadat die Romeinse ryk nie meer bestaan nie.

4 DIE ROMEINS-HOLLANDSE REG

Die Romeinse reg en Romeins-Hollandse reg is onafskeidbaar aan mekaar gekoppel.[65] Die Romeins-Hollandse reg is sterk deur die Romeinse reg beïnvloed deurdat die ou skrywers die Romeinse regswetenskap oorgeneem en op die inheemse reg ingeënt het. Daar word algemeen aanvaar dat Romeinse reg in Holland geresipieer is, maar in werklikheid is die Romeinse reg slegs *in subsidium* as 'n model aangewend waar die plaaslike reg tekort geskiet het. As gevolg van die gesistematiseerdheid van die Romeinse reg het die regsgeleerdes en skrywers verder gegaan as wat hulle moes en die toepaslikheid van die Romeinse reg as vanself-sprekend aanvaar, maar dit het nooit die inheemse reg van Holland verdring nie.[66] Dit gebeur selde dat 'n Romeinsregtelike instelling onveranderd in die Suid-Afrikaanse reg voorkom en daarom kan die twee stelsels nie direk met mekaar vergelyk word nie.[67] Daar moet 'n skakel tussen die Romeinse en Suid-Afrikaanse reg gesoek word en hierdie skakel is die Romeins-Hollandse reg.

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57 Selikowitz 55.
58 Van der Berg "Legal representation: Right or privilege?" 1984 *THRHR* 447.
59 Dit was igv misdade waar lyfstraf, die doodstraf of verbanning opgelê kon word.
60 *D* 50 13 1 10.
61 Voet 3 1 11.
62 *D* 1 16 9 5.
63 Voet 3 1 11.
64 Van Warmelo "Romeinse reg" 1981 *De Jure* 304.
65 Van Warmelo "Die huidige posisie van die Romeinse reg in Suid-Afrika" 1979 *Obiter* 194.
66 De Villiers "Roman Law in Holland and England" 1924 *SALJ* 139.
67 Van Zyl (1972) 24.

Gedurende die vyf eeue wat die oplewing van die reg in Italië voorafgegaan het, was daar nie sprake van ontwikkeling nie en daarom word hierdie tydperk buite rekening gelaat.[68] In die vroeë middeleeue moes die partye by 'n geding die proses self hanteer deur middel van 'n tweegeveg wat by wyse van vrae en antwoorde geveg is. Verrigtinge was in hierdie tydperk baie formeel en ten einde hulself teen die risiko van 'n formele fout te beskerm, het die partye hulle by belangrike sake met regsadviseurs omring. Dit was egter nie ware verteenwoordiging nie aangesien die verrigtinge van tyd tot tyd verlaat is ten einde met die adviseurs te konsulteer.[69] In die twaalfde eeu was daar egter 'n oplewing van die Romeinse reg onder leiding van die glossatore wat die gevolg van die herontdekking van die *Digesta* van Justinianus was.[70] Onder die invloed van die Romeinse reg is 'n meer billike prosedure vir siviele sake ontwikkel ingevolge waarvan ware verteenwoordiging tot stand gekom het. 'n Balie, bestaande uit *advocates*, en 'n sy-balie, bestaande uit *procureurs* (*taelmannen*), het tot stand gekom.

In Holland was oningewydes se behoefte aan regsverteenwoordiging in siviele sake so groot dat persone by wyse van statutêre regulasies of praktyksreëls onder sekere omstandighede in die hoër howe verplig was om deur behoorlik opgeleide persone bygestaan te word.[71] Dit is sowel in belang van die litigante as ter bespoediging van die verrigtinge nodig gevind. Die motivering vir laasgenoemde was dat verwarring en vertraging deur onervarendheid en onkunde veroorsaak is. Die prosedure het uit verskeie formules bestaan waarby streng gehou moes word. Afwykings van die formules was fataal en kon tot 'n boete lei.[72] Die risiko was groot dat 'n party sy saak as gevolg van 'n formele fout kon verloor. Om hierdie rede het litigante in belangrike sake dikwels van die dienste van regsadviseurs gebruik gemaak. Hierdie adviseurs het nie namens die litigant opgetree nie, maar is tydens die verloop van die proses geraadpleeg. Alhoewel die partye die hof self kon toespreek, het hulle as gevolg van die formalistiese prosedure die dienste van 'n prokureur (*taelman*), wat die plegtige formules en die regte vrae en antwoorde van die prosedure geken het, bekom.[73]

In die vroeë Nederlandse strafsake het 'n klaer persoonlik sy beskuldigings aan die beskuldigde gerig.[74] Teen die vyftiende eeu kon 'n persoon wat in strafsake voor 'n hof gebring is nie aandring op 'n reg om deur 'n advokaat of prokureur verdedig te word nie.[75] Nadat hy gepleit het, kon die beskuldigde die hof versoek om hom toe te laat om verteenwoordig te word. Daar is tussen twee klasse verteenwoordigers onderskei, naamlik *taelmannen* en *raed*.[76] Die funksie van die *taelmannen* was om die hof toe te spreek terwyl van *raed* verwag is om hul kliënte van advies te bedien.[77] Dit wil voorkom of die hof aanvanklik 'n diskresie gehad het om verteenwoordiging toe te laat, maar teen die einde van die veertiende eeu was die

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68 Van Zyl (1972) 25 is van mening dat die vyf eeue voor die begin van die 12de eeu, agv die retrogressie van die reg, buite rekening gelaat kan word by 'n beskouing van die ontwikkeling van die reg.

69 Hahlo en Kahn *The South African legal system and its background* (1968) 476.

70 Van Zyl (1972) 25.

71 *S v Wessels* 1966 4 SA 89 (K) 91D.

72 Kotzé "History of the Roman-Dutch law" 1909 *SALJ* 78.

73 *Idem* 79.

74 Selikowitz 57.

75 *S v Wessels supra* 91G.

76 Selikowitz 57.

77 Wessels *History of the Roman-Dutch law* (1908) 194. Daar word aangevoer dat die *taelmannen* op die een of ander wyse aan die howe verbonde was.

regters verplig om te sorg dat onverdedigde aangeklaagdes verdediging bekom. In 'n oktrooi wat in 1404 aan Kennerland toegestaan is, is uitdruklik bepaal dat niemand 'n prokureur of advokaat mag verbied om vir 'n ander te verskyn nie.[78] Op 30 Junie 1450 het die Hof van Holland 'n dekreet uitgevaardig ingevolge waarvan geen eiser persoonlik kon verskyn nie, maar 'n prokureur moes aanstel. Dit was die begin van die aanstelling van *procureurs* in Holland.[79] Die effek van hierdie dekreet op die strafprosesreg is onseker, maar volgens Voet[80] was die posisie nog dieselfde as in die Romeinse reg, naamlik dat die beskuldigde 'n advokaat of prokureur slegs met die toestemming van die regter kon aanstel. Dit kom dus voor asof daar nie 'n algemene reg op regsverteenwoordiging in strafsake bestaan het nie. Tog blyk dit uit die volgende aanhaling uit Voet[81] dat die Romeins-Hollandse praktyk nie so rigied soos die Romeinse reg was nie:

> "It should however be added that, being present in person, he can by permission of the judge employ the services of an advocate or the aid of an attorney, if perchance he is without skill in the business of courts."

Op 9 Julie 1570 is die Strafprosesordonnansie van Philip II, wat die basis van die strafprosesreg in die Nederlande en die Kaap geword het, afgekondig.[82] Ingevolge artikel 14 is beskuldigdes nie toegelaat om deur *voorspracke* of *taelmannen* te praat nie, tensy die regters van mening was dat sodanige regsverteenwoordiging nodig was. Die artikel het alle gewoontes en gebruike wat strydig met die artikel was, afgeskaf omdat die gebruik van regsverteenwoordigers die administrasie van geregtigheid belemmer het en drogredenering (*cavillatien*) tot gevolg gehad het.[83]

In die sestiende eeu is 'n regsverteenwoordiger in die vorm van 'n *taelman* of *voorspraek* aan 'n beskuldigde toegewys waar hy nie alreeds oor dusdanige dienste beskik het nie en hy dit versoek het. Die Romeinsregtelike vereiste van die "invloed" van die opponent wat so 'n groot rol gespeel het by die besluit of bystand nodig was, is vervang deur die vraag of die beskuldigde sy eie verteenwoordiging kon bekostig.[84] Die praktyk in Nederland om 'n beskuldigde toe te laat om deur 'n regsverteenwoordiger verdedig te word, gaan terug na die begin van die vyftiende eeu.[85] So bepaal die "Great Privilege" van 15 Maart 1476 van Mary van Boergondië dat 'n persoon vir homself kan pleit of dat hy die dienste van 'n prokureur kan bekom. Die howe het onderskei tussen sake wat voor die howe afgehandel moes word en sake wat voor ondergeskikte regters moes dien. In eersgenoemde geval was dit praktyk dat die howe in siviele sake verteenwoordiging deur 'n prokureur vereis het.[86] Die praktyk is besonder streng toegepas in die geval waar 'n gedingsparty die eiser was. So bepaal 'n ordonnansie van 2 April 1672 dat eisers hulle net na die hof kan wend as 'n petisie deur 'n prokureur of advokaat geteken is. Johannes van der

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78 Kotzé 64–65.

79 CH Van Zyl "A brief history of the law of attorneys so far as South Africa is concerned" 1912 *SALJ* 261.

80 3 3 15.

81 3 3 15.

82 Wessels 376.

83 Selikowitz 58 meld ook dat die reël in die ordonnansie van 1570 waardeur die reg op regsverteenwoordiging beperk was, nie oral ontvang is nie. Hy gaan dan voort en noem oa die "Custom of Flushing" in Antwerp waar die geleentheid om deur prokureurs verdedig te word as 'n *goede recht* en 'n *voorrecht* gesien is.

84 Voet 3 1 11.

85 Kotzé 64.

86 Grotius *Introduction to practice* (1903) bk 1 hfst a 14.

Linden (1756–1835)[87] meld dat verweerders uit noodsaak die bystand van prokureurs nodig gehad het, omdat slegs prokureurs wat tot die hof toegelaat is die formules kon formuleer. Waar ondergeskikte regters ter sprake was, kon gedingspartye self optree, maar Van der Linden[88] het die praktyk as so ingewikkeld beskou dat hy privaat persone gewaarsku het dat dit beter was om 'n ervare prokureur aan te stel sodat hulle nie hul sake as gevolg van 'n gebrek aan kennis sou skaad nie.

In die sewentiende eeu merk Van Leeuwen[89] op:

> "As many persons by reason of their inexperience in legal matters, or by reason of their necessary absence, cannot or may not maintain and conduct their own causes, necessity has introduced that one may prosecute them through the assistance of others, legally authorised thereto, after enquiry [was] had as to their ability. Such authorised persons are pleaders and interpreters, otherwise called Advocates and Attorneys."

Die doel van advokate in siviele sake was om sake vir hul kliënte te hanteer en die interpreteerders, wat ook *procurators* genoem is en wat vir die verloop van die geding verantwoordelik was, te adviseer.[90]

Vanaf die dekreet van 1450 tot 1658 is verskeie plakkate en regulasies afgekondig wat die werksaamhede van prokureurs gereguleer het. Dit sluit onder andere aspekte soos opleiding, kwalifikasies en hul instruksies aan advokate in. So bepaal die plakaat van Charles V van 20 Augustus 1551 byvoorbeeld dat advokate en prokureurs hul kliënte eerlik en getrou moet dien.[91] Hierdie amptelike regulering van die beroep en die behoefte aan beheer oor die aktiwiteite en werkswyse van advokate en prokureurs is 'n aanduiding van die erkenning wat die beoefenaars van die beroepe geniet het.

Teen die eerste helfte van die negentiende eeu was die posisie dat

> "if a person wishes to go to law, either as plaintiff or defendant, he would act most advisedly in engaging an attorney, or if the case is of some importance and somewhat complicated, in engaging an advocate and an attorney".[92]

Die Romeinse praktyk is, behalwe in geval van armlastiges, nie gevolg nie. Dit was, ooreenkomstig elke gebied se gebruik, in die regter se diskresie om te besluit of die toegewese bystand deur juniors of deur alle advokate gelewer moes word. Advokate is, anders as in die Romeinse praktyk, nie volgens vermoë teen mekaar opgeweeg nie.[93]

5 DIE ENGELSE REG

Alhoewel die Romeinse reg nooit in Engeland "geresipieer" is nie, is baie van die beginsels sonder uitdruklike erkenning aangeneem. Gevolglik was die Romeinse invloed op die Engelse gemenereg van wye omvang.[94]

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87 In sy byvoeging tot Voet se *Commentarius ad Pandectas* 3 1 1 vn (a).
88 *Ibid.*
89 Van Leeuwen *Het Roomsch-Hollandsche recht* vertaal deur Kotzé *Commentaries on the Roman-Dutch law* (1921) soos aangehaal deur Botha "Early legal practitioners of the Cape Colony" 1924 *SALJ* 255.
90 Van Leeuwen soos aangehaal deur Van Zyl (1912) 264.
91 Van Zyl (1912) 263–264.
92 Van der Linden *Institutes of Holland* (vert deur Juta) (1906) 262–263 soos aangehaal deur Selikowitz 59.
93 Voet 3 1 11.
94 De Villiers 141.

Voor Julius Caesar se inval van Brittanje in 55 vC het die druïdes, 'n godsdienstige groep wat ook verantwoordelik was vir die handhawing van die reg ("laws") en gewoonte, regsadvies bedien aan partye wat by regsgeskille betrokke was.[95] Die eerste verwysing na regsverteenwoordiging in die Engelse reg is te vinde in die wette van Hlothaere en Aedric, konings van Kent wat uit 685–686 nC dateer.[96] Hierdie wetgewing het 'n meganisme vir die herwinning van gesteelde goedere daargestel en die term *advocatio* is gebruik.[97] Cohen[98] is van mening dat dit die eerste "gleam of representation in formal matters" is.[99] 'n Brief wat na 900 aan koning Edward geskryf is, lees soos volg:

> "When Helmstan committed the crime of stealing Aethered's belt . . . Then he sought me and prayed me to be his intercessor (forspeca) . . . Then I spoke on his behalf (spaec ic him fore) and interceded for him with King Alfred . . . so he allowed him to be lawworthy at my intercession (for mire forspaece) . . ."[100]

Een van die belangrikste bronne van die Angel-saksiese periode is die *Quadripartitus*, 'n versameling ou Engelse wette. Die belangrikste deel is die *Leges Henrici Primi*. Lieberman[101] is van mening dat dit rondom 1114–1118 vir Henry I geskryf is. Die *Leges Henrici Primi* bevat onder andere besprekings onder die hoofde *Advocatus, Concilium, Defensor* en "Professional Lawyers". Cohen[102] beskou die *Quadripartitus* se *advocatus* as die "rudimentary germ" van regsverteenwoordiging in Engeland.

Die Normandiese verowering van Engeland in 1066 het 'n groot rol gespeel in die ontwikkeling van regsverteenwoordiging as instelling, aangesien daar 'n toename in geskille tussen die veroweraars en die inboorlinge was. Dit was heel waarskynlik vóór die ontwikkeling van die Engelse gemenereg 'n algemene idee dat 'n litigant op regsbystand geregtig is, en dat hy by verrigtinge deur 'n advokaat verteenwoordig kon word.[103] Hierdie praktisyns het egter nie altyd 'n kenmerkende regsprofessie gevorm nie.[104] Daar word aangevoer dat daar eerstens na die geestelikes vir regshulp gekyk is. So is daar in die begin van die 12de eeu opgemerk dat "there was no clerk who was not also a legal adviser".[105] Persone wat in die hof gepraat het, moes oor kennis en ervaring van die praktyk en die voorgeskrewe formules beskik. Dat afwyking van die formules fataal was, kan uit die gevolge van "miskenning" afgelei word. "Miskenning" was "failing to say the usual words in counting[106] and defending".[107] Die voordele van 'n "counter" het teen 1200 duidelik geblyk deur die toepassing van die beginsel van *de advocatus*. Hiervolgens was 'n advokaat se foute in die hof sonder gevolge indien hy aangedui het dat hy onder korreksie praat. Van

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95 Bodey *Religion* (1973) 9.
96 Lieberman *Die Gesetze der Angelsachsen* III (1903) 18.
97 Whitelock *English historical documents* I (1979) 394.
98 Cohen *A history of the English bar and attornatus to 1450* (1929) 2.
99 Zane "The five ages of the bench and the bar in England" 1907 *Illinois LR* 1 voer egter aan dat daar voor die Normandiese inval van 1066 geen regspraktisyns in Engeland was nie.
100 Cohen 3. *Forspeca* is die Angel-saksiese woord vir advokaat.
101 Lieberman *Über das englische Rechtsbuch Leges Henrici* (1901) 314.
102 11.
103 Downer *Leges Henrici Primi* (1972) 157.
104 Baker *The order of serjeants at law* (1984) 8.
105 Pollock en Maitland *History of English law before the time of Edward I* (1898) 214.
106 "Count" is 'n formele klagte deur 'n eiser.
107 Bateson *Borough customs* (1906) 1.

hierdie "counters" kon as vriende optree, maar teen 1220 was van hulle gereelde praktisyns.[108]

Die monnike was die geleerdes van die tyd en dan ook die persone wat die lyfeienes moes bystaan in hul aksies teen die feudale heersers. Soos dit gestel word:

> "[T]he bishop and the parish priest . . . could help the Saxon serf and the Norman villein in various ways . . . They stood between him and the oppression of the feudal superior . . . They were his advocates in the courts of Law."[109]

'n Verdere gevolg van die Normandiese verowering was dat die verrigtinge in die *Curia Regis* in Frans of Latyn gevoer is. Dit het veroorsaak dat partye die dienste van persone moes bekom wat die taal van die howe verstaan het. Hulle het as *narratores* of "pleaders"[110] bekend gestaan. Eers in 1362 het 'n Engelse wet[111] bepaal dat alle hofverrigtinge in Engels sal geskied omdat "the great mischiefs which have happened to many people of the realm because the laws, customs and statutes are not commonly known . . . because they are pleaded . . . and judged in the Frensh language, which is too unknown".[112]

Die saak van *Archbishop Lanfranc v Bishop Odo* van ongeveer 1071 is bewys van die bestaan van 'n regsprofessie op sowel die Europese kontinent as in Engeland. In hierdie saak verwys Lanfranc na sy regsopleiding wat waarskynlik in Bologne ondergaan is.[113] Die behoefte aan regsverteenwoordiging is in hierdie tyd grotendeels deur formalisme veroorsaak. Aksies is by wyse van regsformules gevoer en afwyking daarvan was fataal.[114]

In 1121 is daar ook in *Modbert v Prior and Monks of Bath* van *advocati* melding gemaak. Die geskrifte van John of Salisbury, Biskop van Chartres, wat in die 12de eeu geleef het, verwys ook na *advocati* en *procuratores* wat uit verkeerde dade geld gemaak het.[115] Die feit dat die proses mondeling plaasgevind het en daar nie van skriftelike prosesstukke gebruik gemaak is nie, is deur die regsverteenwoordigers uitgebuit. Hulle het die proses só uitgerek dat van die inligting tot hul kliënte se voordeel vergeet is. Die eerste spore van "paper pleading" word eers in 1460 gevind.[116]

Soos in Rome en Holland is daar aanvanklik ook van persone vereis om persoonlik in siviele sake te verskyn, maar later was dit moontlik om 'n agent (prokureur) met die goedkeuring van die soewerein aan te stel. Hierdie vereiste van spesiale goedkeuring is in 1235 by wyse van 'n wet afgeskaf en *eisers* het die *reg* gekry om prokureurs aan te stel om namens hulle en in hul afwesigheid in *enige* regsgeding op te tree.[117] Reeds voor 1302 het daar egter 'n reël bestaan ingevolge waarvan verteenwoordiging nie in strafsake toegelaat is nie.[118] Die beweegrede vir hierdie reël is dat 'n beskuldigde in ernstige misdade minder geleentheid gebied moet word

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108 Baker 11.
109 Cohen 45.
110 *Idem* 170 174.
111 *Statutes of the realm* III 375.
112 Douglas *English historical documents* (1969) 483.
113 Macdonald *Lanfranc* (1926) 4.
114 Bateson 1 en Cohen 50.
115 John of Salisbury *Policraticus* (1159) in Cohen 121.
116 Holdsworth *A history of English law* (1903) vol III 646.
117 Van Zyl (1912) 265.
118 Stephen *A general view of the criminal law of England* (1890) 46.

om die gevolge van sy wandade te ontkom. In die 13de eeu was daar pogings om regspraktisyns te verbied. So het die abte van Ramsay en St Alban's dit in die tyd van Henry III (1216–1272) in hul "manorial" howe gedoen.[119] Die koninklike regters het ook bystand aan beskuldigdes wat van misdade aangekla is, verbied.[120] Die vrees was dat die praktisyn se "undue skill and competence in advocacy" sou verhoed dat geregtigheid geskied.[121] Die afleiding wat gemaak kan word, is dat vroeg reeds besef is dat verteenwoordiging die kanse op sukses vergroot. Teen die begin van die vyftiende eeu was die reël in Engeland dat 'n aangehoudene nie op verteenwoordiging kon aanspraak maak waar hy weens 'n ernstige misdaad aangehou is nie, tensy 'n regspunt geargumenteer moes word. In geval van minder ernstige oortredings kon die aangehoudene wel op verteenwoordiging aanspraak maak.[122] Die reg op verteenwoordiging in alle sake is eers in 1836 verleen.[123]

Die prokureursberoep het reeds van die vroegste tye in Engeland bestaan, maar die presiese periode waarin dit ontstaan het, is nie bekend nie. Dat gebruikmaking van regsverteenwoordigers gewens was, blyk uit die volgende aanhaling wat dateer uit die tyd van Henry II:[124]

> "The days dragged painfully on as, without any help of trained lawyers, the 'suitors' sought to settle perplexed questions . . ."[125]

Die idee van regsverteenwoordiging het in hierdie tyd groter bekendheid verwerf. Faktore wat hiertoe bygedra het, was die uitbreiding van die stelsel van rondgaande howe, die vestiging van 'n permanente koninklike geregshof in Westminster en die ontwikkeling van 'n stelsel van "writs" (lasbriewe). Die groot verskeidenheid lasbriewe en die wyse waarop hulle saamgestel is, het 'n behoefte aan interpreteerders laat ontstaan. Soos Cohen[126] dit stel:

> "But the writ alone, with its long history, would amount for a rise of a specialist class: form was the very essence of a writ."

In 'n dokument, *The commune of London*, wat uit die periode voor 1180 dateer, word ook van 'n *attornatus* melding gemaak.[127] *Attornatus* beteken "deputy or substitute". Brunner[128] beskou die *attornatus* as 'n produk van die Normandiese invloed. Hy sê:

> "The *attornatus* or *atourne* meets us in the Norman legal services as a special type of representative for legal proceedings . . ."[129]

Die opkoms en ontwikkeling van regsverteenwoordiging as 'n professie kan nie jaar vir jaar nagevolg word nie, maar 'n progressiewe ontwikkeling kan tog in 'n mate chronologies bespeur word:[130]

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119 Maitland *Selected pleas in manorial courts* (1889) 136.
120 Palmer "The origin of the legal profession" 1976 *The Irish Jurist* 130.
121 Blake 11.
122 Kotzé 64.
123 Selikowitz 62.
124 Regeer 1154–1189.
125 Association of American Law Schools *Selected essays in Anglo-American legal history* (1907) 117.
126 125.
127 Round *Feudal England* (1895) 86.
128 Brunner *Forschungen zur Geshichte des deut u fran Rechts* (1878) 422.
129 Dit kom voor asof die *attornatus* se werk aanvanklik baie terloops ("casual") was. So is Katherine Bompuz in 1306 as "attorney" aangestel om 'n goue ring in ontvangs te neem (Thomas *Early mayors' court rolls* 246).
130 Cohen 138 ev.

1159: 'n Koninklike "writ" verleen aan Abingdon goedkeuring om 'n *attornatus* na die rondgaande howe ("assizes") en howe in die algemeen te stuur.

1223: 'n "Proxy" word aangestel om in die "shiremoot" van Staffordshire te verskyn.

1230: In 'n jurisdiksiegeskil tussen twee abte "both the plaintiff and defendant pleaded by attorney, but at least one of the parties was present".

1235: Die praktyk hierbo word deur die Wet van Merton bekragtig.

Die regsprofessie het alreeds in die tydperk van Edward I (13de eeu) bestaan en is daar tussen prokureurs ("attorneys") en "pleaders" (*narratores*, *counteurs* of "sergeant"-*counteurs*) onderskei. In *The Sergeants case* van 1839, wat oor eksklusiewe verskyningsregte vir "sergeants" by die "Bar of the Common Pleas" gehandel het, het lord Brougham die onderskeid soos volg aangedui:

> "If you appear by an attorney, he represents you, but when you have the assistance of an advocate you are present and he supports your cause by his learning, ingenuity and zeal."[131]

In hierdie tyd het daar 'n wet getitel *De attornatis* bestaan wat van regters vereis het om persone van goeie karakter as prokureurs te kies. In *De attornatis et apprenticiis*, 'n dokument van 1292, vereis die koning van John van Metingham dat hy vir elke plaaslike gebied ("shire") moet soek vir mense van

> "the best standing and the most willing learners according as they think it would be good for their court and the King's subjects; further, that those so chosen shall follow the court and deal with the business there and no one else shall".

Dit was egter eers gedurende Henry IV se heerskappy (1399–1413) dat van regters vereis is om ondersoek na die geskiktheid van persone vir die prokureursberoep in te stel.[132]

Teen 1300 is die werk van "counters and other learned counsel" uitdruklik deur die parlement goedgekeur. Soos Blake[133] dit stel:

> "It thus appears that the Counters in the Bench during the 1290's numbered between 25 and 30 and that the majority of them . . . were fully fledged advocates."

Diegene wat nie so gereeld in die "plea rolls" te vinde was nie, is deur die "clerks of the Bench" as *narratores* beskryf. Hierdie *narratores* het later as *servientes ad legem* bekend geraak en is later weer deur "serjeants at law" vervang.[134] In 1471 is "serjeant" beskryf as "a minister of art, without whom the art could neither be served nor occupied".[135] Die sterk posisie waarin die "serjeants" hulle bevind het was grotendeels toe te skryf aan die feit dat hulle 'n monopolie gehad het om in die "Common Pleas" te pleit en om regters in beide die King's en Queen's Bench aan te stel. In 1671 verklaar die koning egter:

> "[T]hat such persons as are or shall be appointed to be his majesty's counsel at law by letters patent . . . shall have precedency in all places, before serjeants at law that are not the King's serjeants."[136]

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131 Holdsworth 311–319.
132 Van Zyl (1912) 265.
133 14.
134 Baker 21.
135 *Pasten v Jenney* (1471) YB Trin Edw IV.
136 Privy Council Register PC 2/63 f 114 (22 Nov 1671).

Hierdie uitoefening van koninklike prerogatief was duidelik 'n verlies aan voorrang en het gelei tot die opkoms van 'n kader van vooraanstaande advokate wat nie deel van die "Order of the Coif", waaraan die "serjeants" behoort het, was nie. Die "serjeants" se monopolie van die "Common Pleas" is egter eers is 1834 verbreek deur 'n brief waarin die koning die hoofregter van die "Common Pleas" beveel het om alle advokate toe te laat. Dit het nie dadelik 'n invloed uitgeoefen nie, omdat die prokureurs wat die opdragte uitgereik het, getrou gebly het aan die "serjeants" wat hulle geken het. Mettertyd het die Orde van die Coif weggekwyn en teen die begin van die 20ste eeu was daar slegs twee oorlewendes wat lede van die orde was.[137]

Die gebruikmaking van skriftelike pleitstukke in die middel van die 15de eeu het 'n effek gehad op die meganismes van regsinstellings en op die reg in geheel. Dit het byvoorbeeld gelei tot 'n onderskeid tussen diegene wat die pleitstukke voorberei en diegene wat die saak in die hof hanteer, naamlik die "attorney" en die "narrator".[138] Uiteindelik het hierdie onderskeid daartoe gelei dat die Inns of Court in die 16de eeu begin weier het om prokureurs tot die balie toe te laat.

Gedurende die 18de eeu was verhore meestal amateuragtige gebeurtenisse waarin gerespekteerde lede van die publiek as jurielede, aanklaers en toeskouers deelgeneem het.[139] Bykans alle ernstige oortredings is deur juries by "assizes"[140] of "quarter sessions" verhoor.[141] Omdat daar nie 'n professionele polisiediens was nie, het individue, gewoonlik die slagoffer, die vervolging ingestel en hanteer. Daar was egter ook aanklaers, maar baie van hulle het van beskeie agtergronde gekom. So kon 'n derde van die aanklaers in die Essex "quarter sessions" nie eers skryf nie.[142] Die verhore het hoofsaaklik sonder regskundiges geskied, maar teen 1730, toe advokate vergoeding kon ontvang, is hulle toegelaat om getuies te ondervra en te kruisondervra, maar nie om die jurie toe te spreek nie. Aanklaers is ook toegelaat om van regsbystand gebruik te maak indien hulle dit kon bekostig, maar in die reël was dit nie nodig nie omdat die regter die ondervraging en kruisondervraging sou uitvoer. So is daar in 'n ondersoek na 171 verhore in die Old Bailey gedurende die 18de eeu bevind dat raadsmanne in ses gevalle vir die vervolging opgetree het en in agt gevalle vir die verdediging.[143] Die effek van die regspraktisyns se vaardigheid in kruisondervraging namens die verdediging blyk duidelik uit die opmerking dat "[w]e can point to a couple of cases in [the judges'] notes where the job was done so skilfully that it resulted in acquittals".

Mettertyd het die praktyk ontwikkel om aanklaers vir hul uitgawes te vergoed. Dit het vergoeding aan regsverteenwoordigers ingesluit. Die gevolg was dat die vraag

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137 Baker 129.

138 Holdsworth 653–654.

139 Young en Wall *Access to criminal justice: Legal aid, lawyers and the defence of liberty* (1996) 27.

140 Dit was die sessies wat periodiek in elke "county" (graafskap of distrik) gehou is om siviele en strafregtelike geregtigheid te administreer (Onions *The shorter Oxford English dictionary on historical principles* (1970). Dit staan egter ook bekend as rondgaande howe (Bosman *et al Tweetalige woordeboek* (1977).

141 In Engeland was dit howe met beperkte siviele en strafregtelike jurisdiksie en appèl wat kwartaalliks deur die vrederegters van die onderskeie distrikte binne hul distrikte gehou is (Onions).

142 King "Decision-makers and decision-making in the English criminal law 1750–1800" 1984 *Historical J* 33.

143 Langbein "Shaping the eighteenth century criminal trial: A view from the Ryder sources" 1983 *U of Chicago LR* 124.

teen die einde van die 18de eeu ontstaan het of beskuldigdes nie ook verteenwoordig moet word nie en in besonder of die beskuldigde se verteenwoordiger nie die reg het om die jurie toe te spreek nie. Wetgewing tot dien effekte is by vier geleenthede ter tafel gelê,[144] maar dit is telkens weens die teenstand van die regters nie deurgevoer nie. Die Prisoner's Counsel Act 1836 het ondanks hewige teenstand egter aan gevangenes wat daarvoor kon betaal die reg verleen om raadsmanne aan te stel wat die jurie ook kon toespreek. Dit het tot 'n dramatiese uitbreiding van die balie gelei.[145] Hierdie advokate het namens sowel die vervolging as die verdediging opgetree. Beskuldigdes moes self die koste van een guinea dra terwyl dit as deel van aanklaers se uitgawes beskou is. Die gevolg was dat meer as die helfte van die aanklaers in die "assizes" en "quarter sessions" teen 1843 verteenwoordig was terwyl slegs 'n kwart van die beskuldigdes hierdie voorreg geniet het.[146] In moordsake het die regters gewoonlik die advokate versoek om gratis op te tree.[147]

5 SAMEVATTING EN SLOTOPMERKINGS

In antieke Athene was die uitgangspunt dat elke persoon sy eie saak moes hanteer. Dit was moontlik omdat formalisme ontbreek het en omdat die prosedures aan almal bekend was. Aanvanklik is bystand as vergunning toegelaat, maar later is dit as 'n reg gesien. Die vereiste dat 'n raadsman intiem by die gedingsparty betrokke moes wees, het probleme veroorsaak en dit het gelei tot die ontwikkeling van "toespraakskrywers". Dit was 'n beweging na professionele regsbystand met 'n behoefte aan opleiding en dus die daarstelling van 'n spesialis-instelling, naamlik verteenwoordiging by regsgedinge. Die Griekse bydrae tot verteenwoordiging as instelling is van besondere belang omdat die Grieke 'n groot invloed op die ontstaan van die Romeinse regswetenskap gehad het.

Die Romeinse reg is op sy beurt die basis van enige regshistoriese ondersoek na 'n Suid-Afrikaanse regsinstelling. Voordat daar met die Griekse kultuur kontak was, was die algemene reël dat partye self moes optree. Kontak met die Grieke en die ongerief van die verbod op verteenwoordiging het mettertyd tot die lewering van regsadvies en bystand gelei. Regsverteenwoordiging as instelling het oor die volgende 800 jaar evolusionêr ontwikkel totdat die professie van die advokatuur in die tydperk van Justinianus daargestel is. Die belang van die Romeinse reg lê daarin dat dit 'n groot invloed op die Europese regstelsels uitgeoefen het. Die Romeinse reg as stelsel kan egter nie direk met die Suid-Afrikaanse regstelsel vergelyk word nie omdat dit selde gebeur dat 'n Romeinsregtelike instelling onveranderd in die Suid-Afrikaanse reg voorkom.

Die Romeins-Hollandse reg is die skakel tussen die Romeinse reg en die Suid-Afrikaanse reg soos dit hier te lande ontwikkel het. Die Romeins-Hollandse reg ten opsigte van regsverteenwoordiging het ook ontwikkeling getoon met die gevolg dat dit in sommige opsigte van die Romeinse reg verskil het. Die posisie in die Romeins-Hollandse reg was dat verteenwoordiging in siviele sake sterk aanbeveel is. Of 'n party die dienste van 'n prokureur of 'n advokaat en 'n prokureur moes bekom, het van die belangrikheid en ingewikkeldheid van die saak afgehang. Wat

144 1821 1824 1826 1834.

145 Hostettler *The politics of criminal law reform in the nineteenth century* (1992) 45 vermeld dat daar in 1809 slegs 459 advokate was terwyl daar teen 1846 meer as 3000 was.

146 Philips *Crime and authority in Victorian England* (1977) 104.

147 Young en Wall 30.

strafsake betref, het die reg op verteenwoordiging oor die algemeen afgehang van die hof se houding.[148] 'n Beskuldigde kon nie op 'n reg op regsverteenwoordiging aanspraak maak nie. Daar was egter baie sterk gevoelens ten gunste van regsverteenwoordiging. So sê Vroman[149] dat dit niemand ontneem mag word nie en verder ook: "Ja ook de Duivel niet, indien hy in't Gerigte kwam te verschynen." Met die vestiging van die halfwegstasie aan die Kaap was die posisie van verteenwoordigers tot die jaar 1806 dieselfde as in Holland,[150] naamlik dat verteenwoordiging in siviele sake sterk aanbeveel is terwyl die reg op verteenwoordiging in strafsake oor die algemeen van die hof se houding afgehang het.

Die Romeinse reg het ook op die Engelse reg 'n invloed uitgeoefen en ook dáár het 'n gestruktureerde en georganiseerde regsberoep tot stand gekom. Die belang van die Engelse reg lê daarin dat die Kaapkolonie in 1806 finaal deur Brittanje oorgeneem is. Alhoewel die agste artikel van die Artikels van Kapitulasie onder andere vir die voortgesette toepassing van die Romeins-Hollandse reg voorsiening gemaak het, het dit later onafwendbaar geblyk te wees dat die Engelse reg 'n invloed op die Suid-Afrikaanse reg sou uitoefen. Dit het veral vir die prosesreg gegeld.

Die posisie ten opsigte van die reg op regsverteenwoordiging tot en met konstitusionalisering in 1994 is die produk van 'n evolusionêre proses wat oor 'n tydperk van ongeveer drieduisend vierhonderd jaar strek. Die geskiedenis van die regsprofessie is een van geleidelike verandering eerder as merkwaardige gebeure. Die kragte wat aktief in hierdie ontwikkelingsproses was, is uiteenlopend en het hul oorsprong in verskeie geskiedkundige tydvakke gehad. Tog is daar 'n aaneenlopende skakel tussen die bydraende faktore. In Deel 2 van hierdie artikel word die ontwikkeling van die reg op regsverteenwoordiging sedert 1652 tot na konstitusionalisering in oënskou geneem.

(*word vervolg*)

HUGO DE GROOT-PRYS

Die Hugo de Groot-prys vir die beste bydrae oor die Grondwet is toegeken aan professor M Havenga *vir haar artikel "Corporations and the right to equality".*

148 Voet 3 3 15.
149 Vroman *Tractaat de foro competenti* (1721) 2 4 3.
150 Van Zyl (1912) 267.

The outsider and natural justice: A re-examination of the scope of application of the *audi alteram partem* principle

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"There was one thing though that vaguely bothered me . . . In a way, they seemed to be conducting the case independently of me. Things were happening without me even intervening. My fate was being decided without anyone asking my opinion." – Albert Camus *The outsider*.[1]

OPSOMMING

Die buitestander en natuurlike geregtigheid: 'n Herondersoek na die toepassingsveld van die *audi alteram partem*-reël

Daar word oor die algemeen aanvaar dat die *audi alteram partem*-reël slegs van toepassing is wanneer 'n owerheidsorgaan ingevolge statutêre magte 'n handeling verrig wat 'n individu se vryheid, eiendom of bestaande regte nadelig aantas, of wanneer die individu 'n regverdigbare verwagting het dat hy of sy aangehoor sal word voordat die handeling verrig word. Die algemeen-aanvaarde siening is ook dat bogenoemde uiteensetting van die toepassingsveld van die *audi*-reël tot gevolg het dat 'n persoon wat 'n aanvanklike aansoek rig aan 'n owerheidsorgaan vir 'n betrekking, lisensie, permit of soortgelyke beskikking ten opsigte waarvan die aansoeker geen reg of regverdigbare verwagting het nie, nie kan aandring op 'n geleentheid om sy of haar saak te stel voordat die aansoek van die hand gewys word nie.

In hierdie artikel word aan die hand gedoen, met verwysing na toepaslike regspraak, dat daar heelwat gesag in ons reg is vir 'n meer buigsame en omvattende benadering. Selfs al het die aansoeker geen regsaanspraak op die verlangde betrekking of lisensie nie, en selfs al het hy of sy nie 'n regverdigbare verwagting van 'n gunstige beslissing of dat hy of sy aangehoor sal word nie, is hy of sy geregtig daarop om 'n saak te stel ter ondersteuning van die aansoek, of ten minste om die besluitnemer aan te spreek ten opsigte van oorwegings wat teen die aansoeker in ag geneem word. Daar word ook kortweg verwys na die implikasies van die grondwetlike waarborg van administratiewe geregtigheid, en na tersaaklike Engelse en Australiese regspraak.

1 1983 Penguin edition (translation by Joseph Caredo) 95.

1 INTRODUCTION

In South African law, it is generally accepted that the *audi alteram partem* principle applies whenever a statute empowers a public official or body to perform an act or to give a decision prejudicially affecting an individual in his or her liberty, property or existing rights, or whenever an individual has a legitimate expectation entitling him or her to a hearing.[2]

In *Foulds v Minister of Home Affairs*[3] the court intimated that a "complete outsider" would ordinarily not be entitled to invoke the *audi* principle. The expression "complete outsider" seems to have been intended to refer to a person who seeks a right, a benefit or a position which he or she has not previously held, to which he or she does not have any legal claim, and which he or she does not have any legitimate expectation of obtaining, and who does not have any legitimate expectation of being heard before his or her application is turned down.[4] Is it correct that such an outsider does not have a right to be heard in respect of his or her application for the new right, benefit or position sought by him or her?

In *McInnes v Onslow-Fane*[5] the court distinguished between three types of administrative decision in attempting to define the circumstances in which an individual is entitled to a hearing: forfeiture cases (decisions which deprive a person of a right, a position or a benefit which he or she already holds, for example where a public servant is dismissed or a licence is revoked); expectation cases (decisions regarding the confirmation, renewal or continuation of a right, a benefit or a position already held by the person concerned); and application cases (decisions refusing to grant the applicant the right, benefit or position that he or she seeks, and that he or she has not previously held).

Megarry V-C held that it was "plainly apt" that, in forfeiture cases, the individual concerned be granted a fair hearing because there was a threat to take something away for some reason. On the other hand, he stated that in application cases there was no right to be heard because nothing was being taken away, and normally there were no charges against the applicant. In his view, expectation cases were akin to forfeiture cases because the expectation of renewal, continuation or confirmation was one which raised the question of what it was that had

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2 *Administrator, Transvaal v Traub* 1989 4 SA 731 (A); *South African Roads Board v Johannesburg City Council* 1991 4 SA 1 (A) 10G–I; *Du Preez v Truth and Reconciliation Commission* 1997 3 SA 204 (A) 231C–D; *Van der Merwe v Slabbert* 1998 3 SA 613 (N) 624G–I; *Van der Merwe v Smith* 1999 1 SA 926 (C) 934E–G. This formulation of the rule leaves unanswered the question of what meaning should be given to the expressions "liberty", "property" (see *Administrator, Natal v Sibiya* 1992 4 SA 532 (A) 539A–B; *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 9 BCLR 1235 (Tk) 1246; *Cekeshe v Premier for the Province of the Eastern Cape* 1997 12 BCLR 1746 (Tk) 1768J–1769A) and "existing rights" (see *Noble & Barbour v South African Railways & Harbours* 1922 AD 527 536; *Conjwa v Postmaster General, Transkei* 1998 7 BLLR 718 (Tk) 732C–D; Baxter "Fairness and Natural Justice in English and South African Law" 1979 *SALJ* 607 622–623 fn 118) and what circumstances give rise to a legitimate expectation of a hearing.

3 1996 4 SA 137 (W) 149F–G.

4 A similar view was expressed in *SA Metal Machinery Co Ltd v Transnet Ltd* 1999 1 BCLR 58 (W) 66C, where it was held that, unless and until a tender submitted to an organ of state is accepted, the tenderer "is effectively a stranger to the tender process and . . . to the administrative action [involved in evaluating the various tenders]".

5 1978 3 All ER 211 (ChD) 218a–d.

happened to make the applicant unsuitable for the position or licence for which he or she was previously considered suitable. Consequently, in expectation cases, the applicant should be told, before his or her application was turned down, the grounds for the proposed refusal in order to enable him or her to make representations in that regard.[6]

The question arises whether the *Onslow-Fane* trichotomy is applicable in South African law. The so-called forfeiture cases can be equated with "existing rights" cases.[7] But what about the so-called expectation and application cases?

2 EXPECTATION CASES

Megarry V-C regarded *Breen v Amalgamated Engineering Union*[8] as an example of an expectation case. There the plaintiff was a member of a trade union who had been elected a shop steward by his fellow members. The union rules required that his election be confirmed by the district committee of the union in order for it to become effective. That committee decided, however, without having heard the plaintiff, not to confirm his election. The majority of the court held that (except to the extent that allegations of dishonesty might have been taken into account against the plaintiff) the committee was not under any obligation to inform him of their intention not to confirm his election, or to give him an opportunity to make representations in this regard.[9]

In a dissenting judgment, Lord Denning MR made the following statement:

> "If a man seeks a privilege to which he has no particular claim – such as an appointment to some post or other – then he can be turned away without a word. He need not be heard. No explanation need be given . . . But, if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard. I go further. If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, . . . Seeing that [the plaintiff] had been elected to this office by a democratic process, he had, I think, a legitimate expectation that he would be approved by the district committee, unless there were good reasons against him. If they had something against him, they ought to tell him and to give him a chance of answering it before turning him down."[10]

In the *Onslow-Fane* case, Megarry V-C said the following:

> "In *Breen's* case, the plaintiff, having been elected by his fellow members, had a legitimate expectation of confirmation by the committee. If even in a legitimate expectation case there is no general right to notice of what is against the applicant, and the chance of meeting it, in a mere application case there could hardly be a greater right."[11]

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6 The tripartite classification adopted in the *Onslow-Fane* decision has been subjected to some valid criticism: see Aronson and Franklin *Review of administrative action* (1987) 107; Wade and Forsyth *Administrative law* (1994) 555; De Smith, Woolf and Jowell *Judicial review of administrative action* (1995) 403–413; Cane *An introduction to administrative law* (1996) 179.

7 See *Mahomed v United Lower River Diggers Committee of Barkly West* 1920 CPD 312 315.

8 1971 1 All ER 1148, referred to in the *Onslow-Fane* case (1978 3 All ER 222b–223d).

9 1158c–e, 1159d–e, 1162h–j. See *R v City of London Corporation, ex parte Matson* 1997 WLR 765.

10 1154f–1155c.

11 223b–c.

The majority of the court in *Breen* did not regard the plaintiff as having had a legitimate expectation of having his appointment confirmed by the committee. Consequently, the above statement by Megarry V-C is based on an incorrect interpretation of *Breen's* case. Nevertheless, Lord Denning MR's abovementioned *dictum* in *Breen* has been cited in a number of South African decisions.[12]

There is no doubt that a person who has a legitimate expectation of having an appointment confirmed (or of having a benefit, such as a licence, renewed) is entitled to be heard before a decision adverse to him or her is taken.[13] But does an applicant for renewal or confirmation necessarily have such a legitimate expectation? Megarry V-C thought so.[14] It may be that an applicant for renewal or confirmation will, generally, have a legitimate expectation of a favourable decision, or that he or she will be heard before an adverse decision is taken. It will, however, have to be determined on the facts of each case whether or not the matter gives rise to a legitimate expectation on the part of the applicant.

In our law, there is some authority for the proposition that, even if he or she does not have any legitimate expectation, an applicant for renewal of a benefit is entitled to be heard before a decision adverse to him or her is taken. For example, in *Stern v Wynberg Liquor Licensing Board*[15] the applicant, who had been the holder of a liquor licence for sixteen years, had applied for the renewal of his licence. The licence was renewed but the hours during which he was allowed to sell liquor were curtailed. During its deliberations, after it had adjourned to decide on the application, the respondent had consulted with a police officer about the curtailment of hours. The police officer had put his views before the respondent, without the applicant having been invited to state his own views. The court held that the respondent's conduct had been grossly unfair and, consequently, set the respondent's decision aside.

Likewise, in *Dhulam v Nigel Town Council*[16] the applicant, who had held a hawking licence for twenty years, had applied to the respondent for a certificate

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12 See *Lunt v University of Cape Town* 1989 2 SA 438 (C) 447C–F; *Administrator, Transvaal v Traub* 1989 4 SA 731 (A) 756A–E; *Mankatshu v Old Apostolic Church of Africa* 1994 2 SA 458 (TkA) 463I–464C; *Minister of Justice, Transkei v Gemi* 1994 3 SA 28 (TkA) 32B–E; *Maqungo v Government of the Republic of Transkei* 1995 1 SA 412 (TkA) 416G–417B.

13 See *Foulds v Minister of Home Affairs* 1996 4 SA 137 (W) 149F–J, where the court stated the following regarding an application to the Immigrants Selection Board for permanent-residence status: "The applicant is not a complete outsider. He . . . is a person who has lived in this country . . . for approximately three years. He was granted a temporary residence permit to take up employment in this country and when he was dismissed by his employer he was granted a temporary residence permit to work for his own account. He has . . . established a business in this country and would be prejudicially affected if he has to leave this country. In these circumstances, . . . it was a reasonable and legitimate expectation that the Board . . . would properly and fairly consider the applicant's application and give him an opportunity to deal with adverse information obtained by it and with adverse policy considerations insofar as there were no special circumstances or reasons justifying the non-disclosure of such information and policy considerations to him and insofar as they had not already been dealt with by the applicant in his application."

14 "This head [sc expectation cases] includes cases where an existing licence-holder applies for a renewal of his licence, or a person already elected or appointed to some position seeks confirmation from some confirming authority" (218c–d).

15 1945 CPD 158.

16 1961 1 SA 174 (W).

to enable him to obtain a further licence. As in previous years, no objections had been raised by anybody to the grant of the certificate to the applicant. The applicant was notified that his application would be considered by the respondent's licensing board, but did not appear before the board on the relevant date and was subsequently notified that his application had been refused. In an application to have this decision set aside, it was contended by the applicant that he had not been given a fair hearing. It was held that, although the applicant had no right to a certificate, in the particular circumstances of this case a fair hearing had not been given. In the court's view, the licensing board should have looked at all the circumstances of the application and should have decided whether or not the applicant, in view of his long history of trading and long period of obtaining certificates previously without any objection, might not have been lulled into a false sense of security by the lack of notification of any objections to him.[17]

Generally, however, our courts have not accepted that an applicant for the renewal of a benefit should be given an opportunity to be heard.[18]

3 THE RIGHT OF AN INITIAL APPLICANT TO BE HEARD

In the *Onslow-Fane* case the plaintiff had applied for a boxing-manager's licence. The court held that it was plainly an application case in which the plaintiff was seeking to obtain a licence which he had not previously held and had no legitimate expectation of holding.[19]

Relying on Lord Denning MR's above statement in *Breen*, the court concluded as follows:

> "[T]here is no obligation on the board to give the plaintiff even the gist of the reasons why they refused his application, or proposed to do so. This is not a case in which there has been any suggestion of the board considering any alleged dishonesty or morally culpable conduct of the plaintiff ... The refusal of the plaintiff's application by no means necessarily puts any slur on his character, nor does it deprive him of any statutory right ... [T]he board are fully entitled to give no reasons for their decision, and to decide the application without any preliminary indication to the plaintiff of those reasons."[20]

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17 177C–F. Although the court emphasised (177D) that this was an application for a new certificate and that technically there was no such thing as a renewal of a hawker's licence, in modern legal parlance this case would probably have been regarded as a legitimate-expectation case. The decision illustrates that, long before the term "legitimate expectation" was coined by Lord Denning MR in *Schmidt v Secretary of State for Home Affairs* 1969 1 All ER 904 (CA), our courts would have come to the assistance of an aggrieved applicant in circumstances where, in effect, he or she had a legitimate expectation of being heard (or, more likely, of being granted a further licence) before his or her application was turned down.

18 See, for instance, *Jooma v Lydenburg Rural Licensing Board* 1933 TPD 477 483–486. Cf Steyn *Die uitleg van wette* (1981) by Van Tonder *et al* 259–261.

19 "[H]e had only the hope (which may be confident or faint or anything between) which any applicant for anything may always have" (218a).

20 223d–f. The court added: "The case is not an expulsion case where natural justice confers the right to know the charge and to have an opportunity of meeting it at a hearing. I cannot think that there is or should be any rule that an application for a licence of this sort cannot properly be refused without giving the applicant the opportunity of a hearing, however hopeless the application, and whether it is the first or the fifth or the fiftieth application that he has made" (224b–d).

In other words, except to the extent that the refusal of an application for a benefit not previously held is based on alleged morally culpable conduct on the part of the applicant, or adversely affects his or her reputation,[21] an applicant for such a new benefit is, in English law, not entitled to be heard before the application is turned down.[22]

Is this also the law in South Africa? Although there are many cases[23] which state that an applicant for a new benefit (or, in the words of the *Foulds* case, "an outsider") is not entitled to any hearing, the cases referred to below indicate that there is authority for the view that an outsider is entitled to the benefit of the *audi* principle.

In *Foxcroft v Bloemfontein Licence Certificate Board*[24] the court was required to interpret an ordinance which governed the consideration of applications for business-licence certificates. In doing so, the court stated the following:

> "[O]ne must bear in mind what at bottom is the subject-matter of this legislation. It is not an exceptional privilege or a valuable monopoly which depends on the issuing of the licence. It is a matter of the right of selling . . . merchandise, a right which by the general law of the land every subject, even the humblest, possesses. It is not to be supposed therefore (unless the legislature clearly enacts the contrary) that when a person wishing to exercise that elementary right, has established that he is a person of good character, that his premises are ideal for the purpose, and so forth . . . , he should still be liable to be debarred from exercising what is almost a natural right, on some recondite ground . . ."[25]

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21 See Baldwin and Home "Expectations in a joyless landscape" 1986 *MLR* 685 695–698. In *R v Secretary of State for the Home Department, ex parte Fayed* 1998 1 WLR 763 (CA) (referred to by Lord Woolf MR in "Judicial review – the tensions between the executive and the judiciary" 1998 *LQR* 579 589), the applicants had applied for naturalisation as British citizens. Their applications had been refused even though they met all the formal requirements. Neither of the applicants had been informed, before the refusal of their applications, of the reservations which the respondent entertained about their applications. The court stated that, apart from the damaging effect on their reputations of having their applications refused, the refusals also deprived them of the substantial benefits of citizenship: "The fact that the Secretary of State may refuse an application because he is not satisfied that the applicant fulfils the rather nebulous requirement of good character or 'if he thinks fit' underlines the need for an obligation of fairness . . . [U]nless the applicant knows the areas of concern which could result in the application being refused . . . it will be impossible for him to make out his case. The result could be grossly unfair" (773E–H). The court also stated that the days when it used to be said that a person seeking a prvilege was not entitled to be heard were long gone (776B–C). Consequently, the court concluded as follows: "The refusal of the benefits of naturalisation and the adverse inferences that will be drawn from such refusal are so serious that, as a matter of natural justice, an applicant should not be visited with them without a fair chance to meet the adverse case that threatens this result" (787G–H).

22 This general rule has not, however, been applied consistently. See *R v Huntingdon District Council, ex parte Cowan* 1984 1 WLR 501 508C–H; Wade and Forsyth *Administrative law* (1994) 555–556.

23 Eg *Administrator, Transvaal v Traub* 761G–H ("In general it is probably correct to say that a person who applies for appointment to a post is not entitled to be heard before the authority concerned decides to appoint someone else or to make no appointment") and *Laubscher v Native Commissioner, Piet Retief* 1958 1 SA 546 (A) (in which it was held that an applicant for a permit to enter "native trust land" was not entitled to be heard before his application was rejected because he had no antecedent right to enter such land). See also *Rapholo v State President* 1993 1 SA 680 (T) 688C–D 689F; Kellaway *Principles of legal interpretation of statutes, contracts and wills* (1995) 198 206.

24 1921 OPD 148.

25 1921 OPD 150.

In other words, the court was of the view that every person has a common-law right to conduct a business and that, if he or she applies for a certificate to enable him or her to exercise that right, the certificate should not be refused on arbitrary grounds. Although the court did not say so in so many words, it follows from the proposition that every person has a right to trade, and consequently a right to be issued with a trading certificate unless valid grounds exist for not granting such a certificate, that a refusal of a certificate amounts to an interference with common-law rights and that the applicant should be given a prior opportunity to comment on the grounds for the intended refusal.

In *Nanabhay v Potchefstroom Municipality*[26] the applicant had applied for the renewal of a general dealer's licence. The respondent had erroneously regarded the application as being one for a new licence. The court stated[27] that, even if it was an application in respect of a new licence, the applicant would have been entitled to be informed of the respondent's objection to granting the licence and to an opportunity, if not of an oral hearing, of controverting the prejudicial allegation contained in the objection:

> "[T]hough persons or bodies exercising functions like those entrusted to the respondents need not follow all the methods of procedure followed in courts of law, their procedure must not be in defiance of elementary standards of justice. To decide the dispute against the applicant without giving him an opportunity of meeting the prejudicial allegations made against him is . . . in conflict with such standards . . . For the reasons stated, even if the application were in respect of a new licence, the respondents' refusal of the applicant's application would have to be set aside . . . But . . . the application was in respect of a renewal, and therefore the applicant was entitled not only to the right just mentioned, but also to lead evidence and to be heard orally."[28]

This decision suggests (admittedly by way of an *obiter dictum*) that an applicant for a new licence is entitled to be informed of considerations adverse to him or her which the decision-making body intends to take into account in exercising its decision-making powers, and to make written submissions regarding those considerations.[29]

In *Kadalie v Hemsworth*[30] the applicant had applied for an exemption certificate in terms of an ordinance which provided as follows:

> "Any native . . . who shall be employed under a contract of service as a . . . skilled employee or who shall on his own behalf carry on some trade or business may upon producing satisfactory evidence thereof on application . . . be granted a certificate . . . which . . . shall exempt the holder from the operation of the existing laws relating to passes."

In submitting his application for an exemption certificate, the applicant had requested an opportunity of supplementing the application in respect of any matters with which the subcommissioner who was to consider the application was not satisfied, and had asked to be advised of any grounds upon which the subcommissioner considered him undeserving of the certificate to allow him an

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26 1926 TPD 483.

27 491.

28 491 494–495. See also *Bignaar v Municipal Council of Rustenburg* 1927 TPD 615.

29 A similar principle was applied in *Home Service Security (Pty) Ltd v Knysna Divisional Council* 1975 2 SA 562 (C) 570*pr*–A 576F–G.

30 1928 TPD 495.

opportunity of controverting such grounds. The subcommissioner had refused the application without having replied to the applicant's requests. In opposing the applicant's review application in respect of the refusal of the certificate, the subcommissioner stated that he knew the applicant to be "an agitator engaged in propaganda work amongst natives and coloured persons . . . , and that his activities embrace the dissemination of doctrines . . . calculated to spread unrest and unsettlement amongst natives and coloured persons". Consequently, it was the subcommissioner's view that the applicant was "not 'a deserving and respectable' native" to whom an exemption certificate should be granted.[31]

The court held that an administrative officer, when deciding a case in which he is required to act in a quasi-judicial capacity, acts irregularly where the applicant, having asked for information to enable him to complete his case, is denied information on important points which the officer, relying on his own sources of information, takes into account against the applicant:

> "[T]he application for a certificate should not have been disposed of until the main points of what I may call the counter case had been brought to the applicant's notice; and . . . failure to give the applicant any indication of these points was not merely an unreasonable way of dealing with the matter, but involved in effect a denial to the applicant of any adequate opportunity of stating his case, and . . . there was therefore a gross irregularity which justifies this Court in setting aside the subcommissioner's decision."[32]

The court stated that its decision was based on two general propositions: first, where a person is applying for some privilege or benefit which, on proof of certain facts, he or she is entitled to have granted to him or her, and a public body or an administrative official has to act in a quasi-judicial capacity for the purpose of deciding whether or not the applicant has made out his or her case, it is the duty of that body or official to give the applicant a fair opportunity of presenting his or her case; and secondly, where, in order to give the applicant a fair opportunity of presenting his or her case, it is necessary to give him or her information of points which are being taken into account against him or her, he or she is entitled to have that information whether or not he or she has asked for it.[33]

The court also stated the following:

> "[W]hether a man is defending his existing rights, or seeking to claim a right to which under certain conditions the law entitles him, he is equally entitled to a fair opportunity of presenting his case before the authority responsible for deciding the question at issue . . ."[34]

In *Hirst v South African Medical Council*[35] the applicant had applied to the respondent for a certificate entitling him to be registered as a dentist. The relevant statute provided that where an applicant satisfied the respondent of the existence in his or her case of certain conditions, the respondent was compelled to grant the relevant certificate. The court held that it was a necessary implication that an applicant had to be given every reasonable opportunity of satisfying the respondent of the existence of those conditions. Furthermore, if the respondent, by not advising an applicant of a difficulty operating in its mind, had not given

31 503–504.
32 506–507.
33 507.
34 510.
35 (1929) 50 NLR 170.

him such an opportunity, it would have failed to act in accordance with the provisions of the statute.[36]

In *Loxton v Kenhardt Liquor Licensing Board*[37] Feetham JA said:

> "Where an administrative authority entrusted with *quasi* judicial functions holds an enquiry on a question submitted for its decision, and the party whose rights or claims are the subject of such enquiry is entitled to a hearing, it is one of the requisites of a fair hearing that, if the authority avails itself of its own knowledge, in regard to particular facts relevant to the question submitted to it, or of information in regard to such facts independently obtained from outside sources, it should give the party concerned notice of any points, derived from such knowledge or information, which may be taken into account against him, so as to give him an opportunity of meeting such points."[38]

Two aspects of this statement are of interest. First, the court was of the view that even a person whose "claims" (as opposed to rights) are to be considered at an enquiry is entitled to prior notice of information which may be taken into account against him or her, and to an opportunity of responding to such information. Secondly, the court did not express this rule as being of universal application; rather, it applies only if the individual concerned is entitled to a hearing. The court did not indicate in what circumstances the individual would be entitled to a hearing; the court stated simply that there could be no doubt of the applicability of this general rule to the proceedings of licensing boards when dealing with questions as to the "forfeiture of existing rights".[39]

In *Windyridge Estates & Trust Co (Pty) Ltd v Durban Rent Board*[40] the applicant had applied to the respondent for an increase in the rental of certain flats and had led evidence as to the value of the property, which was not challenged in the proceedings before the respondent. Thereafter, the respondent had held an inspection *in loco* and, relying on its own knowledge, had valued the property, for the purposes of fixing the rent, at a considerably lower figure than that contended for by the applicant. The court held as follows:

> "[A] Rent Board is bound, in conducting any enquiry, to listen fairly to every party, and always to give to the parties to the controversy a fair opportunity to contradict, correct or deal with any statement made to the Board, or any consideration which the Board has in mind, which is calculated, or likely, to be prejudicial to a party. This last mentioned principle . . . has its origin, not in statutory provisions, but is regarded as one of the fundamental principles of natural justice . . ."[41]

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36 In *Vlotman v South African Medical Council* 1933 NPD 92 95–96 the following was stated with regard to the *Hirst* case: "I do not regard that case as deciding that the council must give an applicant information as to its reasons for refusing the application, but only as deciding that where it transpires that a difficulty has been operating in the mind of the council it must inform the applicant of that difficulty to give him an opportunity of removing it." The principles enunciated in the *Kadalie* and *Hirst* cases apply only in instances where the applicant would be entitled to receive the benefit sought by him or her upon compliance with specified conditions or criteria. See also *Kadalie v East London Town Council* 1933 EDL 180 185: "[O]nce the applicant proves that he is a fit and proper person he is entitled to a permit as a matter of right and not as a privilege. Inasmuch as Kadalie was claiming this right, . . . he also had the right to claim an opportunity of proving his qualification."

37 1942 AD 275.

38 315.

39 316.

40 1946 NPD 535.

41 1946 NPD 545.

In setting aside the decision of the respondent, the court stated:

> "[B]efore it takes into account any fact or consideration which has not been led in evidence or debated before it, it must . . . give to any party whose *interests* are likely to be detrimentally affected, fair notice of what it proposes to take into account, and a fair opportunity of controverting or canvassing those matters" (my emphasis).[42]

In *Tayob v Ermelo Local Road Transportation Board*[43] the appellant, who had held an exemption certificate authorising him to carry on a taxi business since 1940, had applied, towards the end of 1950, for a renewal of his exemption in respect of 1951. His application had been turned down and he had appealed to the National Transport Commission, which had dismissed his appeal. The Commission's decision had been upheld by the Supreme Court. In allowing the appellant's appeal against the Supreme Court's ruling, Centlivres CJ said:[44]

> "The Chairman [of the Commission] went on to suggest that the granting of an exemption was not a right but merely a privilege. It almost amounts to saying that the granting of an exemption is in the gift of the Commission or a local board. This is a wrong approach to adopt by a statutory board which is empowered by Parliament to grant permission to carry on a trade. It is not an exceptional privilege or a monopoly which depends on the issuing of the permission. Even the humblest citizen has the right to approach such a board and he is entitled to get the permission he requires, unless there are sound reasons to the contrary."[45]

By echoing the decision in *Foxcroft*,[46] this statement gives recognition to the idea that a first-time applicant is entitled to be issued with a licence unless good reasons exist why he or she should not receive one. If this is so, it is difficult to understand why the right of such an applicant to be given a prior opportunity to argue against the refusal of a licence should not also be recognised.

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42 546. As far as the meaning of the word "interests" is concerned, see *Naidenov v Minister of Home Affairs* 1995 7 BCLR 891 (T) 901I and *SA Metal Machinery Co Ltd v Transnet Ltd* 1999 1 BCLR 58 (W) 65G–I.

43 1951 4 SA 440 (A).

44 449A–C.

45 The fact that the appellant had applied for a renewal of his exemption (and that, for this reason, he was not a "complete outsider") did not influence the Appellate Division's decision. In *Castel v Metal & Allied Workers Union* 1987 4 SA 795 (A) 808C–F it was accepted (with reference to *Tayob*'s case) that an applicant for a trading licence is entitled to get the permission he or she requires unless there are sound reasons to the contrary, and that the *audi* rule must be observed in respect of applications for trading licences. Rose Innes *Judicial review of administrative tribunals in South Africa* (1963) 53 comments as follows on *Tayob*'s case: "[E]very citizen is entitled as of right to obtain permission to carry on a trade, unless there are sound reasons to the contrary, and the granting of a licence is as of right, subject to the same proviso, and is not a privilege in the gift of a licensing authority." See also *Road Services Board v John Bishop (Africa) Ltd* 1956 2 SA 504 (FC) 508C–E; *Swift Transport Services (Pvt) Ltd v Road Service Board*; *Rhodesia Railways v Road Service Board* 1956 2 SA 514 (SR) 520A–C; *Welkom Village Management Board v Leteno* 1958 1 SA 490 (A) 504H–505B; *Hillowitz v Germiston Town Council* 1962 3 SA 335 (W) 338H–339A; *Bartlett v Munisipaliteit van Kimberley* 1966 2 SA 95 (GW) 104B–D; *Vries v Du Plessis* 1967 4 SA 469 (SWA) 478B–C; Meyer "Licensing" in Joubert (ed) *LAWSA* vol XV (1981) par 2; and the comments on *Administrateur van Suidwes-Afrika v Pieters* 1973 1 SA 850 (A) by Taitz "The application of the *audi alteram partem* rule in South African administrative law" 1982 *THRHR* 254 260.

46 1921 OPD 148.

The decision in *Pretoria North Town Council v A1 Electric Ice-Cream Factory (Pty) Ltd*[47] concerned a refusal by the appellant to grant to the second and fourth respondents the certificates which they required, in terms of certain ordinances, to enable them to obtain licences to hawk ice-cream. The first and third respondents were companies which had been manufacturing ice-cream and selling it in Pretoria for several years. In 1949 the first respondent had concluded a contract with a Ms Meyjes in terms of which she bought ice-cream in bulk and hawked it in the area, at first through white hawkers and later through black hawkers. The third respondent sold ice-cream through a Mr Buys, who employed black hawkers. Certificates for licences had been granted to all these hawkers up to and including 1950. Thereafter, all certificates were refused. In 1951 and 1952 there had been fifteen applications by black hawkers. All these applications had been refused, without reasons being given. Schreiner JA referred[48] to the decision in *Yoffe v Koppies District Licensing Board*,[49] in which it had been held that a distinction should be made between instances in which a new licence was being sought and instances in which an applicant had held a licence in previous years and was seeking a renewal of his or her licence. In this regard, Schreiner JA stated the following:

> "I do not agree with this view. No doubt the claim to a renewal will often be morally stronger than that of a new licence . . . But, in the absence of statutory provision, the distinction seems to me to be one of degree rather than kind. The claim of one who has held a licence for a long time is *prima facie* stronger than that of one who has held it only for a short time, just as a trader who has sunk considerable capital in his business has *prima facie* a stronger claim than one who has not. But in the absence of differential statutory treatment . . . , there is no vital distinction between a new licence and a renewal. It was accepted in *Loxton v Kenhardt Liquor Licensing Board*, 1942 A.D. 275, that applications for certain licences, in particular liquor licences, must be treated by a licensing body on *quasi*-judicial and not on purely administrative lines . . . An applicant for a certificate for a licence to hawk ice-cream is entitled to have his application dealt with substantially on the same lines as one who seeks a liquor licence, and this is so whether he held a certificate in the previous year or not."[50]

Schreiner JA added[51] that it did not necessarily follow that a local authority or board could be compelled to furnish reasons for its refusal of a certificate. In this regard, Schreiner JA said the following:

> "Assuming, as I do, that the council was not obliged to furnish the reasons for its refusal of the certificates it seems to me, nevertheless, that if it was in possession of any private information which might found an objection to the grant of any certificate it was obliged to disclose such information to the applicant and give him an opportunity of dealing therewith . . ."[52]

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47 1953 3 SA 1 (A).
48 12B–C.
49 1948 3 SA 743 (O).
50 12C–H.
51 13*pr*–A.
52 13G–H. Schreiner JA added: "It was suggested that there might have been reasons based on facts privately learned by the members of the licensing committee; if that had been the case the facts should have been disclosed to the second and fourth respondents, to enable them to explain or contradict them" (15H–*in fine*). See also *Brentwood Park Bottle Store (Pty) Ltd v Kempton Park Liquor Licensing Board* 1957 3 SA 118 (T) 125E; *R v Pillay* 1958 4 SA 141 (T) 146E–F.

There could hardly be clearer authority for the proposition that an outsider should be given the benefit of the *audi* principle before his or her application for a benefit or a position not previously held is rejected.

In *Chief Native Commissioner, Northern Areas v Dhlamini*[53] the respondent had been carrying on business as a hawker on "native trust land" for some time and had applied for a renewal of his licence. His application had been turned down without the *audi* principle having been applied. The court rejected the argument that the respondent was not entitled to be heard before the decision was taken as the decision allegedly did not affect any antecedent right which the respondent had.[54] Referring to *Tayob*,[55] the court stated that, according to the common law, even the humblest citizen has the right to be granted permission to carry on a trade unless sound reasons to the contrary exist, and that consequently the respondent had an antecedent right to trade and was entitled to be heard before any decision affecting that right was made.[56]

In *Moleko v Bantu Affairs Administration Board (Vaal Triangle Area)*[57] the applicant sought an order setting aside the decision of the respondent to refuse his application for a trading-site permit and licences authorising him to carry on business. The applicant had not held any such permit or licence previously. The respondent had failed to give the applicant any hearing or to apprise him of the facts which constituted an obstacle to the granting of the permits and licences sought by him. The court said:

> "He should have been told on what date the first respondent intended to consider his application and it was . . . the duty of the Board to have apprised the applicant of those matters which it considered might adversely affect his application and which might weigh with the Board in its consideration of the application. Particularly is that so when certain of the matters on which it now appears to have relied are matters peculiarly within its own knowledge and are not matters which would necessarily have been known to the applicant."[58]

In *Lawson v Cape Town Municipality*[59] the applicant had held trading licences in respect of two body-massage businesses. As a result of the introduction of a new ordinance, he was required, in addition to his trading licences, to obtain a licence as a body masseur. In terms of the ordinance, the respondent was required to obtain a police report and was obliged to turn down the licence application in the event of an unrefuted clearly adverse police report. The relevant police report contained several allegations unfavourable to the applicant, to the effect that he was operating a brothel under the guise of the body-massage business. The respondent turned down the applicant's licence application, but did so without having disclosed the substance of the police report to him and without having given him an opportunity to challenge the allegations made in that report. The court held[60] that the council was obliged to disclose the police report, or at least its substance, to the applicant before turning down his application:

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53 1959 4 SA 436 (T).
54 438*pr*–A.
55 *Supra*.
56 438B–E. The fact that the respondent was seeking a renewal of his licence did not constitute part of the *ratio decidendi*.
57 1975 4 SA 918 (T).
58 926*pr*–B.
59 1982 4 SA 1 (C).
60 11H-*in fine*.

> "Such an application stands or falls by the opinion which a council forms pursuant to the police views and recommendations. An applicant may persuade the SA Police to change its views and recommendations, either by showing that they are based on wrong facts or by undertaking to introduce safeguards. Moreover, it seems to me that an applicant may be able to persuade a council to see the police views and recommendations in a different light. The consequences for an applicant who is not afforded the opportunity so to correct or persuade, may be drastic. He is denied the right to trade and if, like the applicant, he is already trading, then he must stop. These are strong reasons, to my mind, for holding that the maxim *audi alteram partem* applies at the stage when a council has to form the opinion [as to whether the police views indicated that the application should not be granted]."[61]

In *Maharaj v Chairman, Liquor Board*[62] the applicant's application for a liquor licence had been turned down. In response to her request for reasons for the decision, the respondent had indicated that it was not satisfied that the granting of the licence was in the public interest. In an *obiter dictum*, Nicholson J said:

> "It seems to me that, if the respondent felt there were deficiencies concerning whether the grant of the licence was in the public interest, it could never have been right and just and fair to simply refuse the application without informing the applicant of such deficiencies and affording the applicant an opportunity of supplementing the application. Even without the aid of . . . s 24*(b)* of the [1993] Constitution, I am of the view that the *audi alteram partem* principle as contained in our common law applied. As the applicant was never told in what respects her application was not in the public interest I am of the view that the maxim was not satisfied."[63]

It appears from the cases referred to above that, long before the reception of the doctrine of legitimate expectation into our law, our courts recognised the right of an initial applicant to be heard, or at least to be notified of considerations adverse to him or her which might be taken into account by the decision-maker, and to be allowed to make representations in respect of those considerations, particularly when they would not necessarily have been known to the applicant.[64] This rule applies with particular force, but not only when the applicant would, upon satisfaction of specified requirements or criteria, be entitled to be granted the benefit or position sought by him or her. Subsequent to the reception of the doctrine of legitimate expectation in our law, the courts have continued to apply this rule, without relying on that doctrine.

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61 12*pr*–C. It is not clear to what extent the fact that the applicant had already been trading influenced the court's decision. This fact does not, however, seem to have constituted part of the *ratio decidendi*; indeed, the court was of the view that a first-time applicant who is refused a licence would be "denied the right to trade".

62 1997 1 SA 273 (N).

63 277G–I.

64 See *Tabakain v District Commissioner, Salisbury* 1974 1 SA 604 (R) 606E–G: "The complexities of modern society have enormously multiplied the controls to which people are subjected in the exercise of their general rights, and there is an increasingly insidious tendency to regard permits of all kinds as a form of privilege. I would resist the notion of regarding a permit . . . as a sort of delectable crumb that might or might not be dropped from the bureaucratic dinner table. To withhold such a permit is to affect the citizen adversely in his rights by denying to him the opportunity of exercising his trade in a manner that is normal for anyone of good character. Not only is it the scope of the general right to trade that is adversely affected, it is also the obvious slur that is thereby cast upon the applicant's fair name and fame." See also *South African Broadcasting Corporation v Transvaal Townships Board* 1953 4 SA 169 (T) 175E–G; *Basson t/a Repcomm Community Repeater Services v Postmaster-General* 1994 3 SA 224 (SE) 233B–C.

4 THE CONSTITUTION

Section 33(1) of the Constitution of the Republic of South Africa, 1996[65] provides that everyone has the right to administrative action which is lawful,[66] reasonable and procedurally fair.[67] Does this mean that an outsider is entitled to procedurally fair administrative action and, if so, what meaning should be assigned to "procedural fairness"?

Section 33(1) states that "[e]veryone" is entitled to procedurally fair "administrative action".[68] Accordingly, the meaning of the expression "administrative action" will determine in what circumstances the constitutional right to procedural fairness may be invoked. In *Cekeshe v Premier for the Province of the Eastern Cape*[69] it was held that legislative action which has its source in the parliamentary process (in the sense that the matter is debated by a body with legislative powers) will not amount to "administrative action".[70]

It has been suggested that the term "administrative action" must be understood as covering any form of action taken by bodies exercising public power, including adjudicative administrative decisions, and delegated and subordinate legislation.[71] It has also been argued that any application for admission to a governmental benefit programme would have to be considered in accordance with the section 33(1) requirement of procedural fairness.[72]

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65 Act 108 of 1996 ("the Constitution").

66 Burns *Administrative law under the 1996 Constitution* (1998) ("Burns") 138 argues that "lawful administrative action" should be interpreted widely to include compliance with the Constitution, with enabling legislation and with common-law rules.

67 Until such time as the proposed Administrative Justice Act is enacted, the provisions of s 24 of the Constitution of the Republic of South Africa, Act 200 of 1993 remain in effect: see item 23 of Sch 6 to the 1996 Constitution.

68 In *Tettey v Minister of Home Affairs* 1999 1 BCLR 68 (D) 78F–79G it was held that the words "[e]very person" used in item 23(2) of Sch 6 to the Constitution must be given their ordinary meaning and must be construed as including "every individual who comes before the Courts in this country, whether high or low, rich or poor, alien or local". Cf *Xu v Minister van Binnelandse Sake*; *Tsang v Minister van Binnelandse Sake* 1995 1 SA 185 (T), *Naidenov v Minister of Home Affairs* 1995 7 BCLR 891 (T) and *Parekh v Minister of Home Affairs* 1996 2 SA 710 (D), in which it was held that aliens are not entitled to rely on the constitutional right to administrative justice.

69 1765G. See also *Frans v Munisipaliteit van Groot Brakrivier* 1997 3 BCLR 346 (C) 352F–H, where it was held that something which occurs, not as a result of a decision or the exercise of a discretion, but by operation of law as a result of an objectively determinable fact, does not constitute "administrative action".

70 This view finds support in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) 394H–395F 396D–397B.

71 Klaaren "Administrative justice" in Chaskalson *et al Constitutional law of South Africa* (1996) par 25.2. This view is shared by Burns 136, who argues that "purely administrative acts" such as the issuing of licences also constitute "administrative action". In *Bushbuck Ridge Border Committee v Government of the Northern Province* 1999 2 BCLR 193 (T) 199F it was held that, in general, administrative action is taken in the exercise of a discretionary power conferred upon a public functionary by or under any law. See also *Metro Inspection Services (Western Cape) CC v The Cape Metropolitan Council* 1999 1 All SA 115 (C) and *Independent Municipal & Allied Trade Union v MEC, Environmental Affairs* 1999 6 BCLR 664 (NC) 680F. Cf *Uitenhage Local Transitional Council v Zenza* 1997 3 All SA 193 (SE) 197.

72 Asimow "Administrative law under South Africa's final Constitution: The need for an administrative justice act" 1996 *SALJ* 613 617–618. Asimow also points out (620) that the

continued on next page

In *Goodman Bros (Pty) Ltd v Transnet Ltd*[73] the court had to determine whether the respondent (an organ of state) performed "administrative action" in awarding a tender. The court stated that "administrative action" encompassed any act relating to the management of the respondent's affairs and the administration of its powers:[74]

> "[A]ny person dealing with a state organ . . . is entitled to expect fairness, openness and equitable conduct from it *in all its actions*. The respondent is required to act in the spirit of the Constitution and the consequence of this is that in exercising its discretion to accept or reject any tender the respondent is required to act 'fairly, responsibly, and honestly' " (my emphasis).[75]

It appears, then, that a public body which, in the exercise of statutory powers, considers and decides upon an application by an initial applicant for a licence, a benefit or a position will be performing "administrative action". This proposition finds support in *Kotze v Minister of Health*.[76] There the applicant sought to have a decision refusing his application for a discharge from the public service on grounds of continued ill-health set aside. In other words, he was seeking a benefit not previously held by him. The court stated:

> "[T]he second respondent should have afforded the applicant an opportunity to deal with any other information which did not form part of his application and which she intended to take into account when considering his application. Fairness dictates this. To deny the applicant this opportunity is to deny him reasonable procedurally fair administrative action as envisaged by s 24 of the [1993] Constitution."[77]

Apart from stating that the exercise of decision-making powers which does not affect any rights or legitimate expectations amounts to "administrative action", this decision indicates that the right to procedurally fair administrative action includes the right to be informed, in advance of the decision, of factors which may be taken into account in making it. Indeed, in *Van Huyssteen v Minister of Environmental Affairs and Tourism*,[78] it was held that the right to procedurally fair administrative action entails more than merely the application of the *audi alteram partem* and *nemo iudex in sua causa* rules, and extends to the principles and procedures which, in the particular circumstances, are right and just and fair.[79]

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drafters of s 24 of the 1993 Constitution intended the term "administrative action" to describe as wide a range of administrative behaviour as possible.

73 1998 8 BCLR 1024 (W).

74 1031G–H.

75 1032F. See also *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1997 10 BCLR 1429 (W) 1436; *Umfolozi Transport (Edms) Bpk v Minister van Vervoer* 1997 2 All SA 548 (A). Cf *SA Metal Machinery Co Ltd v Transnet Ltd* 1999 1 BCLR 58 (W) 66C; *Coolcat Restaurante BK h/a Die Kafeteria. UOVS v Vrystaatse Regering* 1999 2 SA 635 (O) 642B–C.

76 1996 3 BCLR 417 (T). See also *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust* 1999 8 BCLR 908 (T) 915B–D, where it was held that the conduct of an organ of state in awarding a licence or permit to competing applicants constitutes administrative action.

77 426B–C.

78 1996 1 SA 283 (C) 305C–D.

79 This statement was cited with approval in *Maharaj v Chairman, Liquor Board* 1997 1 SA 273 (N) 277F–G and *South African Rugby Football Union v President of the Republic of South Africa* 1998 10 BCLR 1256 (T) 1275C–H.

5 A COMPARATIVE PERSPECTIVE: SOME AUSTRALIAN DECISIONS

In *FAI Insurance Ltd v Winneke*[80] the question arose whether the Governor-in-Council of Victoria, when deciding whether to renew an approval previously granted to a company allowing it to carry on the business of workers' compensation insurance, is subject to the rules of natural justice. The High Court stated that the exercise of a power revoking a licence will attract the rules of natural justice, but that there has been a greater reluctance on the part of the courts to insist upon the application of natural justice when power is exercised to grant or refuse an initial application for a licence:[81]

> "In the absence of a contrary legislative provision the cancellation of, or refusal to renew, a permit or licence to carry on some business activity must comply with the rules of natural justice . . . At the other end of the scale it requires most unusual circumstances to warrant the view that upon an initial application for a licence which is not one which the relevant authority must issue as of course upon compliance with specified procedures, there is a duty to provide a hearing. Such licences rest in the discretion of the licensing authority and are not often the subject of clearly prescribed criteria upon satisfaction of which the grant of a licence must follow as of right . . . In a case where the criteria are not prescribed in detail and where matters of policy may be involved, the situation is unlikely to warrant the drawing of the inference that there is some entitlement to a licence or some entitlement to a hearing before a licence is refused."[82]

The court also stated that an application for renewal of an existing licence should be considered in accordance with the requirements of natural justice because the holder of the licence may have a legitimate expectation that the licence will be renewed in the absence of some disqualifying circumstance.[83]

The decision in the *Winneke* case was cited with approval in *Attorney-General (New South Wales) v Quin.*[84] All magistrates in New South Wales who had held office under the Justices Act of 1902 had been invited to apply for appointment under the Local Courts Act of 1982. Pursuant to a selection process, the appellant had announced that all serving magistrates, other than the respondent and four others, would be appointed to the new courts. In doing so, the appellant had acted on adverse comments made by the selection committee about the unsuccessful candidates without giving them any opportunity of responding. The court said:

> "Clearly [the respondent] had no right to appointment nor was there any foundation for regarding as legitimate any expectation which he might have entertained. It is one thing to expect to continue in a position; it is another to expect to be appointed to it. That distinction was drawn in *FAI Insurance Limited v Winneke* . . . between the initial application for a licence and an application for its renewal. No doubt even with an application for appointment to a position there may be special circumstances which make it only fair to accord some sort of a hearing . . . However, in the absence of special circumstances, the situation is as described by Lord Denning MR in *Breen v Amalgamated Engineering Union* . . . The respondent had no entitlement to the adoption of a particular procedure in the consideration of his application when it was originally considered, save perhaps that he was entitled to an opportunity to reply to the allegations made against him."

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80 (1982) 151 CLR 342.
81 360–361.
82 377–378.
83 379.
84 (1990) 170 CLR 1.

Thus, in Australian law, an outsider is as a general rule not entitled to be heard in respect of his or her application for a benefit or a position not previously held by him or her. An outsider will, however, have a right to be heard if he or she would be entitled to receive the benefit or position sought upon showing that certain requirements are met. An outsider is also entitled to reply to allegations made against him or her. In addition, there may be unusual or special circumstances which, in a particular case, would make it fair to grant a hearing to an outsider.[85]

6 CONCLUSION

In *South African Rugby Football Union v President of the Republic of South Africa*[86] ("the *SARFU* case") the view was expressed by De Villiers J that the Supreme Court of Appeal no longer regards the invasion of existing rights by the exercise of statutory powers as a prerequisite for the application of the *audi* principle, and that all that is required to activate that principle is a likelihood that, in the ordinary course of events, the exercise of the statutory power concerned will cause prejudice to the individual affected. This view was based on statements made in *South African Roads Board v Johannesburg City Council*[87] and in *Du Preez v Truth and Reconciliation Commission*.[88] If this view is correct, it may lend support to the argument advanced here, namely that outsiders are entitled to be heard.

In the *South African Roads Board* case, Milne JA stated that a distinction should be made between statutory powers which, when exercised, equally affect members of the community at large and those which "are calculated to cause particular prejudice to an individual or particular group of individuals".[89] He stated that the word "calculated" meant, not "intended", but "likely in the ordinary course of things" to have this result.[90] He said, further, that, in respect of the second category of statutory powers, the repository should normally "be obliged to afford the particular party prejudicially affected a hearing before exercising the power".[91] It is on this basis that De Villiers J concluded in the *SARFU* case that the Supreme Court of Appeal had "by necessary implication dropped the requirement of existing rights". In support of this conclusion, De Villiers J also relied on certain statements made by Corbett CJ in the *Truth and Reconciliation Commission* case. This conclusion, however, appears to be incorrect, for a number of reasons.

First, if Milne JA and Corbett CJ did indeed intend to discard the existing-rights requirement which, rightly or wrongly, has been applied by the Supreme Court of Appeal for several decades,[92] one would have expected them to have said so in unequivocal language. They did not.

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85 See also *Hamblin v Duffy* (1981) 55 FLR 228, (1981) 37 ALR 297; *Ansell v Wells* (1982) 63 FLR 127, (1982) 43 ALR 41; *Mair v Bartholomew* (1992) 108 ALR 182.

86 1280D–E 1281E.

87 12E–13B.

88 231–233.

89 12F–G. O'Regan "Rules for rule-making" in Corder and McLennan (eds) *Controlling public power: Administrative justice through the law* (1995) 105 107 argues that the distinction should rather be between adjudicative and legislative functions, the latter involving the creation of new and binding rules and the former involving the application of rules.

90 12F–G.

91 13A–B.

92 At least since *Laubscher v Native Commissioner, Piet Retief* 549E–F 551E–H and *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad* 1959 3 SA 651 (A) 660C–D.

Secondly, it is apparent from the *South African Roads Board* case[93] that the rights and property of the respondent were affected by the decision in issue. Likewise, in the *Truth and Reconciliation Commission* case, Corbett CJ concluded that "the whole process [was] potentially prejudicial to [the appellants] and their rights of personality".[94] In other words, the Supreme Court of Appeal was concerned in both cases with decisions and proceedings that infringed the rights of parties, or had the potential to do so.

Thirdly, in the *Truth and Reconciliation Commission* case Corbett CJ proceeded from the premiss that the *audi* principle is a rule of natural justice which comes into play whenever a statute empowers a public official or body to perform an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever that individual has a legitimate expectation entitling him or her to a hearing.[95] The Chief Justice then stated[96] that the *audi* principle is an important facet of the general requirement of natural justice that "in the circumstances postulated" (sc when the exercise of statutory powers prejudicially affects an individual's liberty or property or existing rights, or when he or she has a legitimate expectation entitling him or her to a hearing) the public official or body concerned must act fairly.

Consequently, it appears that the *South African Roads Board* and *Truth and Reconciliation Commission* cases do not constitute direct authority for the view that the existing-rights requirement has been discarded.[97] Of course, whether or not that requirement is satisfied in a given case is a matter of construction. On a conventional interpretation of the existing-rights requirement, an outsider would never be entitled to a hearing because none of his or her rights would be affected by the decision-making process. This approach is, however, in conflict with the views expressed in the *Foxcroft*, *Tayob*, *Dhlanuini* and *Moleko* cases.

In any event, the decisions referred to in this article indicate that an outsider is entitled to be heard (or, at least, to be treated fairly) in respect of his or her initial application, regardless of whether or not the decision-making process can be shown to affect his or her existing rights, liberty or property adversely, and irrespective of whether or not he or she has a legitimate expectation of being heard.[98]

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93 9D–E.
94 233E.
95 231C–D.
96 231F–G.
97 The decision in *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 2 SA 709 (SCA) suggests, however, that the existing-rights requirement is no longer being applied rigidly: It was held that interested parties should be given the benefit of the *audi* rule when an application for a mining licence is considered because the granting of such a licence can have "serious consequences" or "grave results" (718D–E), or cause "potential jeopardy" (718I).
98 This does not mean that the *audi* rule is applicable to every decision of an organ or official of government in terms of a statute. In certain circumstances, public policy and public interest will take precedence over the rights of individuals in order to ensure effective governance: *Crow v Detained Mental Patients Special Board* 1985 4 SA 83 (ZH) 96A–C; *Administrator, Transvaal v Traub* 761G–H; *Deacon v Controller of Customs & Excise* 1999 6 BCLR 637 (SE) 644I–645F. See also *R v Secretary of State for the Home Department, ex parte Fayed* 1998 1 WLR 763 (CA) 776H–777C: "[The requirement of notice of potentially adverse considerations] does not require the Secretary of State to do more than to identify the subject of his concern in such terms as to enable the applicant to make such submissions as he can . . . [M]y remarks are limited to cases where an applicant would be in real difficulty in doing himself justice unless the area of concern is identified by notice. In many cases which are less complex . . . the issues may be obvious. If this is the position notice may well be superfluous because what the applicant needs to establish is clear."

AANTEKENINGE

REGVERDIGING VAN DIE AANTASTING VAN DIE REG OP DIE FISIES-PSIGIESE INTEGRITEIT INGEVOLGE ARTIKEL 49 VAN DIE STRAFPROSESWET 51 VAN 1977

Die persoonlikheidsreg op die fisies-psigiese integriteit word gemeenregtelik en grondwetlik van groot waarde in die Suid-Afrikaanse reg geag (sien Neethling *Persoonlikheidsreg* (1998) 103 ev; *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 145–146; *Minister of Law and Order v Monti* 1995 1 SA 3 (A) 39; a 12 van die Grondwet, Wet 108 van 1996). Daarom krenk iedere aantasting van die fisies-psigiese liggaam *per se* die reg op die *corpus*, en is bygevolg in beginsel *contra bonos mores* of onregmatig. In *Stoffberg v Elliot* 1923 CPD 148 (sien ook bv *Esterhuizen v Administrator, Tvl* 1957 3 SA 710 (T) 718; *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 153; *Mabaso v Felix* 1981 3 SA 865 (A) 875; *Burger v Administrateur, Kaap* 1990 1 SA 483 (K) 489) stel die hof dit so:

> "In the eyes of the law, every person has certain absolute rights which the law protects . . . and one of those rights is the right of absolute security of the person. Nobody can interfere in any way with the person of another, except in certain circumstances which I will further explain to you. Any bodily interference with or restraint of a man's person which is not justified in law, or excused in law, or consented to, is a wrong, and for that wrong the person whose body has been interfered with has a right to claim such damages as he can prove he has suffered owing to that interference."

Hieruit blyk dat die *prima facie* onregmatigheid van 'n aantasting van die fisiese integriteit onder andere deur die bestaan van 'n regverdigingsgrond opgehef kan word (sien bv *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 153; *Malahe v Minister of Safety and Security* 1999 1 SA 528 (SCA) 533–534 540; Neethling, Potgieter en Visser *Law of delict* (1999) 333; Neethling *Persoonlikheidsreg* 116–117). Een van die belangrikste regverdigingsgronde wat dikwels by krenking van die *corpus* ter sprake kom, is statutêre of amptelike bevoegdheid, en hier geskied die vraag na die regmatigheid al dan nie van 'n liggaamsaantasting deur die uitoefening van 'n statutêre of amptelike bevoegdheid uiteraard primêr met verwysing na die betrokke veroorlowende statuut of gemeenregtelike reël. Soos egter aangedui, verskans artikel 12 van die Grondwet die reg op sekerheid van die persoon, waarby sowel die reg op liggaamlike en psigiese integriteit as vryheid van alle vorme van geweld, enige vorm van marteling, en wrede, onmenslike of vernederende behandeling of straf inbegrepe is. Dit beteken dat enige statutêre of gemeenregtelike reël wat 'n aantasting van 'n persoon se fisies-psigiese integriteit veroorloof en dientengevolge dié reg beperk, beoordeel moet word aan die hand van die kriteria wat die Grondwet rakende die beperking van fundamentele regte stel – onder andere dat die beperking sowel redelik as regverdigbaar moet wees in 'n oop en

demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid (sien a 36 van die Grondwet; Neethling *Persoonlikheidsreg* 93–94 124). In hierdie verband word as uitgangspunt nietemin aan die hand gedoen dat die algemene beginsels wat reeds met betrekking tot die *boni mores* (regverdigingsgronde inbegrepe) uitgekristalliseer het om die (on)regmatigheid van 'n liggaamsaantasting te bepaal, as *prima facie* aanduiding van die redelikheid al dan nie van sodanige krenking ingevolge die handves van fundamentele regte beskou behoort te word (sien Neethling *Persoonlikheidsreg* 69; Dendy 1996 *De Rebus* 604).

Teen hierdie agtergrond word die statutêre bevoegdheid van veral die polisie om ingevolge artikel 49 van die Strafproseswet 51 van 1977 die reg op die fisies-psigiese integriteit te krenk, onder die vergrootglas geplaas. Hierdie artikel handel oor die gebruik van geweld by inhegtenisneming en verg aandag omdat dit onlangs deur die Tweede Wysigingswet op Geregtelike Aangeleenthede 122 van 1998 vervang is. Die ou artikel 49 het soos volg gelui:

> "**Gebruik van geweld by inhegtenisneming.** – (1) Indien iemand wat ingevolge hierdie Wet gemagtig is om 'n ander in hegtenis te neem of om met sy inhegtenisneming behulpsaam te wees, poog om so 'n persoon in hegtenis te neem en so 'n persoon –
>
> (a) hom teen die poging verset en nie sonder die aanwending van geweld in hegtenis geneem kan word nie; of
>
> (b) vlug wanneer dit duidelik is dat 'n poging gedoen word om hom in hegtenis te neem, of hom teen die poging verset en vlug,
>
> kan die aldus gemagtigde persoon, ten einde die inhegtenisneming uit te voer, die geweld aanwend wat in die omstandighede redelikerwys nodig is om die verset te bowe te kom of om die betrokke persoon te verhinder om te vlug.
>
> (2) Waar die betrokke persoon in hegtenis geneem staan te word weens 'n Bylae 1 bedoelde misdryf of in hegtenis geneem staan te word op grond daarvan dat hy redelikerwys verdink word so 'n misdryf te gepleeg het, en die persoon wat ingevolge hierdie Wet gemagtig is om hom in hegtenis te neem of om met sy inhegtenisneming behulpsaam te wees, hom nie op 'n ander wyse in hegtenis kan neem of kan verhinder om te vlug as deur hom te dood nie, word die doding geag straffelose doodslag te wees."

Besonder insiggewend vir huidige doeleindes is die volgende *dictum* van hoofregter Rumpff in *Matlou v Makhubedu* 1978 1 SA 946 (A) 956 oor die uitleg van artikel 37 van die 1955-Strafproseswet, wat *verbatim* deur die hierbo aangehaalde artikel 49 vervang is (sien bv *Macu v Du Toit* 1983 4 SA 629 (A) 637 ev oor die analoë uitleg van lg artikel):

> "Ek dink dit moet aanvaar word dat wanneer 'n reg tot arrestasie in die gemene reg en in die 1955-Wet . . . gegee word, implisiet 'n reg toegeken word om gebode weerstand teen te gaan en om vlug te verhinder. Dit beteken ook dat *noodsaaklikerwys* daar opsetlike geweld op die oortreder of verdagte toegepas kan word wat 'n besering kan veroorsaak. Ek dink ook dat by die toepassing van geweld 'n *redelike optrede* van die arresteerder toegelaat moet word en dit sal, in die algemeen, van al die relevante omstandighede afhang of die geweld redelik was of nie. En hierby sal o.a. die erns van die misdaad teen die mate van geweld wat toegepas is opgeweeg moet word. Ook die vraag wat in art. 37 genoem word, nl. of die verdagte nie *op 'n ander wyse* in hegtenis geneem en verhinder kan word om te ontsnap nie, en die vraag of die arresteerder *redelike gronde tot verdenking* gehad het, sou in die gemene reg oorweeg moet word" (my kursivering).

Regter Rumpff (958) verduidelik die toepassing van hierdie beginsels op die geval van 'n vlugtende verdagte soos volg: Indien die omstandighede dit toelaat, behoort eers 'n mondelinge waarskuwing gegee te word; indien hieraan nie gehoor gegee word nie, dan 'n waarskuwingskoot in die lug of op die grond; en waar hierdie

optrede ook geen gevolg het nie, dan eers 'n poging om die verdagte in die bene te skiet. Hierdie benadering kom ooreen met die beginsels wat ten aansien van noodweer en noodtoestand geld (vgl Neethling, Potgieter en Visser *Delict* 79–81 88 90; Neethling *Persoonlikheidsreg* 118–119 120). Dit is naamlik dat die noodwendigheid van 'n liggaamsaantasting moet vasstaan en, indien dit vasstaan, dat die dader steeds redelik moet optreë. Wat redelik is, is natuurlik 'n feitelike vraag. 'n Faktor wat 'n belangrike rol hier speel, is dat die liggaamsaantasting nie skadeliker moet wees as wat in die omstandighede nodig is nie (sien Neethling *Persoonlikheidsreg* 124–125; sien ook Neethling "Onregmatigheid, nalatigheid; regsplig, "duty of care"; en die rol van redelike voorsienbaarheid – Praat die appèlhof uit twee monde?" 1996 *THRHR* 687–689).

Artikel 49 lui tans soos volg:

> **"Gebruik van geweld by inhegtenisneming.** – (1) Vir die doeleindes van hierdie artikel beteken –
>
> (a) 'arresteerder' 'n persoon wat ingevolge hierdie Wet gemagtig is om 'n verdagte in hegtenis te neem of om met sy of haar inhegtenisneming behulpsaam te wees; en
>
> (b) 'verdagte' 'n persoon ten opsigte van wie 'n arresteerder 'n redelike vermoede het of gehad het dat sodanige persoon 'n misdryf pleeg of gepleeg het.
>
> (2) Indien 'n arresteerder poog om 'n verdagte in hegtenis te neem en die verdagte hom of haar teen die poging verset, of vlug, of hom of haar teen die poging verset en vlug, wanneer dit duidelik is dat 'n poging aangewend word om hom of haar in hegtenis te neem, en die verdagte nie sonder die aanwending van geweld in hegtenis geneem kan word nie, kan die arresteerder, ten einde die inhegtenisneming uit te voer, die geweld gebruik wat redelikerwys nodig en proporsioneel in die omstandighede is om die verset te bowe te kom of om die verdagte te verhinder om te vlug: Met dien verstande dat die arresteerder ingevolge hierdie artikel geregverdig word om dodelike geweld te gebruik wat gerig is op, of waarskynlik aanleiding sal gee tot, die dood of ernstige liggaamlike besering van 'n verdagte, slegs indien hy of sy op redelike gronde vermoed –
>
> (a) dat die geweld onmiddellik noodsaaklik is vir doeleindes van beskerming van die arresteerder, 'n persoon wat die arresteerder wettiglik behulpsaam is of enige ander persoon, teen onmiddellik dreigende of toekomstige doding of ernstige liggaamlike besering;
>
> (b) dat daar 'n wesenlike risiko is dat die verdagte onmiddellik dreigende of toekomstige doding of ernstige liggaamlike besering sal veroorsaak indien die inhegtenisneming uitgestel word; of
>
> (c) dat die misdryf waarvoor die inhegtenisneming verlang word aan die gang is en van 'n gewelddadige en ernstige aard is en die gebruik van lewensbedreigende geweld of 'n sterk waarskynlikheid dat dit ernstige liggaamlike besering sal veroorsaak, behels."

Die volgende opmerkings kan in hierdie verband gemaak word: Artikel 49(1) is van toepassing op enige deur-die-Strafproseswet-gemagtigde persoon (soos polisiebeamptes as vredesbeamptes) wat poog om op grond van 'n *redelike vermoede* dat hy 'n misdaad pleeg of gepleeg het, 'n verdagte te arresteer. Die gekursiveerde woorde sal waarskynlik op dieselfde wyse deur die regspraak vertolk word as die sinsnede (vervat in a 40(1)(b) van die Strafproseswet wat handel oor regmatige arrestasie sonder 'n lasbrief) dat 'n persoon "redelikerwys verdink" moet word daarvan dat hy 'n in die Eerste Bylaag van die wet bedoelde misdryf gepleeg het; en dit is naamlik dat daar *redelike gronde* vir die verdenking moet bestaan. In *Minister of Police v Mthalane* 1978 3 SA 542 (N) 545 word bedoelde sinsnede soos volg omskryf: "The test is an objective one and the grounds of suspicion must be those

which would induce a reasonable man to have the suspicion." (Vgl ook bv *Duncan v Minister of Law and Order* 1986 2 SA 805 (A) 814; *Nkambule v Minister of Law and Order* 1993 1 SA 848 (T) 849; *Minister of Law and Order v Hurley* 1986 3 SA 568 (A) 579; *Botha v Lues* 1983 4 SA 496 (A) 505.)

Aangesien subartikel (1) net op verdagtes van toepassing is, kan dit nie die besering (of dood) van onskuldige persone – ook nie in die proses van die inhegtenisneming van 'n verdagte nie – regverdig nie (vgl mbt die ou a 49 *Malahe v Minister of Safety and Security* 1999 1 SA 528 (SCA) 534; *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A) 368; *Macu v Du Toit* 1983 4 SA 629 (A) 641; *Hughes v Minister van Wet en Orde* 1992 1 SACR 338 (A) 343 345–346; *Prince v Minister of Law and Order* 1987 4 SA 231 (OK) 238; Neethling 1996 *THRHR* 683 688–689).

Artikel 49(2) magtig die aantasting van die fisiese integriteit van 'n verdagte by arrestasie mits aan die volgende vereistes voldoen word: (a) die verdagte moet hom verset of vlug of verset en vlug; (b) dit moet duidelik vir die verdagte wees dat daar gepoog word om hom te arresteer (hierdie beginsel is vroeër reeds deur die regspraak gevestig: sien *Macu v Du Toit* 1983 4 SA 629 (A) 645 647; Neethling *Persoonlikheidsreg* 125 vn 215); (c) die verdagte moet nie sonder die aanwending van geweld gearresteer kan word nie (die noodwendigheid of noodsaaklikheid van die liggaamsaantasting moet dus vasstaan, dws daar moet (redelikerwys) geen ander uitweg vir die arresteerder bestaan as om geweld te gebruik nie – daarom moet daar bv eers op ander maniere, soos 'n mondelinge waarskuwing of 'n waarskuwingskoot in die lug, gepoog word om die verdagte te stuit); en (d) die geweld moet redelikerwys nodig en proporsioneel in die omstandighede wees om die verdagte onder beheer te bring (die manier of wyse waarop die liggaamsaantasting geskied, moet dus nie skadeliker wees as wat nodig is om die verdagte te stuit nie – dit is bv nie nodig om 'n verdagte in die been te skiet as hy relatief maklik gevang kan word nie: vgl oor die toepassing van 'n analoë proporsionaliteitstoets deur die howe by noodweer, Neethling *Persoonlikheidsreg* 119). (Soos aangedui, is die beginsels vervat in die laaste twee vereistes reeds deur die howe tav die vorige a 49 toegepas: sien bv *Macu v Du Toit* 1983 4 SA 629 (A) 637 ev; *George v Minister of Law and Order* 1987 4 SA 222 (SOK) 228–230; *Prince v Minister of Law and Order* 1987 4 SA 231 (OK) 233–237; *Wiesner v Molomo* 1983 3 SA 151 (A) 156 ev; vgl *Matlou v Makhubedu* 1978 1 SA 946 (A) 956; *Manamela v Minister of Justice* 1960 2 SA 395 (A) 402 oor a 37 van die 1955-Strafproseswet; sien verder Neethling *Persoonlikheidsreg* 124–125; Neethling 1996 *THRHR* 688–689.)

Die gebruik van dodelike geweld, dit wil sê geweld wat (waarskynlik) die dood of ernstige liggaamlike besering van 'n verdagte tot gevolg sal hê, word egter in die voorbehoudsbepaling tot artikel 49(2) gekwalifiseer. Hierdie kwalifikasie was waarskynlik die pro-aktiewe resultaat van kritiek dat die ou artikel 49(2) so 'n ontsettende mag in die hande van arresteerders geplaas het om die lewe van 'n verdagte straffeloos te neem (in *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A) 368 praat Hefer AR van die "awesome power" van die polisie), dat verwag kon word dat dit as 'n ongrondwetlike (onredelike) beperking van die reg op lewe van die verdagte ingevolge artikels 11 en 36 van die Grondwet aangeveg sou word (sien Neethling 1996 *THRHR* 689).

Dit kom voor of die gebruik van "dodelike geweld " net geregverdig is indien aan die volgende vereistes voldoen word: (i) Die arresteerder moet op redelike gronde vermoed (oftewel, soos aangedui, gronde waarop 'n redelike man 'n vermoede sou hê) (ii) dat bedoelde geweld onmiddellik noodsaaklik is (iii) ter beskerming van enige persoon se lewe of liggaam (ernstige besering) (iv) teen optrede van die verdagte wat onmiddellik dreigend is of in die toekoms sal plaasvind. Alhoewel

hierdie vereistes 'n samevatting en parafrasering van artikel 49(2)(a) verteenwoordig, kan die voorskrifte van subartikel (2)(b) en (c) myns insiens goedskiks ook daaronder tuisgebring word. (Let daarop dat vereiste (i) hierbo vir al drie gevalle geld.) Alvorens dodelike geweld deur die arresteerder gebruik mag word, vereis eersgenoemde subartikel naamlik 'n *wesentlike risiko* (of dan wel werklike gevaar) van onmiddellik dreigende of toekomstige aantasting van die lewe of liggaam (ernstige besering) van enige persoon deur 'n verdagte (vgl vereistes (iii) en (iv) hierbo) *indien die inhegtenisneming uitgestel word.* Uiteraard noop sodanige risiko of gevaar dadelike optrede aan die kant van die arresteerder en is dodelike geweld daarom ook onmiddellik noodsaaklik (vgl vereiste (ii) hierbo). Insgelyks verg subartikel (2)(c) – afgesien daarvan dat dit spesifiek betrekking het op 'n situasie waar 'n ernstige en gewelddadige misdryf aan die gang is – die gebruik van geweld deur die verdagte wat die lewe of liggaam (sterk waarskynlikheid van ernstige besering) van enige persoon bedreig (vgl weer vereistes (iii) en (iv) hierbo), voordat die arresteerder dodelike geweld teen die verdagte mag aanwend. Weer eens dui die begrippe *lewensbedreigende* geweld of 'n *sterk waarskynlikheid* van ernstige liggaamlike besering, tesame met die feit dat daar 'n *ernstige en gewelddadige misdryf aan die gang* moet wees, daarop dat die gebruik van dodelike geweld deur die arresteerder ook hier onmiddellik noodsaaklik is. Indien bostaande uiteensetting van die inhoud van die drie subartikels korrek is, ontstaan die vraag of dit dan werklik nodig was om die voorbehoudsbepaling op hierdie wyse te kompliseer. Myns insiens kon die wetgewer met paragraaf (a) volstaan het aangesien dit, soos aangedui, ook die gevalle in paragrawe (b) en (c) dek.

Hoe ook al, daar kan min twyfel bestaan dat die arresteerder net dodelike geweld teen 'n verdagte mag gebruik indien hy met 'n situasie van *noodweer* teen 'n verdagte ter beveiliging van die lewe of fisiese integriteit (ernstige besering) van enige ander persoon te make het. Dit kom inderdaad voor of die wetgewer die gemeenregtelike vereistes vir noodweer (sien hieroor Neethling *Persoonlikheidsreg* 117–119: Neethling, Potgieter en Visser *Delict* 75–84; Van der Walt en Midgley *Delict: Principles and cases* (1997) 99–100; Snyman *Strafreg* (1992) 110–120) hier in 'n groot mate statutêr vergestalt het. Hierdie vereistes – te wete dat die aanval onregmatig en reeds begonne of onmiddellik dreigend moet wees, terwyl die verdediging teen die aanvaller self gerig, noodsaaklik en nie skadeliker moet wees as wat nodig is om die aanval af te weer nie (sien *ibid*) – stem grootliks ooreen met vereistes (c), (d), (ii), (iii) en (iv) hierbo. Daarom sal dit die howe loon om waar daar twyfel oor die uitleg van artikel 49(2) bestaan, waar toepaslik kers by die regspraak se interpretasie en toepassing van die gemeenregtelike vereistes vir noodweer op te steek.

Die regverdiging van dodelike geweld teen 'n verdagte ten einde *toekomstige* doding of ernstige liggaamlike besering af te weer, gaan na alle waarskynlikheid arresteerders (soos die polisie) en regsprekers hoofbrekens besorg. (Gemeenregtelik kan nie in noodweer teen 'n persoon opgetree word bloot omdat daar een of ander tyd in die toekoms 'n aanval van hom verwag word nie: sien Snyman *Strafreg* 113.) Daar sal volgens die feite van elke besondere geval noukeurig oorweeg moet word of daar redelike gronde bestaan wat onmiddellike dodelike geweld teen die verdagte noodsaak ten einde toekomstige doding of ernstige liggaamlike besering te verhinder. In hierdie proses moet die volgende waarskuwing in *Ntanjana v Vorster and Minister of Justice* 1950 4 SA 398 (K) 406 altyd goed deur die howe voor oë gehou word:

> "The Court must be careful to avoid the role of the armchair critic wise after the event, weighing the matter in the secluded security of the Courtroom."

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SOME THOUGHTS ON THE INTERPRETATION AND APPLICATION OF SECTION 8(1) OF THE MATRIMONIAL PROPERTY ACT 88 OF 1984

1 Introduction

Chapter I of the Matrimonial Property Act 88 of 1984 ("the Act") creates the accrual system, which may be chosen by parties to an antenuptial contract as their matrimonial proprietary regime. The premise on which the accrual principle is based is reflected in the following statement by the South African Law Commission:

> "The fundamental idea is that one spouse contributes financially and otherwise to the growth of the other spouse's estate and should therefore be entitled to share in that spouse's estate on the dissolution of the marriage" (Report Pertaining to the Matrimonial Property Law RP26/1982 par 17 1).

The legislator thus envisaged the creation of a system whereby, upon the dissolution of a marriage out of community of property, both spouses ought to share in the assets amassed through their mutual efforts and contributions during the subsistence of the marriage, without there having been a joint estate during the existence of the marriage (Cronjé and Heaton *South African family law* (1999) ("Cronjé and Heaton") 119–120). The system takes effect only on dissolution of the marriage, when the claim to share in the accrual arises. While the marriage lasts, the parties are married out of community of property (Van Aswegen "Transactions between a spouse and a third party: The effect of the Matrimonial Property Act 88 of 1984" 1984 *MBL* 140 147–148). The accrual system can therefore be described as a deferred community of gains, or a postponed community of profit (Hahlo *The South African law of husband and wife* (1985) ("Hahlo") 304; Cronjé and Heaton 119). During the marriage the spouses are financially independent of each other, except for the duty of mutual support. Either spouse can dispose of his or her property as he or she pleases without requiring the consent of the other spouse. Section 3(2) of the Act provides that a spouse's share in the estate of the other spouse at the dissolution of the marriage is, during the subsistence of the marriage, not transferable or liable to attachment, and does not fall into his or her insolvent estate, should he or she be sequestrated.

The spouses' freedom of disposition is, however, not as unlimited as appears at first blush. If there were no restrictions whatsoever on freedom of disposition, a spouse could, if so minded, defeat the other spouse's right to an appropriate share in his or her accrual by testamentary dispositions or donations, be they to mistresses or lovers, children of a previous marriage or charities (Hahlo 308).

Dispositions *mortis causa* are dealt with in section 4(2) of the Act, which provides that the accrual of the estate of a deceased spouse is determined before effect is given to any testamentary disposition, donation *mortis causa* or succession out of that estate in terms of the law of intestate succession.

The risk that one spouse may try to deprive the other of his or her right to share in the accrual by stripping himself or herself of assets by acts *inter vivos* is addressed in section 8 of the Act. Section 8(1) provides that if a spouse, during the subsistence of the marriage, seriously prejudices or will probably seriously prejudice, by his or

her conduct, the right of the other spouse to share in the accrual of his or her estate at the dissolution of the marriage, then the spouse who stands to be so prejudiced may apply to the High Court for the immediate division of the accrual. The court may order such a division only if it is satisfied that no other person will be prejudiced by it. There seems, however, to be considerable uncertainty as to how section 8(1) must be interpreted and applied in practice. So far, no cases have been reported which could give some guidance in this regard. Accordingly, one may look for practical guidance to the German legal system, where provision similar to our section 8(1) is made in the Civil Code.

2 The German law

The German matrimonial proprietary regime has always been a mixed system of its own kind, which is neither one of community nor one of separation of property. The provisions of the German Civil Code of 1896 ("*Bürgerliches Gesetzbuch* (*BGB*)") now governing the matrimonial proprietary regime of spouses, as well as their respective marital rights, have been altered considerably by law reforms of 1 July 1958 and 1 July 1977. The resulting German regime of community of accrued gains (*Zugewinngemeinschaft*) can be described as a deferred community of acquests while the marriage lasts, which becomes transformed into a system of accruals once the marital regime ends (see, in general, the English report of Rheinstein and Glendon in *International Encyclopedia of Comparative Law* IV *Persons and Family* 105–114). Section 1363(2) *BGB* provides that the property of the husband and wife immediately prior to the marriage will not become the joint property of the spouses. This also applies to property acquired by a spouse after the marriage, regardless of the legal grounds of acquisition. Once the marital regime ends, the established accrued gains of one spouse, exceeding the accrued gains of the other, will entitle the latter to an equalisation claim (*Ausgleichsforderung*).

Section 1363 *BGB*, which provides for the existence of separate estates of the spouses during the subsistence of the marriage, as would be the case in a South African marriage "out of community", reads (in translation) as follows:

> "1363. [Community of accrued gains]
>
> (1) The matrimonial regime in which the spouses live is one of community of accrued gains unless they agreed otherwise by marriage contract.
>
> (2) The property of the husband and the property of the wife will not become joint property of the spouses; this also applies to property acquired by a spouse after entering the marriage. Gains made by the spouses during the marriage shall, however, be equalized if the community of accrued gains comes to an end." (Translation quoted from Goren *The German Civil Code* (1994) 238.)

Section 1378 *BGB* makes provision for an equalisation claim upon dissolution of the marriage. The deferred proprietary equalisation claim of each spouse becomes relevant upon termination of the proprietary regime, for example as a result of divorce. The equalisation claim results in the sharing in half of the eventual surplus in one of the spouse's accrued gains, when balanced with the other spouse's accrued gains. The claim is based on the notions of final and initial assets. The accrued gain is defined in section 1373 *BGB* as the amount by which the final assets of a spouse (*Endvermögen*) exceed his or her initial assets (*Anfangsvermögen*).

Initial assets are defined in section 1374 *BGB* as the assets belonging to a spouse, after deduction of his obligations, at the beginning of the matrimonial regime. Even if the obligations exceed the value of the initial assets, the value will not become a

negative amount since the value of the initial assets must be at least zero. Section 1374 paragraph 1 *BGB* states that obligations may be deducted only up to the amount of the assets, not in excess of their value.

In terms of section 1375 *BGB*, final assets are assets belonging to a spouse, after deduction of obligations, at the time of the termination of the matrimonial regime. The value of initial assets held at the beginning of the marriage is their value at that time. The value of other assets included in the initial assets is their value at the time of acquisition. The value of the final assets is their value at the termination of the marriage. It is laid down in section 1376 *BGB* that any allowable diminution in such final assets is calculated on the value of the assets at the time of diminution.

Where there are no initial assets at all, the final assets of each spouse will be balanced in the same manner – in other words, the amount by which the assets of the one spouse exceed those of the other spouse will be split in half. If a spouse does not have any final assets, in other words, if there are no final assets as a result of that spouse's overindebtedness, then that spouse is not obliged to make an equalisation payment to the other spouse (Gernhuber and Coester-Waltjen *Lehrbuch des Familienrechts* (1994) 546).

In general, the value for the computation of the final assets is the value of the assets which exist at the termination of the matrimonial regime, in terms of section 1376(2) *BGB*. The date of the termination of the matrimonial regime is also the decisive date for the assessment of the value of the equalisation claim between the spouses (Gernhuber in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* Band 7 Familienrecht (1993) ("Gernhuber") s 1384 no 4). In the case of termination of the marriage by divorce, however, an earlier date must be applied. In the case of divorce, the date for calculating the amount of accrued gains is the date of the pendency of the summons for divorce. This is laid down in section 1384 *BGB*, which reads as follows:

> "In case of divorce the date for the calculation of the amount of accrued gains will be the date of the pendency of the summons for divorce instead of the date of termination of the matrimonial regime" (my translation).

The pendency of a claim (*Rechtshängigkeit*) is effected by the service of the summons, and its procedural effects are defined in section 261 of the Code of Civil Procedure Rules ("*Zivilprozeßordnung*"). In divorce matters before the Family Court the pendency is effected once the summons is served (Stephan in *Zöller Zivilprozeßordnung* 17 ed (1991) s 261 no 2; Hartmann in Baumbach, Lauterbach, Albers and Hartmann *Zivilprozeßordnung* 55 ed (1997) s 261 no 22).

It is important to note that, with regard to the termination of the matrimonial property regime by divorce, the date of the divorce remains the decisive date for any equalisation claim to come into existence. A spouse is entitled to claim any equalisation payments only once the divorce judgment has become final and conclusive. For the purposes of computation and assessment of the final assets of the spouses and any accrued gains, however, the date is deferred to the date of the pendency of the divorce summons (Federal Supreme Court, Civil Division – *BGH* 1988 *NJW* 2369).

The rationale underlying section 1384 *BGB* is that at the stage when the marital relationship has come under strain and one of the spouses declares his or her intention to the other spouse to file for a divorce, the risk exists that one of the spouses may attempt to diminish the value of his or her final assets in terms of section 1375 *BGB*, which would be to the disadvantage of the other spouse (*BGHZ*

46 215 217; *BGH* 1987 *NJW* 1764). Once one of the spouses has filed for a divorce this risk increases considerably, as the institution of divorce proceedings usually results in estrangement and hostility developing between the spouses, thus leading to lack of confidence in each other and mistrust between them (*BGHZ* 46 217). It is for that reason that the legislator decided to defer the date for the calculation of the value of the accrued gains to an earlier date, sc the date of service of the summons for divorce on the other party. Thus, a protective measure is provided in order to prevent spouses from concealing or diminishing their accruals (*BGHZ* 46 217, with reference to the Protocol of the Legal Commission of the Lower House of the German Parliament; see also High Appellate Court of Hamm – *OLG Hamm* 1980 *NJW* 1637; Gernhuber s 1384 no 1; Thiele in *Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* Viertes Buch Familienrecht (1994) ("Thiele") s 1384 no 1; Diederichsen in Palandt *Bürgerliches Gesetzbuch* (1999) s 1384 no 2; cf *BGHZ* 44 163 166 and *OLG Hamm* 1988 *Familienrechtszeitschrift* 174, confirming that the date of the pendency of the divorce summons is the decisive date for the assessment of the final assets of the spouses and any accrued gains).

The duration of the divorce proceedings does not have any effect on the effective date in terms of section 1384 *BGB*. Even if the proceedings are suspended for some time, the date of service of the divorce summons on the other spouse remains the effective date (Thiele s 1384 no 4).

In the light of the foregoing, it can be concluded that the protective effect of section 1384 *BGB* is similar to that of section 8(1) of the South African Matrimonial Property Act with regard to the accrual which has to be shared between the spouses on divorce. The difference, however, is that under our domestic law one of the spouses has to make an application to the court for the immediate division of the accrual, whereas under German law the date of the service of the summons claiming a decree of divorce is the effective date to be applied for the calculation of accrued gains in the case of divorce.

The application to court for an immediate division of accruals in terms of section 8(1) of the Matrimonial Property Act does not necessarily have to be brought as part of a divorce action. This becomes clear from subsection (2), in terms of which the court making the order for the division of accruals may also order that the matrimonial property system of accrual-sharing as well as community of property and community of profit and loss are excluded.

German law also provides (in s 1386 *BGB*) for the premature equalisation of accrued gains in cases other than divorce. The provision reads as follows:

> "(1) A spouse is entitled to claim premature equalisation of accrued gains if the other spouse over a long period of time negligently failed to fulfil the economic obligations inherent in marital relations and if it can be presumed that he will also fail to fulfil them in future.
>
> (2) A spouse is entitled to claim premature equalisation of accrued gains if the other spouse:
>
> 1. undertook a legal transaction of the kind mentioned in section 1365 without the requisite consent; or
> 2. if he diminished his assets through acts listed in section 1375 and as a result a substantial jeopardy for the future equalisation claim is feared.
>
> (3) A spouse is also entitled to claim premature equalisation of accrued gains if the other spouse persistently refuses without sufficient justification to disclose to her his existing assets" (my translation).

Section 1365 *BGB* limits a spouse's right to disposal of his property in its entirety. For such a disposal, he requires the consent of the other spouse. The acts listed in section 1375 *BGB* are gratuitous dispositions made by the spouse, by which he did not comply with a moral obligation or with the principles of common decency. It also includes a spouse's action by which assets were wasted or transactions implemented with intent to cause detriment to the other spouse.

Section 1386 *BGB* deals with the unacceptability to one of the spouses of remaining married under the regime of community of accrued gains. The reasons underlying the unacceptability vary. The provisions of section 1386 *BGB* subparagraph (1) require that the foundations of the community of accruals are substantially disturbed, and that the disturbance can be expected to continue in the future. Section 1386 subparagraph (2) *BGB*, however, enables a spouse to claim equalisation prematurely because of behaviour on the part of the other spouse which is likely to endanger a future equalisation payment. In subparagraph (3) the unacceptability is based on the apprehension that the spouse, by not disclosing existing assets, is trying adversely to affect the other spouse (see also Thiele s 1386 no 2).

The legislator's intention, when enacting section 1386 *BGB*, was to enable the spouses to terminate their matrimonial proprietary regime of community of accrued gains by prematurely equalising the spouses' accruals without terminating the marriage. Accordingly, an application in terms of section 1386 *BGB* cannot be brought before the court if the matrimonial property regime has already been terminated, either by divorce or on the death of one of the spouses. After equalisation, the regime of marriage "out of community of property" will apply (Gernhuber s 1386 no 4).

As I have shown above, the date of termination of the matrimonial proprietary regime is also the decisive date for the equalisation claim between the spouses. In the case of a premature equalisation claim in terms of section 1386 *BGB*, however, the date for the calculation of the accrued gains is the date of pendency of the claim (*Rechtshängigkeit*), which is effected by the service of the summons on the other party. This is laid down in section 1387 *BGB*. The legislative rationale underlying this provision was the same as in the case of section 1384 *BGB*, se to eliminate, or at least to reduce, the risk that one spouse may attempt to diminish the value of his or her final assets to the detriment of the other spouse (Gernhuber s 1387 no 2; Thiele s 1387 no 1).

3 Conclusion

The fact that section 8(1) of the Matrimonial Property Act is not often applied in practice has resulted in uncertainty as to how to interpret this provision. Which date must be applied as the cut-off for determining the accrual when an application is made to court for an order directing the immediate division of the accrual of the spouses – the date of service of the papers in the application, or the date when the order is granted by the court? The period of time that passes between the service of the application and the granting of the order may undermine the whole purpose of section 8(1), se to provide protection to a spouse against attempts by the other spouse to diminish the value of the matrimonial assets. If the decisive date is the date on which the order is granted, it will give the other spouse sufficient time to do what he or she is sought to be prevented from doing – diminishing the value of the assets and the accrued gains. In order for spouses to enjoy the full protection of section 8(1), an earlier date should therefore be applied.

It is for precisely this reason that the German legislator in the case of divorce, as well as in the case where one spouse has failed to fulfil the financial obligations inherent in his marital relationship and where it can be presumed that he will fail to fulfil them in the future, decided to anticipate the date for the calculation of the value of the accrued gains to the date of service of the summons. More effective protection can thus be provided for the spouse who is at risk of becoming a victim of an attempt to diminish the value of the accrual.

Although section 8(1) has been criticised as a legal remedy that "will often merely succeed in closing the gate after the horse has already escaped" (Van Wyk "Community of property and accrual sharing in terms of the Matrimonial Property Act, 1984: Part 2" 1985 *De Rebus* 59 61), it remains a valuable mechanism for the prevention of future prejudice to spouses. I suggest, therefore, that when an application is brought for an order directing the immediate division of the accrual in terms of section 8(1), the date to be applied in the calculation of the accrual should be the date of service upon the respondent spouse of the papers in the application. The applicant will then be in a position to enjoy the full protection of section 8(1), in a similar way to spouses who in Germany are protected by sections 1384 and 1386 *BGB*. The interpretation and application of section 8(1) in practice should no longer remain shrouded in uncertainty.

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THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL: UNDERSTANDING SECTION 35(3)(d) THROUGH THE CASES

Section 35(3)(d) of the Constitution of the Republic of South Africa, Act 108 of 1996 embodies two opposing rights: On the one hand there is society's interest in *trying* people accused of *crime*, rather than granting them immunity because of legal error, and on the other there is the right of the accused, if innocent, to be acquitted with minimum disruption to his/her social and family relationship and, if guilty, to be convicted and an appropriate sentence imposed without unreasonable delay, for, as the saying goes, "justice delayed is justice denied".

1 Introduction

The debate about the priority between the victim's rights and the rights of an accused is emotive and often aggressive. Much is reported in the popular press about the constitutional rights of accused persons being violated because of overcrowded courts, industrial action by court personnel or delays for whatever reason. However, in this whole outcry, with the emphasis on the rights of the accused, it has been argued that the rights of the dead, injured, and/or maimed (that is, the victim) are not being given proper consideration. One can only hope that we have not yet arrived at the point where a person accused of crime has rights so great that the people have none. The administration of our criminal law should not be a game in which the

cleverer and more astute player will win: It is a serious proceeding by people seeking to discover the actual facts for the sake of public safety and in the interest of the public generally. (See the judgment of Riddell J in R *v Barnes* 36 CCC 40 56 Ont SC App Div.)

The effective administration of the criminal justice system and its obligations to both the accused and the community demand that the system avoid protracted and unnecessary delays, especially delays in bringing matters to trial. The argument that the right to a fair trial, which includes the right to a "speedy trial" or "trial within a reasonable time", is a fundamental right, must be seen as relevant and important to protect not only the individual interest, but a larger social interest, as well. It is this balance that this note seeks to interrogate.

2 Comparative statutes

Section 35(3)(d) of the Constitution of the Republic of South Africa, Act 108 of 1996 provides: "Every accused person has the right to a *fair trial*, which includes the right to have their trial begin and conclude without unreasonable delay. In terms of section 11(b) of the Canadian Charter "Any person charged with an offence has the right ... to be tried within a reasonable time". Article 12(1)(b) of the Constitution of Namibia Act 1 of 1990 provides that "*a trial must take place within a reasonable time*, failing which the accused shall be released". The Constitution of the Kingdom of Lesotho guarantees that any person charged with a criminal offence "shall be afforded a *fair hearing within a reasonable time* ..." (s 12(1)). In the United States of America, the Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial". *Smith v Hooey* (393) US 374 (9169) succinctly summed up the purpose of this legislative provision. It was held that the right *to* a speedy trial broadly encompassed the three essential pillars of criminal justice – first of all, the duty to avoid undue and oppressive incarceration prior to trial, thereby affirming the principle of "innocent until proven guilty"; secondly, the obligation to minimise anxiety on the part of the accused; and thirdly, the function of limiting the possibility that lengthy delays could impair the ability of an accused to defend himself. The court took the view that the existence of any of these obstacles would skew the fairness of the entire system.

Similar statements regarding the rights of an accused are to be found in the international covenants. Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) reads: "In the determination of ... any criminal charge against him ... everyone is entitled to a ... *hearing within a reasonable time* ..." and the African Charter on Human and Peoples' Rights (1981) also speaks of "the right to be tried within a reasonable time" (Article 7(1)(d). In the International Covenant on Civil and Political Rights (1966), however, reference is made to a *trial "without undue delay"*.

It is patently obvious that despite some variation in wording, the primary intention of all legislation appears to be to provide for the reasonable and expeditious finalisation of criminal matters. This is in keeping with the primary character of any fair trial proceeding, the fundamental purpose of which is to minimise unfair restrictions on the liberty of an accused, to minimise anxiety and stress to the accused; to limit, as far as possible, the deterioration of evidence; and to provide the accused with the best possible opportunity to present his/her case. Yet, despite very laudable intentions, the Acts (with the exception of the Namibian Constitution, which is unique in this regard) omit the important aspect of advising what consequences should ensue when the right is violated. The Namibian Constitution

specifically prescribes the release of the accused for a failure to adjudicate the charge within "a reasonable time". No room is left for any intermediate alternative. The other Covenants and legislation are noticeably silent.

In a case where an accused is of the view that his/her rights under such a provision have been violated, s/he bears the onus of satisfying the court that the state has unreasonably delayed in proceeding with the trial. According to LaFave and Israel (*Criminal procedure* (1989) 686) the accused must claim this protection before the trial commences. In cases where the accused enters a plea and submits to trial and is convicted, he may not be heard to raise the issue for the first time on appeal. However, it is recognised that a concession may be granted where the failure to raise such objection timeously was due to ineffective or negligent representation. In such cases, the Appeal Court may incline towards hearing the proceeding. Such an onus can be particularly strenuous as it is required to be discharged even before the trial has begun and any evidence led.

Many counsel across the world have argued that where the right is proved to have been violated, the only satisfactory remedy is a stay of prosecution and an acquittal of the accused. Some have been successful and others not so. This begs the question: What distinguishes these various cases?

3 "Reasonable time"

All the statutes appear *ad idem,* either dictating a "reasonable time" between charge and prosecution or otherwise proscribing "undue delay" between charge and trial. Defining the concept of "reasonable time" or "undue delay" has been an extremely contentious issue in applications to set aside charges and stay prosecutions. Despite the wealth of case law, this concept of "reasonable time" continues to elude precise description, a fact recognised by the Supreme Court of Zimbabwe in *In Re Mlambo* 1992 4 SA 144 (ZS) 149–150 when it held that the issue of determining reasonableness is one which "defies exact definition". No time limit is expressly provided in any legislation and each case appears to be treated on a casuistic basis, taking cognisance of a variety of factors, including but not limited to (a) the complexity of the case, and (b) the specific conduct of all affected persons. Naldi *Constitutional rights in Namibia* (1995) 67 1 takes the view that an open-ended definition is more beneficial to effective legal processes, since a "rigid formula could lead to harsh decisions" and a degree of flexibility accordingly seems more appropriate.

However, despite the apparent lack of precise definition, one thing that is clear is the fundamental *purpose* behind the provision. Whichever piece of legislation is considered, there is no gainsaying that the primary aim of the rule is to protect against excessive procedural delays. In *Moreira De Azevedo v Portugal Ser A* vol 189 (1990) ECHR par 74, the European Court of Human Rights stressed "the importance of administering justice without delays which might jeopardise its effectiveness and credibility". Similarly, in *S v Amujekela* 1991 2 SACR 411 (Nm) 412 the court held :

> "It is incomprehensible that an accused can be deprived of his liberty for months on end, waiting for a decision to be made by the Prosecutor-General. To allow an accused to languish away in custody, basically at the whim of the Prosecutor-General, cannot be countenanced and would be contrary to art 12(1)(b) of the Constitution . . ."

3 1 Factors influencing "reasonable time" considerations

As regards the understanding of when the right has been violated, *Barker v Wingo* 407 US 514 (1972) is especially informative. *In casu,* the court held that the protection of the Sixth Amendment would be frustrated whenever the delay could

be deemed to be "presumptively prejudicial". According to LaFave *et al supra*, this does not mean a period of time so long that it may actually be presumed that the defence at the trial would be prejudiced. Nor does it mean that once a sufficient time has been established, the prosecution has the burden of establishing that in fact there was no prejudice. According to them, the court apparently meant that a claim of denial of a speedy trial might be heard after the passage of a period of time which is *prima facie* unreasonable in the circumstances. Again, the court omitted to set parameters and the amorphous issues at stake have not been crystallised. The reasoning also appears to be somewhat circuitous as "reasonable time" is defined in terms of "prejudice" and "prejudice" is explained in terms of "unreasonable delay".

In most jurisdictions a body of case law has evolved setting out the factors that will be considered when assessing the effect/nature/consequences of any delays. In *Barker v Wingo* (117) the court attempted to categorise the possible reason/s for delay with the intention that a court's response would then be dictated by the category into which the excuse fell. The first and most serious category of excuses identified was "deliberate attempt by the state to delay trial in order to hamper the defence". If proved, this factor would weigh very heavily against the state's case. The second category was "negligence on the part of the state or overcrowded courts". This was considered less serious than the former, but nevertheless had to be considered. Finally, the court recognised a final group of excuses, namely, "a valid reason, such as a missing witness". Whilst this could justify some tardiness in the prosecution of a case, the court noted that the mere allegation that a witness is missing would never be sufficient justification. A court faced with an application for dismissal would have to assess the value of the proposed evidence of the witness and the extent of the effort made by the state to locate him/her.

The Canadian courts have their own list of factors which they employ in assessing the reasonableness of a delay. In *R v Askov* [1990] 2 SCR 1199 these were set out succinctly as (a) length of delay; (b) explanation for the delay (ie was it attributable to (i) the accused, (ii) the state, or (iii) the system?); (c) waiver of the right by the accused; and (d) prejudice to the accused. With regard to waiver, Hogg *Constitutional law of Canada* 1096 s 49 7 notes that where defence counsel has consented to an adjournment or a later trial date, this could well appear to be a waiver of the right. However, courts, cognisant of the importance of the fundamental right in issue, will accept such agreement as constituting a waiver only if it is apparent that defence counsel was aware and conscious of the issue of waiver. Further, it will not be a waiver if consent to a late trial date amounted "merely to acquiescence with the inevitable".

It is trite that the nature and complexity of a case will invariably affect the possibility of a speedy trial. In *Sanderson v Attorney-General, Eastern Cape* 1997 12 BCLR 1675 (CC) 1689 Justice Kriegler's advice to the state was to remain alive to such inherent delays and to factor them into the decision when to charge the suspect. The mere complexity of a case cannot justify unreasonably lengthy delays and an over-zealous prosecution should not be allowed to hide behind such an excuse. (*Hussainara Khatoon v State of Bihar* AIR 1979 SC 1369 dealt in detail with the attitude of the courts to systemic delays.)

4 "At what point does the clock start ticking?"

In assessing whether any lapse of time is reasonable or not, the courts must have a commencement date and an end date. The end point is relatively simply to determine, being when the parties are in court and all are prepared to proceed with the trial. However, it is the point of commencement which has given rise to a degree of controversy.

In *In Re Mlambo* the court held that the critical stage begins from the moment the accused is charged (149). This refers "to the period prior to the commencement of the hearing or trial" and not merely to "whatever period may elapse after the accused has tendered a plea". The court unequivocally rejected the interpretation that the significant period starts running only after formal charges have been put to the accused and a plea recorded. It was stressed that "the time frame is designed to relate far more to the period prior to the commencement of the . . . trial than to whatever period may elapse after the accused has tendered a plea". In substantiating its stance, the court noted that the purpose of the protection was intended to be against any unreasonable impairment of the liberty and security of the accused. In defining security, the court emphasised that one had to consider not only physical integrity and that the concept also related to stigmatisation, loss of privacy, anxiety and disruption of one's family life, social life and work.

In United States v Marion 404 US 307 (1971) the court *a quo* held that *ex facie* the wording of the Sixth Amendment, the right would become effective only when a criminal prosecution had begun. Thus the protection extended only to those persons who had been "accused" in the course of a prosecution and the count began from that time onward. Apparently the Sixth Amendment affords no protection to those not yet formally accused in a court of law nor, it would seem, does it require the government to discover, investigate, and accuse any person within any particular period of time.

However, on appeal, the Supreme Court was more cognisant of the negative effects of arrest *per se*. In its judgment, it took into account the fact that the act of arresting a person was a public act which could subject an accused to public obloquy, employment hardship and financial constraints. Moreover, an arrest is a serious interference with the liberty of an accused (regardless of whether he was eventually granted bail or not) and could result in untold anxiety for him, his family and his friends. The Supreme Court was therefore inclined to extend the provisions of the remedy of a speedy trial to a time prior to that of the formal charge but absolutely declined to extend the reach of the Amendment to the period prior to arrest. The court was aware of the difficulties faced by an accused as a result of delays and acknowledged that the passage of time, whether before or after arrest, could impair memories, cause evidence to be lost, deprive the defendant of witnesses, and/or otherwise interfere with his ability to defend himself. However, in declining to extend the remedy to cover any earlier period, the court stood by the view that the possibility of prejudice at the trial was not itself sufficient reason to wrench the Sixth Amendment from its proper context. Thus the established rule in the United States now appears to be that the "speedy trial" right attaches either at the time of arrest or from the point of a formal charge, whichever comes first. The European Court has also adopted the stance that the *dies* commences from the moment of arrest and runs up to the trial at first instance. It is the submission of the writer that this approach creates a loophole for the very purpose of lawfully circumventing the provision.

In *John Jackson Smith v Herbert Ushewokunze and the Attorney-General, Zimbabwe* (judgment No SC 214/97) Gubbay CJ also adhered to the view that the *dies* commences at the moment of the charge. In this case the charge itself came into existence at the point when the accused was told that he was to be prosecuted. Gubbay CJ held that the starting point in contemplating the period of alleged delay would therefore be when the party was officially notified, either expressly or by implication, that criminal charges were to be brought against him. On his reasoning,

it would appear that the period of "mere investigation" would not constitute part of the *dies*. In *Jackson*'s case, the applicant became aware on 28 June 1993 that the victims had been to consult with lawyers; on 16 December 1994, the Minister of Home Affairs notified him that the matter had been referred to the Attorney-General; on 30 August 1995 the police officer in charge of the investigation informed him that he was the subject of an investigation and he was asked for a statement in respect of the allegations being made against him. (This statement he promptly supplied the following day.) According to the evidence, nothing further ensued. The court held that the fact that he must have realised that he was under suspicion with regard to the allegations of criminal activity and that investigations were under way, did not start the clock ticking against the state. No charges had yet been brought against him. Similarly, in *Du Preez v Attorney-General of the Eastern Cape* 1997 3 BCLR 329 (E) 338D–F), the court held that the offer of an opportunity to provide an explanation about allegations of a crime did not constitute a charge. The European Court has defined charge (for the purposes of this context) as "the official notification given to an individual by the competent authority of an allegation that he has committed an offence" (*Eckle v Germany (Federal Republic)* 1983 5 EHRR 1 and *Foti v Italy* 1983 5 EHRR 313).

Under South African law, the notion of "charge" as a noun is defined in section 1 of the Criminal Procedure Act 51 of 1977. However, "charge" as a verb is not defined. In *Sanderson v Attorney-General, Eastern Cape*, in which the court was required to decide when *dies* commenced, Kriegler J declined to make any definition of the concept "charge", feeling that this would be superfluous because the final Constitution does not use the term (1689). In deciding when *dies* started running, the judge's view was that

> "when assessing the anxiety, stress and social embarrassment suffered by a public figure accused of a morally reprehensible crime, it is of little consequence whether nicely worded imputations have been formulated, reduced to writing or put to the person. In the context of section 25(3)(a) and the preservation of the individual's protection against unfair criminal proceedings it can safely be accepted that 'having been charged' includes appearing in the dock for the formal remand of a criminal case"

It was further held that to adopt a narrow textual approach to the interpretation of section 25(3)(c) of the interim Constitution would in all probability cause important features of the provision to be overlooked. Consequently, in determining when *dies* commenced, the court reaffirmed the approach that it would be from the moment of the charge and not from the date of the plea in court.

However, in *Coetzee v Attorney-General, KwaZulu-Natal* 1997 3 All SA 241 (D) 255 the court held that

> "delay, which occurs before an accused is arrested or served with a summons, may be more prejudicial to the accused than the delay, which occurs thereafter. At least, when he is arrested or served with a summons the accused knows what charge he is facing and is in a position to take appropriate steps to preserve the evidence relevant to his defence or to refresh his memory, whereas during the pre-arrest stage he may not be in a position to do so or may not deem it necessary to do so".

Hogg endorses this approach on the ground that if delay in the laying of the charge has impaired the accused's ability to defend the charge, the pre-charge delay would also be a breach of the fair-trial guarantee (1 122 s 49 6). Accordingly, in *Coetzee*'s case *supra*, it was held that in assessing the correctness of awarding a stay based on unreasonable delay and absence of a fair trial, courts must take cognisance of all factors which were incidental to the delay, but should have specific regard to the length

of the delay between the commission of the crime and the commencement of the trial. In making this assessment the court must look at all the reasons for the delay as well as any prejudice which the accused may have suffered as a result of the delay (256). It is the further submission of the writer that the application of the relevant provisions, as set out in *Coetzee*'s case, is far more reasonable, since it effectively eliminates the *lacuna* which enabled the provision to be lawfully infringed.

De Grandpre J (in a dissenting opinion) in *Hawrelak v City of Edmonton* 1976 1 SCR 387 417 held:

> "To speak of civil liberties is very hollow indeed if these liberties are not founded on the rock of absolutely unimpeachable conduct on the part of those who have been entrusted with the administration of the public domain."

In *R v Morin* 1992 1 SCR 771 795, the Supreme Court of Canada held that it would not tolerate unreasonable delay based on a plea of inadequate resources:

> "The government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay, which distinguishes this obligation from others that compete for funds with the administration of justice."

The same thinking could easily be applied to South Africa.

The point of termination has been discussed only under the Covenant for Civil and Political Rights. The Human Rights Court found that it should be extended to continue until the exhaustion of any appeal procedure. Thus in *Pinkney v Canada* the court found that there had been a violation of the right to a fair trial in circumstances where the applicant's appeal against conviction could not be heard for more than two years because the transcript of the original trial was not produced. (See Naldi 67.)

5 "Prejudice"

When assessing the proper remedy for a violation of the protection under discussion, counsel have in most jurisdictions, identified prejudice as the most important factor in determining what would constitute an appropriate remedy. The courts are also *ad idem* that if it is established that there was prejudice to the accused as a result of the delay, the accused is entitled to a vacation of the charge and/or sentence. The question that arises is whether all or any forms of prejudice should result in a stay Except in Namibia, this has been a much debated issue.

5 1 United States of America

In *Barker v Wingo* proof that an accused had suffered prejudice was not regarded as conclusive. The court took the view that it was a fundamental error to say that a defendant could not prevail unless he were able to make an affirmative showing of prejudice. In assessing whether the allegation of prejudice had been proved, it was agreed that courts should not be overly demanding with respect to proof of actual prejudice. It was noted that in some instances, lengthy delay should place the burden on the prosecution to show absence of prejudice. The reasoning of the court was based on the recognition, as a fact, that loss of memory is an element of the proceedings not always reflected in the record "because what has been forgotten can rarely be shown".

However, in *US v Strunk* 467 F 2d 969 (7th Cir 1972), the court recognised that the usual remedy for the violation of the Sixth Amendment right was a dismissal of the indictment or the vacation of any sentence already imposed. Even though this was the traditional approach, the court in *Strunk*'s case was nevertheless of the view

that there was no sound reason why less drastic relief could not be granted in appropriate cases. *In casu,* the facts of the application were as follows: the accused had been tried and convicted of the offence charged. In his subsequent application for the vacation of the sentence and dismissal of the charge, no objection was raised as regards the sufficiency of evidence pointing to his guilt, nor did he make any allegation of prejudice in the manner in which he had been required to present his case. Accordingly, the court was of the mind that in such circumstances the setting aside of the sentence and a dismissal of the charge would be inappropriate. In explaining its apparent inconsistency, the court noted that the severity of the remedy of dismissal had, in the past, perhaps caused courts to be loath to uphold the right and they appeared extremely hesitant to find that there had been a failure to afford a speedy trial.

The court *a quo,* in seeking to recognise the right in a manner both appropriate and reliable, found that there was tardiness on the part of the state and directed that the accused (applicant) receive a reduction on his sentence for the period of impermissible delay. The sound thinking of the *Strunk* court is to be applauded: In this way, both the accused's right is protected from unreasonable violation and social interests are satisfied. Justice is therefore seen to be done.

On appeal, however, the Supreme Court unanimously reversed the decision, noting that any delay may subject the accused to emotional stress and that the prospect of rehabilitation may be affected as a result: "In light of the policies which underlie the right to a speedy trial, dismissal must remain the only possible remedy" (*Strunk v US* 412 US 434 (1973)).

The case of *Klopfer v North Carolina* 386 US 213 (1967) is particularly interesting. The state recognised that the law required that, once an accused had been charged with an offence, it had a constitutional obligation to proceed with the trial within a reasonable time, failing which there was a real likelihood that the accused would be set free. However, after the prosecution had charged the accused, it was realised that the state did not have sufficient evidence for a proper prosecution and obtained a "*nolle prosequi* with leave", thus leaving room for the state possibly to reinstate the charge at a later date. The accused made an application for a complete stay of proceedings to the Supreme Court, alleging that the conduct of the state violated his Sixth Amendment right. Counsel for the state argued that the period between the *nolle prosequi* order and any other possible action on that specific charge could never be influential to a "speedy trial" claim by the accused. The Supreme Court, however, took a different view, noting that even though the defendant was freed without recognisance, he none the less remained subject to "anxiety and concern" because of the fact that the indictment remained alive, being as it were merely suspended as opposed to being dismissed. The application was consequently successful.

Almost twenty-five years later, Gubbay CJ in *R v Mlambo supra* raised the same point when he queried whether the state could stop the clock

> "by resorting to the expedient of withdrawing the charge before the plea . . . only to reinstate the same charge, or a charge based on identical information, when in a position to commence with the trial" (151).

In *Director of Public Prosecutions v Lebona* 1998 2 All SA 389 (LesA) 410 Steyn J answered the query in the negative, arguing that such a practice could result in an absurd result which would render nugatory the protection envisaged by the Constitution.

5 2 Canada

Adopting a similar stance to that in the United States, the court in *R v Askov supra* recognised the extreme anxiety and stress experienced by a person awaiting trial. Cory J held that there was always a "presumption of prejudice to the accused resulting from the passage of time" (1219) and "in the case of long delays, this presumption was virtually irrebuttable" (1232). However, in *R v Morin* [1992] 1 SCR 771 Judges Sopinka and McLachlin did not agree with the principle enunciated in *Askov*'s case. McLachlin J held the view that in awarding a stay, "the accused may have to call evidence if he or she is to displace the strong public interest in bringing those charged with an offence to trial". In a dissenting judgment, Lamer CJ interpreted the decision of Sopinka and McLachlin JJ as requiring that the burden of proving prejudice rested on the accused (778). He dissented from their judgment, feeling that the court should not depart from *Askov*. In *R v CIP* [1992] 1 SCR 843 861–862 the unanimous decision of the court (which included McLachlin J) reiterated the position of the court in *R v Askov supra* with regard to the issue of prejudice.

It would therefore appear that as far as the Canadian courts are concerned, if an accused is successful in invoking section 11(b) of the Constitution and obtaining a stay, there is no direct onus on him or her to establish real prejudice. According to Hogg, this right has become the most frequently invoked of all the Charter rights:

> "This is because the Canadian courts have adopted the approach of automatically granting a stay of proceedings to an accused whose trial has been delayed beyond a reasonable time" (1095 s 48 3).

Other countries have not been so generous in invariably granting a stay in cases where there has been delay.

5 3 Lesotho

In *Director of Public Prosecutions and Attorney General v Lebona* (Lesotho Court of Appeals) *supra,* the applicant for the stay of proceedings (Lebona) had been employed by the Ministry of Trade and Industry and her task was to issue commercial permits. She was indicted for fraud in Augsut 1994, but by December 1996 she had still not been tried. In her application for a stay of prosecution, the applicant alleged that she had suffered immense prejudice for the following reasons:

(i) She had to change counsel, as she did not have sufficient funds to retain her original representative.

(ii) Witnesses had become unavailable in that she was unable to find them. These persons were crucial to her case, as many were the same people to whom she had allegedly given false permits. Further, her earnings had been seriously depleted as she had been suspended from work without pay during the criminal investigation. In granting the relief sought, the court noted that the applicant had made every effort to bring the matter to trial and that the respondent had advanced no reason for the delay. Finding, therefore, that the delay was unreasonable and that applicant had sustained both trial and other prejudice (this latter being a reference to her diminished earnings), the court held that the prosecution be stayed.

This judgment raises another question, namely, whether an applicant's conduct in expediting the matter is integral to an application for a stay of proceedings. In *Barker v Wingo supra* the court refused the application despite a delay of nearly five years, becasue it did not appear that the accused had desired a speedy trial. Kriegler J in *Sanderson v Attorney-General, Eastern Cape supra* 1689 strongly disagreed with this approach:

> "The relevance of an accused's desire to have the trial expedited is not material to the outcome. An accused should not have to demonstrate a genuine desire to go to trial in order to benefit from the right, provided that he can establish any of the three kinds of prejudice protected by the right."

(The three kinds of prejudice referred to were identified as restrictions relating to liberty, security and trial-related restrictions respectively.)

5 4 Zimbabwe

In *John Jackson Smith v Herbert Ushewokunze and the Attorney General supra* five years had elapsed between the alleged criminal activity and the matter being brought to court. The accused argued that this delay would militate against a fair trial. In denying the application, the court held that, based on the evidence, it was clear that the accused still had a very strong recollection of the events. With regard to prejudice caused on witnesses having left Zimbabwe, the court found that most were no further than South Africa and that their evidence could be taken on commission, if necessary. The court was cognisant of the fact that some memories could have faded and that other witnesses could have work commitments or be unwilling to attend the trial; however, none of this was actually proved in evidence. All that could really be established was that the applicant had made no effort to contact potential witnesses: "An apprehension that there may be prejudice does not suffice. There must be real prejudice . . ." (18). The application for a stay was accordingly denied.

5 5 South Africa

In *Wild v Hoffert* AR 166/96 N the accused were arrested on 19 June 1993 and granted bail the same evening. However, after several adjournments, their matter had still not been aired by March 1996. On 13 March 1996 the applicants sought an order declaring *inter alia* that they had not been tried before a court of law within a reasonable time as provided for by section 25(3)(a) of the interim Constitution, Act 200 of 1993, and that further proceedings should accordingly be permanently stayed. In deciding the application, Booysen J was satisfied that the evidence placed before the court indicated that the applicants had suffered prejudice of a personal nature. In regard to the first applicant, a practising advocate, the adverse publicity had affected her in her profession, caused anxiety to herself and her family and caused her to incur substantial legal costs. With regard to the second applicant, an attorney in practice, his professional reputation had been besmirched by the adverse publicity resulting from the charge and he was also experiencing difficulty in exercising his access rights to his children. However, neither party had claimed that the delays had the potential to affect their right to a fair trial or would in fact do so, nor was the court prepared to infer this from the proof of personal prejudice. Accordingly, it held that section 25(3)(a) of the Constitution had not been infringed; there was therefore no basis for the drastic remedy of dismissing the case or granting a stay of prosecution.

In *Coetzee*'s case *supra*, the court was adamant that section 35(3) of the Constitution could not be interpreted to require that every case where there was proof of unreasonable delay or some prejudice, warranted a stay of prosecution (256). Thirion J was alive to the fact that the right of an accused to a trial within a reasonable time is entrenched in the Constitution. However, he took the view that it could not have been the intention of the drafters that the trial should be stayed in each and every case where there has been an unreasonable delay, or there has been some prejudice, however slight. He made the further point that possible prejudice

arising from judicial processes and proceedings is highly varied in nature and effect. Accordingly, a dismissal of the charges or a permanent stay of prosecution may possibly recommend itself as a solution, particularly where the prejudice was such that it could be said that it would result in no fair trial for the accused. (It would appear that this was intended as a general rule which would apply even where fault for the delay could in no way be attributed to the state's conduct.)

5 6 England

There is no equivalent statutory right or remedy in the United Kingdom. The extent of the so-called "speedy trial" remedy has been developed by the judiciary. The Court of Appeal in *Attorney-General's Reference, (No 1 of 1990)* 1992 QBD 630 favoured a two-pronged enquiry when deciding such applications: First it must be determined whether proceedings on a charge may be stayed on grounds of prejudice resulting from delay in the institution of those proceedings even though that delay may not have been occasioned by any fault on the part of the prosecution; secondly, if the answer to the first enquiry is in the affirmative, it must be asked what is the degree of (a) the likelihood and (b) the seriousness of any prejudice which is required to justify a stay of proceedings.

In *Reg v Bow Street Stipendiary Magistrate, Ex Parte Director of Public Prosecutions* (1990) 91 Cr App R283, the Queens Bench had decided that, depending on the circumstances, mere delay which gives rise to prejudice and unfairness may *per se* amount to an abuse of the process. However, in *Reg v Derby Crown Court, Ex Parte Brooks* 80 Cr App R, the court was of the view that before it would grant a stay, it should appear that the delay was unjustifiable.

A stricter approach was adopted in *Jago v District Court of New South Wales* [1989] 168 CLR 23. It was held that even where the delay could be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Delay which is due merely to the complexity of the case or is contributed to by the action of the defendant himself should never be the foundation for a stay. The court was prepared to recognise only a single instance when a stay should be granted and that was when the defendant was able to show, on a balance of probability, that he would suffer serious prejudice to the extent that no fair trial would be held. In *Tan v Cameron* (1993) 2 All ER 493 507 the Privy Council endorsed the view expressed in *Jago*'s case, save that it rejected the approach of the Appeal Court in placing the burden of proving unjustifiable delay on the accused. Rather, the Privy Council was of the view that the onus was on the prosecution to demonstrate that no prejudice had resulted from the delay.

6 "Why society is affected when the right to trial within a reasonable time is violated"

It is trite that when a prosecution is delayed there are repercussions not only for the accused but for society as a whole. Greater minds have identified the serious negative effects of delay on the greater community and these include the fact that an accused on bail, awaiting trial for a lengthy period of time, has further opportunity to commit other crimes; further, the longer the delay in bringing him before the judicial system, the greater the opportunity and the more time he has available to plan an escape. It is human nature that the longer one is left to ponder an idea, the more enticing it becomes – consequently, the more an accused hears of the horrors of prison, the more appealing the idea of escape. Further, an accused who cannot afford the bail set, remains incarcerated. This is a particularly serious problem: first

of all, awaiting-trial prisoners exacerbate the deplorable state of the prisons by contributing to overcrowding; secondly, on a more prosaic note, the longer the delay, the greater the taxpayer's contribution to his maintenance. In *Barker v Wingo* the court noted that lengthy exposure to prison conditions has "a destructive effect on human character and make rehabilitation of the individual offender much more difficult". Additionally, the court was of the view that perpetual delays and a failure to finalise proceedings promptly resulted in a backlog of cases which "enables defendants to negotiate more effectively for pleas of guilty to lesser offences and . . . manipulate the system" (*Barker v Wingo supra* 10-11).

Another interesting point is that in applications by the accused for dismissal of the charges because of delays, the argument is often raised that a fair trial will not take place because of the extended time lapse and the frailty of memory or unavailability of witnesses. Such deficiencies also affect the state's case, and in this instance the problem could be even more serious when one bears in mind that in criminal proceedings, the burden of proof rests with the state, and the test is proof "beyond reasonable doubt".

Lastly and, from the perspective of a survivor's rights, most importantly, when a trial does not take place within the recognised reasonable time and the accused is awarded a stay, the victims/survivors are left with the bitter taste of justice not seen and justice not done. In the long term, the development of such an attitude does not augur well for the entire criminal justice system.

7 Conclusion

In *Lebona*'s case *supra*, the court concluded by expressing the sentiment that judgments in which a stay of prosecution was ordered for violation of the speedy trial provision, should serve as a spur to secure a more efficient delivery of justice. However, such reasoning only results in the rights of the accused being upheld and the state being chastised for its tardy conduct; the victim and/or his family see only that the alleged perpetrator was freed and punishment not exacted.

In *Reg v Horseferry Road Magistrate"s Court, Ex Parte Bennet* 1994 1 AC 42 (HL) 74 Lord Lowry summed up the possible danger so well that his *ipsissima verba* bear repeating:

> "[I]t is the duty of a court to try a person who is charged before it with an offence which the court has the power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely *'pour encourager les autres'*. Rather than a complete stay of proceedings, the alternative would be for the Court to order the expedition of the trial."

Sharing this view, Amsterdam argues that dismissal of a charge should be specially reserved only for those cases in which there is a possible infringement of the accused's ability to defend himself properly or for cases where such a powerful sanction "is needed to compel prosecutorial obedience to norms of speedy trial which judges cannot otherwise enforce" ("Speedy criminal trial: rights and remedies" 1975 *Stanford LR* 525 535). This view is supported by Hogg (128, s 49 10) who notes that the mere deprivation of liberty while awaiting trial is certainly no basis for a vacation of the charge and a stay of the prosecution.

It is submitted that where the prejudice is deemed too remote to detract from the requirement of a fair trial or where even an unreasonable delay does not result in prejudice, a remedy as drastic as a stay does not make sense. Given the radical nature of such an award, exceptional circumstances must be proved to exist before it is employed; otherwise, it would only exacerbate the already prevalent suspicion and mistrust with which many people view the criminal justice system. Stays of prosecution may provide an incentive for governments to eradicate delays from the criminal justice system; however, such a remedy fails to pursue the public interest in bringing the accused person to trial.

It must be noted that in the United States and Canada the statutory provision differs somewhat from that found in the South African Constitution. In South Africa, the right to a trial within a reasonable time is specifically linked to the concomitant right to a fair trial. Thus the South African provision could be interpreted to imply that only incidents relevant to trial-related interests should be included in the enquiry. In the other jurisdictions, the provisions for a speedy trial stand on their own and the courts have been satisfied to include even non-trial related interests when deciding whether a violation has taken place.

Although he recognised the rationale for the above interpretation, Kriegler J found in *Sanderson v Attorney-General, Eastern Cape supra* that so narrow an interpretation of section 25(3)(a) was likely to miss the important features of the provision. It was his view that the section could not be properly applied without consideration being given to the importance of liberty, security and trial-related interests. However, he acknowledged the radical nature of granting a stay, as it effectively bars the state from presenting its evidence against the alleged transgressor. Thus he noted (27) that a bar should, as a general rule, be considered only where there appeared to be irreparable trial damage; where the prejudice appeared to be non-trial related, other remedies such as a directory order requiring expeditious commencement, refusing further remand or possibly damages under the civil law, might be more appropriate. However, he was quick to add that this was his personal view of the matter and that it should not be construed as a fixed rule. *In casu* he applied the principle and decided that the accused was not entitled to a stay.

Upon examination of the South African decisions, it appears that the approach of the judiciary is to be commended. Without doubt, the practice appears to achieve an even balance of the social concern against the right of the accused person whilst at all times remaining aware that the accused's interest in a trial without an unreasonable waste of time has been specifically confirmed in the Bill of Rights.

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REGSTAATLIKE WAARDEGRADERING VAN DIE MENSLIKE LEWE EN LEWENSKWALITEIT: OPMERKINGE OOR NOODTOESTAND AS VERWEER BY AKTIEWE EUTANASIE

1 Inleiding

In die saak *R v Latimer* (1999) 131 CCC (3d) 191 (Sask CA), wat onlangs voor die appèlhof (Court of Appeal; CA) van die Kanadese deelstaat Saskatchewan gedien

het, was die feite kortliks soos volg: Die beskuldigde, L, is van moord in die tweede graad op sy swaar gestremde dogter in die hof *a quo* aangekla. Die slagoffer was 'n 12-jarige kwadrupleeg, met 'n ernstige serebrale gestremdheid ("cerebral palsy"), wat permanent in pyn was. L het haar gedood deur vergiftiging met koolstofmonoksied. Hy het haar naamlik in die kajuit van sy bakkie gesit en die gas van die uitlaatpyp by wyse van 'n tuinslang na die kajuit herlei. L is drie jaar gelede skuldig bevind en tot lewenslange gevangenisstraf, sonder moontlikheid van parool binne tien jaar, gevonnis. L het vervolgens teen sy skuldigbevinding en vonnis na die CA geappelleer. Sy appèl is afgewys, wat spesifiek ook die appèlgrond dat die verhoorhof verkeerdelik geweier het om die verweer van noodtoestand aan die jurie te stel, ingesluit het (*R v Latimer* (1995) 99 CC (3d) 481 (Sask CA) 510–513). Die Kanadese *Supreme Court* (*SC*) het egter daarna 'n herverhoor op nie-verwante gronde beveel (*R v Latimer* (1997) 112 CCC (3d) 193 (SCC) 210).

By die herverhoor het die regter beslis dat die jurie, nieteenstaande die feit dat hulle daaroor deur L se regsverteenwoordiger toegespreek is, nie oor die verweer van noodtoestand in onderhawige verband 'n oordeel mag vel nie. L is gevolglik opnuut skuldig bevind. Na 'n aanbeveling van die jurie het die hof 'n straf van twee jaar gevangenisstraf, waarvan 'n jaar opgeskort is, opgelê. Die hof het verder beslis dat lewenslange gevangenisstraf, sonder die moontlikheid van parool binne tien jaar, 'n wrede en ontoepaslike straf daarstel. L appelleer vervolgens (weer) na die CA op grond daarvan dat die verhoorhof die moontlikheid van noodtoestand as verweer vir beslissing aan die jurie moes gestel het. Terloops, die staat het met sukses geappelleer teen die vonnis wat die verhoorhof opgelê het. Met ander woorde die straf wat in die eerste verhoor opgelê is, is deur die CA herstel.

In die onderhawige bydrae word die vraag of noodtoestand 'n verweer by die neem van die lewe van 'n ander – spesifiek binne die konteks van aktiewe eutanasie – kan daarstel, teen die agtergrond van die beslissing van die CA onder die loep geneem. Hierdie kommentaar moet vervolgens as 'n glos gelees word op my voorafgaande publikasies oor die vraagstuk van aktiewe eutanasie en waarna in die onderhawige bydrae verwys word. Onnodige duplisering van inligting en argumente daarin opgeneem, word doelbewus vermy.

2 Historiese agtergrond

Uit *C* 9 16 2 blyk duidelik dat in geval van 'n toestand van nood 'n mens ter lewensbeskerming 'n ander persoon as die aanvaller kan dood (vgl ook Cicero *De Inventione Rhetorica* lib 2 cap 57; *D* 9 2 29 3; Labuschagne "Noodtoestand" 1974 *Acta Juridica* 73 74; Van der Westhuizen *Noodtoestand as regverdigingsgrond in die strafreg* (LLD-proefskrif, Universiteit van Pretoria, 1979) 617–619).

Die opvatting in die Germaanse reg blyk duidelik uit die slagspreuk "ein Nothschlag, kein Todtschlag" ('n noodslag, geen doodslag) (Stammler *Darstellung der strafrechtlichen Bedeutung des Notstandes* (1878) 21 met goedkeuring aangehaal deur Van der Westhuizen 619). In die Kanonieke reg word algemene en ongekwalifiseerde spreuke aangetref, wat optrede in noodtoestand buite die trefkrag van die reg plaas, (sien *Decret Gregorii* IX 5 tit 41 c 4; Corvinus *Jus canonicum* (1651) 4 25). Hierdie benaderingswyse word ook algemeen by skrywers in die Romeins-Europese fase van die ontwikkeling van ons gemenereg aangetref (sien bv Faber *Codex Fabrianus* (1649) 4 43 55 4; Damhouder *Praxis rerum criminalium* (1646) cap 112 37; De Groot *De jure belli ac pacis* (1939-uitg) 2 2 6 2; Pufendorf *De jure naturae et gentium* (1759) 2 6 1). Carpzovius verduidelik in dié verband: *necessitas legum non habet*, dit wil sê vir nood(toestand) bestaan geen reg nie (*Responsa iuris* (1683) 6 9 94 1).

Weinig van ons gemeneregskrywers spreek die vraag aan of die verweer van noodtoestand by doding van 'n ander beskikbaar sou kon wees. Die Italiaanse juris Clarus, wie se werk uit die 16de eeu dateer, stel dit duidelik dat 'n onskuldige, dit wil sê 'n persoon wat nie die dader aangeval het nie, in 'n toestand van nood gedood mag word (*Opera omnia* (1579) Lib 5 par *homicidium* 31. Sien ook Van Zutphen *Practycke der Nederlandsche rechten* (1645) tit defensie 14; Voet *Commentarius ad Pandectas* (1707) 9 2 22; Labuschagne 80–81). Boehmer (*Meditationes in CCC* (1744) kantskrif tot 145) laat geen twyfel dat die doding van 'n ander in noodtoestand 'n privaat- en strafregtelike verweer kan wees nie: *caedes innocentis ex causa defensionis facta a persequitione criminali et civili liberat.* Ondersteuning hiervoor kan byvoorbeeld ook by Carpzovius (*Verhandeling der lyfstraffelijke misdaden* (vert Van Hogendorp, 1772) hfst 28 1 en 29 18), Huber (*Hedendaagse rechtsgeleertheyt* (1690) 6 13 24) en Van der Keessel (*Praelectiones ad jus criminale* (Beinart en Van Warmelo se verwerking en vertaling, 1969) 48 8 11) gevind word. Pufendorf (2 6 3–4), 'n Duitser wat beskou word as een van die grondleggers van die moderne internasionale publiekreg, behandel hierdie onderwerp in meer detail. Hy wys daarop dat 'n ander gedood mag word indien dit nodig is om van sy/haar liggaam te lewe. Insgelyks mag 'n ander na lotwerping oorboord gegooi word indien 'n reddingsboot oorlaai is. Waar twee persone sou moes sterf en die een tree op so 'n wyse op dat sy lewe gered word, maar dié van die ander vroeër beëindig word, word aanspreeklikheid nie gevestig nie. Ten slotte wys Pufendorf ook daarop dat 'n skipbreukeling wat op 'n plank dryf wat slegs een persoon kan dra, en 'n ander afstoot wat daarop wil klim, regtens verskoon word (sien ook Van der Westhuizen 620–624). Ek dink 'n mens sou met 'n groot mate van sekerheid kon konstateer dat ooreenkomstig ons gemenereg die dood van 'n ander in 'n toestand van nood in gepaste omstandighede 'n strafregtelike verweer sou kon daarstel. Die vraag of aktiewe eutanasie van 'n ander binne die trefkrag van sodanige verweer sou kon val, word egter nie direk deur ons gemeneregskrywers aangespreek nie.

3 Suid-Afrikaanse positiewe reg

Die Suid-Afrikaanse howe het aanvanklik prinsipieel 'n ander rigting as ons gemeneregskrywers ingeslaan. In *R v Werner* 1947 2 SA 828 (A) 834 merk Watermeyer HR soos volg op:

> "I shall not attempt to define the limits within which the plea of compulsion or necessity will excuse criminal conduct. It is enough to say that I am inclined to the view that the killing of an innocent person is never legally justifiable by compulsion or necessity . . ."

(sien verder *R v Hercules* 1954 3 SA 826 (A) 832; *S v Bradbury* 1967 1 SA 387 (A); Snyman *Strafreg* (1999) 121; Burchell *et al South African criminal law and procedure* vol 1 (1997) 93–95). Dit is nog steeds die regsposisie in die Engelse en Amerikaanse reg (sien *R v Howe* [1987] 1 All ER 771 (HL) 778ff; Smith en Hogan *Criminal law* (1996) 237–259; Labuschagne "Medemensdwang as strafregtelike verweer" 1997 *Stell LR* 205 211–219). Met die beslissing van die Suid-Afrikaanse appèlhof in *S v Goliath* 1972 3 SA 1 (A) is 'n kentering in ons reg teweeggebring. In dié saak is G deur M, wat met 'n mes bewapen was, beveel om die oorledene vas te hou en met die dood gedreig indien hy sou weier. G, vresende vir sy lewe, het hieraan gehoor gegee, waarop M die oorledene etlike kere op verskeie plekke op sy liggaam (noodlottig) met 'n mes gesteek het. By bevestiging van G se onskuldigbevinding op 'n klagte van moord verduidelik Rumpff AR soos volg:

> "By die toepassing van ons strafreg, in die gevalle wanneer die handeling van 'n beskuldigde volgens objektiewe standaarde beoordeel word, geld die beginsel dat aan

> die beskuldigde nooit hoër eise gestel word nie as wat redelik is en redelik beteken in hierdie verband dit wat van die gewone deursnee-mens in die besondere omstandighede verwag kan word. Dit word algemeen aanvaar, ook deur die etici, dat vir die gewone mens in die algemeen sy eie lewe belangriker is as die lewe van 'n ander. Alleen hy wat met 'n kwaliteit van heroïsme bedeeld is, sal doelbewus sy lewe vir 'n ander offer. Indien die strafreg dus sou bepaal dat dwang nooit as verweer teen 'n aanklag van moord kan geld nie, sou hy vereis dat 'n persoon wat 'n ander onder dwang dood, afgesien van die omstandighede, moes voldoen het aan 'n hoër vereiste as die wat aan die deursnee-mens gestel word. So 'n uitsondering op die algemene beginsel wat in die strafreg toegepas word, skyn my nie geregverdig te wees nie . . . Wanneer op 'n aanklag van moord 'n vryspraak op grond van dwang kan plaasvind, sal afhang van die besondere omstandighede van elke saak en die hele feitekompleks sal noukeurig ondersoek moet word en met die grootste omsigtigheid beoordeel moet word. In die eenvoudige geval waar A B dood net om sy eie lewe te red, sou die sterkte van die dwang 'n deurslaggewende faktor wees en die dwang sou so sterk moet wees dat, hoewel dit nie 'n *vis absoluta* is nie, dit nogtans daarmee vergelykbaar is in die sin dat die redelike mens dit in die besondere omstandighede nie sou kon weerstaan nie" (25).

Sien ook *S v Peterson* 1980 1 SA 938 (A) 946.

Die aanwending van die redelike man-toets in dié verband is onaanvaarbaar. Die dwangmatige misbruik van, byvoorbeeld, 'n onredelike en irrasionele geestestoestand, soos 'n fobiese toestand, by die dwangslagoffer (beskuldigde) behoort myns insiens insgelyks tot 'n onskuldigbevinding te lei (sien in die algemeen Labuschagne "Medemensdwang as strafregtelike verweer" 1997 *Stell LR* 205 221–223). 'n Verskeidenheid Suid-Afrikaanse skrywers het hulle oor die vraag uitgespreek of die doding van 'n ander in 'n toestand van nood of onder dwang strafregtelike aanspreeklikheid behoort te vestig of nie. Sommige ondersteun die *Goliath*-beginsel en ander verskil daarvan (Paley "Compulsion: Fear and the doctrine of necessity" 1971 *Acta Juridica* 205 237–239; Zeffertt "Duress as criminal defence" 1975 *SALJ* 321 325; Pauw "Doodslag en noodtoestand – die Suid-Afrikaanse en Engelse reg" 1977 *De Jure* 72 78–79; Burchell "Duress and intentional killing" 1977 *SALJ* 282 290; Van der Westhuizen 681–696; Burchell "Heroes, poltroons and persons of reasonable fortitude – juristic perceptions on killing under compulsion" 1988 *SAS* 18 32–34; Maré "Noodtoestand as verweer teen 'n aanklag van moord" 1993 *SAS* 165 185).

In *S v De Bellocq* 1975 3 SA 538 (T) het D haar baba van sewe weke, wat swaar gestremd was en 'n uitsiglose lewe gehad het, in sy badwater verdrink. Sy word aan moord met versagtende omstandighede skuldig bevind en besonder lig, eintlik bloot simbolies, gestraf (sien ook Strauss "Onvrywillige genadedood: 'n Belangwekkende Transvaalse beslissing" 1969 *THRHR* 385 392; Le Roux "Aspekte van eutanasie in die strafreg" 1979 *De Jure* 73 79). Noodtoestand, in die vorm van 'n pligtebotsing, stel klaarblyklik nie in die Suid-Afrikaanse reg by aktiewe eutanasie 'n strafregtelike verweer daar nie (sien verder Labuschagne 1974 *Acta Juridica* 87; Labuschagne "Dekriminalisasie van eutanasie" 1988 *THRHR* 167 176; *S v Hartmann* 1975 3 SA 532 (K); Van der Westhuizen 680 ev; Labuschagne "Aktiewe eutanasie: Mediese prerogatief of strafregtelike verweer?" 1996 *SALJ* 411 413). Direkte aktiewe eutanasie kan ook nie in Engeland en die VSA as 'n strafregtelike verweer stand hou nie (sien vir 'n meer gedetailleerde bespreking van die regsposisie in dié verband in hierdie lande Labuschagne "Eutanatiewe beëindiging van mediese behandeling" 1996 *SAS* 80; Labuschagne "Die strafregtelike verbod op hulpverlening by selfdoding: 'n Menseregtelike en regsantropologiese evaluasie" 1998 *Obiter* 45).

4 Duitse reg

Roxin (*Strafrecht AT* (1997) 622) wys daarop dat iedere menslike lewe voor die reg gelyke waarde het (sien ook a 1–3 van die Duitse Grondwet (*Grundgesetz*; *GG*). Lackner en Kühl (*Strafgesetzbuch mit Erläuterungen* (1997) 244) beklemtoon dat die menslike lewe nie volgens ouderdom, gesondheid, sosiale prestasievermoë, ensovoorts gradeerbaar is nie (sien ook die beslissing van die *Bundesgerichtshof* (*BGH*), Urt v 1988-09-15, *BHGSt* 35, 347 350). Dit sou gevolglik nie volgens artikel 34 van die Duitse Strafwetboek (*Strafgesetzbuch*; *StGB*), wat regverdigende noodtoestand as verweer sanksioneer, 'n verweer daarstel indien 'n dokter 'n pasiënt met 'n 30% oorlewingskans van 'n asemhalingsapparaat ontkoppel om plek te maak vir 'n pasiënt met 'n 70% kans op oorlewing nie. Insgelyks sou dit onregmatig wees indien 'n dokter 'n sterwende pasiënt se dood versnel om 'n orgaan te bekom vir oorplanting op 'n persoon met, medies gesproke, 'n lang lewensvooruitsig. Die lewe van 'n swaksinnige mag ook nie opgeoffer word om dié van 'n Nobelprysdraer te red nie. Dit is ook ontoelaatbaar om die lewe van een mens te neem om die lewens van 'n groot getal ander mense te red. Roxin wys daarop dat dit hoogs omstrede is of die grondbeginsel van ongradeerbaarheid van menslike lewens ook van toepassing is op gevalle waar 'n gemeenskaplike gevaar bestaan. Die klassieke voorbeelde in dié verband is dié waar een persoon gedood word sodat ander skipbreukelinge van sy liggaam kan lewe (623–625. Sien ook Schönke, Schröder en Lenckner *Strafgesetzbuch. Kommentar* (1997) 568). 'n Konkrete geval in dié verband word aangetref in 'n beslissing van die *BGH* van 28 November 1952 (NJW 1953, 513). Gedurende die Nazi-tydperk het sekere dokters deelgeneem aan die doding van enkele geesteskrankes in hulle inrigtings omdat, indien hulle dit nie sou doen nie, hulle vervang sou word deur handlangers van die regime wat al die geesteskrankes in die betrokke inrigtings sou dood. Hulle is in die verhoorhof aan hulpverlening tot moord, in samehang met misdade teen die mensheid, onskuldig bevind. Die *BGH* handhaaf egter die staat se appèl teen dié vrysprake (sien ook Roxin 624; Van der Westhuizen 626–627; Paley 232–233). In een geval, naamlik in defensiewe noodtoestand ("Defensivnotstand"), kan selfs die opsetlike dood van 'n ander deur artikel 34 *StGB* geregverdig word (Roxin 626; Schönke, Schröder en Lenckner 570–571; Lackner en Kühl 244–245). Volgens die heersende mening in Duitsland sou indirekte eutanasie as regverdigende noodtoestand erken kon word (Lackner en Kühl 244. Sien verder hieroor Labuschagne "Beëindiging van mediese behandeling en toestemmingonbekwames" 1995 *Obiter* 175; "Dekriminalisasie van aktiewe eutanasie: Die Duitse reg kom in beweging" 1998 *SALJ* 432).

Kragtens artikel 35(1) *StGB* tree 'n persoon sonder skuld op wat 'n wederregtelike handeling verrig om 'n dreigende gevaar vir lewe, liggaam of vryheid van hom/haar of sy/haar verwant ("Angehörige") of 'n ander naasbestaande wat nie op 'n ander wyse afgewend kan word nie af te weer. In dié geval het 'n mens te make met die sogenaamde "entschuldigender Notstand" (ontskuldigende noodtoestand) wat ek by 'n vorige geleentheid krities onder die loep geneem het (1997 *Stell LR* 209–210; sien ook Van der Westhuizen 302–305). Wat duidelik blyk, is dat 'n ander persoon in 'n toestand van nood (onder dwang) strafvry gedood mag word.

5 Nederlandse reg

Direkte aktiewe eutanasie uitgevoer deur 'n mediese dokter na 'n innige (klemmende) doodsversoek deur 'n pasiënt wat aan 'n ongeneeslike siekte ly, word in Nederland tuisgebring onder die strafregtelike verweer van oormag of noodtoestand, beliggaam in artikel 40 van hulle Strafwetboek (sien hieroor Labuschagne 1988 *THRHR*

190–191; HR 1987-06-23, NJ 1988, 157; Hazewinkel-Suringa en Remmelink *Inleiding tot de studie van het Nederlandse strafrecht* (1996) 296–313 en 362–369; Labuschagne "Gewetensnood as strafregtelike verweer" 1996 *SALJ* 607; 1997 *Stell LR* 210–211). Soos die Nederlandse reg in dié verband ontvou het, het ek kommentaar op 'n verskeidenheid beslissings van hulle howe gelewer (sien "Aktiewe eutanasie en professionele hulpverlening by selfdoding van 'n psigiatriese pasiënt" 1995 *SALJ* 227; "Aktiewe eutanasie: Mediese prerogatief of strafregtelike verweer?" 1996 *SALJ* 411; "Aktiewe eutanasie, hulpverlening by selfdoding en professionele verantwoordelikheid" 1997 *SALJ* 651; "Langtermyn gevangenisstraf, psigiatriese lyding en die reg op hulpverlening by selfdoding" 1998 *SALJ* 270). 'n Nederlandse hof het 'n geneesheer wat 'n swaar gestremde baba met 'n uitsiglose lewe op die klemmende versoek van haar ouers gedood het, van strafregtelike aanspreeklikheid onthef (Labuschagne "Aktiewe eutanasie van 'n swaar gestremde baba: 'n Nederlandse hof herstel die *ius vitae necisque* in 'n medemenslike gewaad" 1996 *SALJ* 216).

6 Kanadese reg

Soos elders aangetoon, vertoon die huidige stand van die Kanadese reg ten aansien van die vraag of 'n verweer van noodtoestand (dwang) op 'n aanklag van 'n dodingsmisdaad stand kan hou, beduidende ooreenkomste, hoewel prinsipieel minder geraffineerd, met die Duitse reg, hierbo bespreek (Labuschagne 1997 *Stell LR* 219–221). In *R v Latimer*, waarmee die onderhawige bespreking ingelei is, verduidelik die eenparige Saskatchewan CA, bestaande uit appèlregters Cameron, Vancise en Wakeling, die verweer van noodtoestand in die Kanadese reg soos volg:

> "Generally speaking, this defence allows for a person to be excused from breaking the law if it was necessary to do so. In other words if a person, faced with imminent risk, acts to avoid the peril, has no reasonable alternative to acting in violation of the law, and does less harm in breaching the law than in abiding by it, then that person may be relieved of responsibility on the premise that the act was not truly voluntary" (200).

In *R v Perka* (1984) 14 CCC (3d) 385 (SCC) 398, waarna in *R v Latimer* verwys word, verklaar Dickson R van die Kanadese Supreme Court (SC), na 'n kort historiese en prinsipiële agtergrond, soos volg:

> "Conceptualized as an 'excuse', however, the residual defence of necessity is, in my view, much less open to criticism. It rests on a realistic assessment of human weakness, recognizing that a liberal and human criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is, when one does a wrongful act under pressure which, in the words of Aristotle . . . 'overstrains human nature and which no one could withstand'."

Die verwysing na altruïsme as 'n moontlike motivering vir sodanige verweer sou in beginsel 'n grondslag vir inkorporering van eutanasie daaronder kon bied. Die begrip "under pressure", waarna verwys word, het onvermydelik 'n kennisonderbou. Nuwe mediese kennis skep nie slegs hoop nie, maar genereer soms ook vrees, stres en deernis. Die mens weet in 'n toenemende mate watter (ook pynlike en uitsiglose) gevolge sekere siektes en toestande onvermydelik meebring (sien verder hieroor Labuschagne "Kennispyn: 'n Bewussynsantropologiese perspektief op die evolusieproses van die persoonlikheidsreg" 1998 *THRHR* 313).

In *R v Perka* (399–401) wys regter Dickson daarop dat selfs al is daar aan die begrensingsvereistes van noodtoestand, naamlik dringendheid en die afwesigheid

van 'n regsuitweg ("no legal way out") voldoen, moet 'n verdere vereiste, naamlik die proporsionaliteitsvereiste, verreken word. Hy verwys vervolgens met goedkeuring na die volgende opmerking van Fletcher (*Rethinking criminal law* (1978) 804):

> "... [I]f the gap between the harm done and the benefit accrued becomes too great, the act is more likely to appear voluntary and therefore inexcusable. For example, if the actor has to blow up a whole city in order to avoid the breaking of his finger, we might appropriately expect him to endure the harm to himself. His surrendering to the threat in this case violates our expectations of appropriate and normal resistance to pressure. Yet as we lower the degree of harm to others and increase the threatened harm to the person under duress we will reach a threshold at which, in the language of the Model Penal Code, 'a person of reasonable firmness' would be 'unable to resist'. Determining this threshold is patently a matter of moral judgment about what we expect people to be able to resist in trying situations. A valuable aid in making that judgment is comparing the competing interests at stake and assessing the degree to which the actor inflicts harm beyond the benefit that accrues from his action" (sien ook *R v Morgentaler* (1975) 20 CCC (2d) 449 (SCC) 497).

In *R v Latimer* (210) konkludeer die Saskatchewanse CA dat, wat die verweer van noodtoestand betref, daar geen "air of reality" ten aansien van die vereistes wat vir sodanige verweer gestel word, teenwoordig was nie. Dit sluit in die bestaan van die "element of proportionality between the harm caused in violating the law and the harm entailed in abiding by it". Daar bestaan gevolglik nie getuienis, indien geloofwaardig, op grond waarvan 'n redelike jurie L op grond van optrede in noodtoestand onskuldig sou kon bevind nie (sien ook *R v Osolin* (1994) 86 CCC (3d) 481 (SCC) 537; *R v Lemky* (1996) 105 CCC (3d) 137 (SCC) 144–146).

Dit is 'n jammerte dat die Saskatchewanse CA nie insae in die Nederlandse reg in dié verband gehad het nie (sien ook *Re Rodriguez and Attorney-General of British Columbia* (1994) 85 CCC (3d) 15 (SCC) en Labuschagne "Die reg om waardig te sterf, aktiewe eutanasie en bystand tot selfdoding" 1995 *SAS* 224). Die konflik waarin 'n geneesheer hom in geval van eutanasie sou kon bevind, vind plaas tussen aan die een kant sy plig om die pasiënt se gesondheid en sy/haar lewe te verseker en aan die ander kant die plig om pyn, ongerief en lyding te voorkom of uit te skakel. Die botsende belange wat ter sprake kom in geval van 'n pasiënt wat ly en in groot pyn verkeer en wie se lewe, volgens bestaande kennis, uitsigloos is en wat 'n opregte en ingeligte begeerte het om daaruit verlos te word, is gevolglik tussen sy/haar *lewenskwaliteit* en die dokter se plig om sy/haar lewe te bewaar, dit wil sê sy/haar *lewe as sodanig*. In die Nederlandse reg word aan die reg van 'n pasiënt op 'n sekere lewenskwaliteit, in gepaste omstandighede, voorkeur gegee bo die geneesheer se plig tot lewensinstandhouding ten alle koste en in alle omstandighede. Eiehandige aktiewe eutanasie, sonder tussenkoms van mediese kundigheid, soos in *R v Latimer*, waar mediese fasiliteite beskikbaar was, is onaanvaarbaar. Mediese kontrole, en in finale instansie ook juridiese kontrole, oor aktiewe eutanasie, asook eutanasie in die algemeen, in sodanige omstandighede is 'n geregtigheidsvoorwaarde vir die sanksionering daarvan (vgl Labuschagne 1988 *THRHR* 191). Die probleem waarvoor beskaafde gemeenskappe by veral aktiewe eutanasie terugdeins, is nie die wettiging daarvan as sodanig nie, maar die bykans grenslose moontlikhede vir misbruik wat dit sou kon meebring. In die lig hiervan is streng kontrolemeganismes in die Nederlandse reg ingebou en word dit voortdurend hersien en aangepas.

Sonder om tot 'n bespreking daarvan oor te gaan, kan hier bloot gekonstateer word dat die straf wat in *R v Latimer* deur die Saskatchewanse CA opgelê is, nie anders as barbaars beskryf sou kon word nie (sien hieroor Labuschagne

"Dodingsmisdade, sosio-morele stigmatisering en die menseregtelike grense van misdaadsistematisering" 1995 *Obiter* 34).

7 Konklusie

Menslike kennis, spesifiek die mediese wetenskap, en sosio-juridiese waardestrukture het 'n vlak bereik waar eutanasie, ook in aktiewe sin, in 'n toenemende mate met deernis en begrip bejeën en soms gewettig sou kon word. Aan (veral) die regstaatlike waardes van individuele lewensoutonomie en waardigheid word hiervolgens 'n groterwordende status, in verhouding tot die individuele lewe as sodanig, toegeken. Mediese en in besonder juridiese kontrolemeganismes verg dat eiehandige optrede by aktiewe eutanasie, soos in *R v Latimer*, nie geduld kan word nie. Die dikwels wreedaardige wyse waarop die reg sekere pasiënte dwing om medies-uitsigloos te lewe, waarby die sterwensproses ingesluit is, sal in finale instansie nie kan stand hou teen die groeiende medemenslike passie en deernis en die opmars van die rasionele in die sosio-juridiese waardestrukture van die mens nie. Effektiewe meganismes teen misbruik sal ontwerp en voortdurend aangepas en verfyn moet word. Die problematiek rondom moontlike misbruik van aktiewe eutanasie kan egter onder geen omstandighede die growwe skending van individuele outonomie en menswaardigheid, asook 'n wreedaardige sterwensproses, regverdig nie.

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Kan daar aan die billikheid 'n normatiewe inhoud verleen word ten einde 'n korrektiewe funksie teenoor die bestaande positiewe reg te vervul? Dit gaan dus verder as die blote verklaring dat die reëls en beginsels wat die bureregtelike verhouding beheer, 'n regverdige en billike oplossing nastreef; dit gaan juis hier om gevalle waar die inherente billike en regverdige reëls in 'n bepaalde geval nie 'n regverdige en billike resultaat kan bewerkstellig nie.

Rand Waterraad v Bothma *1997 3 SA 120 (O) per Hattingh R*

VONNISSE

FOREIGN MARRIAGES AND SECTION 7(3) OF THE DIVORCE ACT 70 OF 1979

Esterhuizen v Esterhuizen 1999 1 SA 492 (C)

1 Introduction

In *Esterhuizen v Esterhuizen* 1999 1 SA 492 (C) (decided in 1995 but reported only in 1999) the applicability of section 7(3) of the Divorce Act 70 of 1979 to "foreign marriages" (those in which the proprietary consequences are governed by a foreign *lex causae*) was considered yet again. The case concerned a couple who were married in terms of a foreign (Namibian) antenuptial contract excluding community of property, community of profit and loss and accrual sharing. At the time of the marriage they were both domiciled in Namibia. Upon their divorce in the Cape Provincial Division of the erstwhile Supreme Court of South Africa, the plaintiff (the wife) sought an order for the redistribution of assets in terms of section 7(3) of the Divorce Act. She also instituted a claim for maintenance. The matter turned on the applicability of section 7(3) in an instance where the proprietary consequences of the marriage are governed by a foreign *lex causae*.

2 Conflict of laws

2 1 The conflicts rule

The choice-of-law rule in this situation is beyond dispute: the law of the husband's domicile at the time of marriage (the law of the matrimonial domicile or the *lex domicilii matrimonii*) governs the proprietary consequences of the marriage. (Josman AJ cited *Frankel's Estate v The Master* 1950 1 SA 220 (A) and *Sperling v Sperling* 1975 3 SA 707 (A) in support of the application of the *lex domicilii matrimonii* (494C–D).) In this instance the *lex domicilii matrimonii* was the law of Namibia, since both parties were domiciled there at the time of the marriage. But what about the availability of section 7(3) of the South African Divorce Act?

Section 7(3) provides:

> "A court granting a decree of divorce in respect of a marriage out of community of property –
>
> (a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or

(b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act No 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988

may . . . on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party."

Section 7(3) originally referred only to marriages which were entered into prior to the commencement of the Matrimonial Property Act 88 of 1984 (ie before 1984-11-01), subject to complete separation of property because the spouses had entered into an antenuptial contract in which they had excluded community of property, community of profit and loss and any form of accrual sharing. The section did not make express provision for marriages which are subject to complete separation of property, not by virtue of the provisions of an antenuptial contract, but by operation of law, such as foreign marriages in which complete separation of property automatically applies by virtue of the provisions of the foreign legal system, and civil marriages by black people which, by virtue of the provisions of section 22(6) of the Black Administration Act 38 of 1927, are automatically subject to complete separation of property. (Prior to its repeal by s 1(e) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, which came into operation on 1988-12-02, s 22(6) of the Black Administration Act provided that complete separation of property would apply in civil marriages entered into by blacks, unless the spouses made a joint written declaration before a magistrate, commissioner or marriage officer, within one month prior to the marriage, that they wished to marry in community of property and of profit and loss. The repeal of s 22(6) was not retroactive. Thus, civil marriages entered into by blacks before 1988-12-02 continue to be governed by s 22(6) of the Black Administration Act, unless the spouses alter their matrimonial property regime by way of an application to court in terms of s 21(1) of the Matrimonial Property Act.)

In 1988 the issue of the applicability of section 7(3) to marriages subject to section 22(6) of the Black Administration Act was settled when the legislature expressly provided for those marriages in section 7(3)(b) of the Divorce Act. (The amendment was effected by s 2(a) of the Marriage and Matrimonial Property Law Amendment Act.)

The position in respect of foreign marriages that are automatically out of community of property, however, remains uncertain. In this regard, two problems arise. The first is whether such marriages can be said to have been entered into in terms of an antenuptial contract, as required by section 7(3)(a) of the Divorce Act. (On the serious problems which the prerequisite of an antenuptial contract posed for foreign marriages from the start, see Roodt "Artikel 7(3) van die Egskeidingswet: Talle vroue feitlik sonder remedie" 1988 *De Rebus* 59.) The second, more important, question is whether section 7(3) applies to foreign marriages, despite our rule that the law of the husband's domicile at the time of marriage determines the patrimonial consequences of the marriage.

From the outset, our courts delivered conflicting judgments on the availability of section 7(3) to spouses in foreign marriages. Even virtually identical fact complexes led to different results. In *Milbourn v Milbourn* 1987 3 SA 62 (W) and *Bell v Bell* 1991 4 SA 195 (W) the *lex domicilii matrimonii* was English law and the parties were married out of community of property by operation of law.

In other words, in neither case was there an antenuptial contract. In *Milbourn v Milbourn* the plaintiff sought to invoke section 7(3) to effect a redistribution of assets, but the claim was denied on the ground that an antenuptial contract was a prerequisite for the application of the section. The plaintiff did not seek comparable relief in terms of the *lex domicilii matrimonii* (English law), and therefore that point was not argued. In *Bell v Bell*, on the other hand, the plaintiff did not rely on section 7(3), but claimed a redistribution of assets in terms of the *lex domicilii matrimonii* (English law). The claim was granted. In another case, *Lagesse v Lagesse* 1992 1 SA 173 (D), it was decided (on rather shaky grounds) that there was an antenuptial contract and that section 7(3) applied, even though the *lex domicilii matrimonii* was the law of Mauritius. (Josman AJ in *Esterhuizen* rightly disagreed with this aspect of the decision in *Lagesse* (see 497G–H).) The above three cases all focused on an antenuptial contract as a prerequisite for the application of section 7(3) without addressing the question whether that provision applies to a marriage the proprietary consequences of which are governed by a foreign *lex causae*. In other words, is section 7(3) applicable to foreign marriages at all? This issue was addressed in *Esterhuizen*.

It is often said that, in the absence of an antenuptial contract, the proprietary consequences of a marriage are governed by the *lex domicilii matrimonii* (see Josman AJ's references to *Frankel's Estate v The Master* (496I–J) and *Bell v Bell* (495A–C)). Josman AJ pointed out, correctly, that the conclusion of an antenuptial contract does not automatically displace the *lex domicilii matrimonii* as the governing law. It is perfectly possible for a couple to select, by way of an antenuptial contract, a matrimonial property regime within the *lex domicilii matrimonii* without indicating another legal system as the *lex causae*. This is exactly what happened in the present case, where the parties entered into an antenuptial contract to avoid the community-of-property regime which applies automatically in Namibia. The fact that they entered into an antenuptial contract did not mean that the law of Namibia (as the *lex domicilii matrimonii*) did not apply to their marriage. It is only when a legal system other than the *lex domicilii matrimonii* is selected by the parties to determine the proprietary consequences of their marriage that the law of the matrimonial domicile is displaced (495H–496C 496I–497D). It seems as if the judge considered only the possibility of an express choice of another legal system to displace the *lex domicilii matrimonii*. In our view, however, an implied choice of another legal system, or even an objective determination of another legal system as the proper law of the antenuptial contract, may have the effect of displacing the *lex domicilii matrimonii*. In *Ex parte Spinazze* 1985 3 SA 650 (A) the court held, in the absence of an express choice of law, that the proper law of the antenuptial contract was South African law:

> "The contract was in South African form; it was entered into in order to avoid a matrimonial property regime, viz community of property, which obtained in South Africa at the time, but not in Italy . . .; at the time when the contract was executed the deceased was domiciled and resident in South Africa; and the parties to the contract obviously intended South Africa to be their matrimonial home and the country where the contract was to operate. These factors may be taken either as indicating a tacit choice of South African law or, at any rate, as showing that South African law was the system with which the contract had its closest and most real connection" (665F–H).

Even though *Spinazze* concerned the formal validity of an antenuptial contract, the determination of the proper law will be done on exactly the same basis should the issue be the patrimonial consequences of the marriage in terms of an antenuptial contract. Therefore, in the absence of an express choice of another legal

system to govern the proprietary consequences of a marriage, a *lex causae* other than the *lex domicilii matrimonii* may be indicated either as a tacit choice or as the objective proper law of the antenuptial contract.

When the matter is viewed in this perspective, it is clear that the *lex domicilii matrimonii* will govern the proprietary consequences of a marriage, unless another applicable *lex causae* is indicated by an antenuptial contract (whether expressly, or tacitly, or in terms of the objective determination of the proper law). Accordingly, section 7(3) can apply only if South African law is indicated

- as the *lex causae*, in consequence of an antenuptial contract expressly selecting South African law, or where South African law is indicated as a tacit choice or is the objective proper law of the antenuptial contract; or
- as the *lex domicilii matrimonii* and there is no indication of the application of another *lex causae*, provided that the prerequisite of an antenuptial contract in terms of section 7(3) is met.

Thus section 7(3) is not applicable to marriages the proprietary consequences of which are not, in terms of our conflict-of-laws rules, governed by South African law. In other words, where a legal system other than that of South Africa is the *lex causae*, section 7(3) cannot apply, *even if there is an antenuptial contract.* Applied to the facts in *Esterhuizen*, this means that, even though the parties concluded an antenuptial contract, they did not expressly or tacitly select a legal system to govern the proprietary consequences of their marriage and thus, in the absence of any indication that another legal system was the *lex causae*, the *lex domicilii matrimonii* – the law of Namibia – applied. Since South African law was not indicated as the *lex causae*, section 7(3) could not apply. (It is open to question whether South African law may not have been indicated as the "objective" proper law of the antenuptial contract, but this issue was not pursued by the plaintiff.) Thus, Josman AJ's decision that section 7(3) was not available to the plaintiff to achieve a redistribution of assets was correct. The apparent obviousness of this conclusion should not, however, hide the intricate reasoning that underlies the decision. For the first time it has been spelt out clearly that section 7(3) does not apply to foreign marriages, unless South African law is indicated as the governing law in terms of our conflict-of-laws rules (and provided, of course, that the prerequisites stated in section 7(3) are met). Josman AJ held that the legislature clearly did not consider foreign marriages either when it inserted section 7(3) into the Divorce Act in 1984 or when it amended section 7(3) in 1988. He added that the rule that the proprietary consequences of a marriage are governed by the *lex domicilii matrimonii* has not been displaced by section 7(3) of the Divorce Act. In this respect Josman AJ's decision constitutes a positive contribution to the conflicts debate on the point and, indeed, takes it a step forward.

2 2 Proprietary consequences versus divorce issues

On the conflict-of-laws level, divorce and the proprietary consequences of marriage constitute two distinct issues which call for determination of the relevant *lex causae*. While the proprietary consequences of marriage are governed by the *lex domicilii matrimonii* (see the discussion above), divorce issues are regulated by the *lex fori* (*Holland v Holland* 1973 1 SA 897 (T); Hahlo and Kahn *The South African law of husband and wife* (1975) 627 637). This was again endorsed in section 2(3) of the Divorce Act, which reads as follows:

> "A court which has jurisdiction . . . in a case where the parties are or either of the parties is not domiciled in the Republic shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in

> the area of jurisdiction of the court concerned on the date on which the divorce action was instituted."

The effect of this section is that a "deemed domicile" is used in order to apply the *lex fori* to divorce issues. Even though the application of the *lex fori* on this basis has been severely criticised (see North "Development of rules of private international law in the field of family law" 1980 I *Hague Recueil* 9 87–88; Schoeman "Domicile, divorce and status in South African conflict of laws: A historical perspective" 1998 *Fundamina* 1), the current state of the law as set out in section 2(3) will be accepted as correct for purposes of this case discussion.

According to Kahn (1979 *Annual Survey of SA Law* 496) divorce issues include aspects such as maintenance, custody and property rights which are not directly associated with the matrimonial property regime of the parties (for instance forfeiture of the patrimonial benefits of the marriage (see s 9(1) of the Divorce Act)). Thus, in the context of choice of law, it seems as if the category *proprietary consequences* relates strictly to those matters which are directly associated with the parties' matrimonial property regime, such as whether they are married in or out of community of property, and everything else linked with the particular regime. This means that, should the proprietary consequences of a marriage be referred to a foreign *lex causae*, that foreign law should apply to all the issues pertaining directly to the matrimonial property regime of the parties. This is apparently what section 7(9) of the Divorce Act purports to convey:

> "When a court grants a decree of divorce in respect of a marriage the patrimonial consequences of which are according to the rules of the South African private international law governed by the law of a foreign state, the court shall have the same power as a competent court of the foreign state concerned would have had at that time to order that assets be transferred from one spouse to the other spouse."

In so far as this section endorses the *lex domicilii matrimonii* rule for proprietary consequences, it may be acceptable. But the *lex domicilii matrimonii* rule is so well-established (see Forsyth *Private international law* (1996) ("Forsyth") 259) that it was hardly necessary to write it into a statute. If the purpose of this subsection was to ensure that a foreign *lex domicilii matrimonii* or any other foreign legal system indicated by an antenuptial contract is applied to the full, it does not provide any guidance at all. For guidance in this respect one would have to look at a past case such as *Sperling v Sperling* 1975 3 SA 707 (A). There legislation promulgated in the foreign (East German) *domicilium matrimonii* (after the parties had already acquired a new domicile in South Africa), which had retrospectively altered the matrimonial property regime of the parties from one out of community of property to one of partial community of property, was applied on divorce in South Africa. The decision to apply the transitional law of the foreign *lex causae* was made upon a "balance of justice and convenience", and it was further held that there was no public-policy consideration which militated against the application of the changed *lex causae* in that case (722C–723A). Therefore, should a foreign *lex causae* (either as the *lex domicilii matrimonii* or as indicated by an antenuptial contract) govern the proprietary consequences of a marriage, that legal system should be applied in its entirety in so far as the proprietary consequences are concerned (subject, of course, to relevant considerations of public policy). And, since the conflict of laws strives to effect justice between individuals, the criterion of a "balance of justice and convenience" should be used in order to achieve precisely that in divorce actions.

Section 7(9) does not address the question of classification or categorisation as far as proprietary consequences and divorce issues are concerned. (Generally on

classification, see Edwards "Conflict of laws" in Dlamini, Harms, Rabie, Van Dijkhorst and Van Oosten (eds) *LAWSA* vol II First Reissue (1993) par 417; Forsyth 63ff.) (For an in-depth discussion of this point, see Roodt "Migrerende egpare se huweliksgoedereprobleme: *Common law*- en gemengde regstelsels" 1995 *THRHR* 194 440.) As pointed out above, matters such as maintenance are regarded as divorce issues and are, in terms of section 2(3), governed by the *lex fori*. Problems regarding classification may arise where the proprietary consequences are referred to a foreign *lex causae* which does not maintain a watertight division between proprietary consequences and divorce issues, so that it may be difficult to decide how far the application of the foreign legal system stretches. Although this issue will not be pursued further here (since *Esterhuizen's* case did not raise the problem), it is submitted that a *via media* approach to classification will be advisable in such cases. Recent South African case law supports this approach (see eg *Laurens v Von Höhne* 1993 2 SA 104 (W)).

Another question that remains is whether South African internal law should step in if the applicable foreign *lex causae* does not provide for something similar to our redistribution of assets or other comparable relief on divorce, as was the situation in *Esterhuizen*'s case. This is the scenario in which a court may be tempted to force section 7(3) to apply. It is submitted that once the proprietary consequences are referred to a foreign *lex causae*, there is very little that a South African court can or should do to interfere with the conflict of laws. Josman AJ correctly refused to apply section 7(3) to proprietary consequences, even though the prerequisites set by the section (an antenuptial contract, and so on) were clearly met.

2 3 The need for reform

Josman AJ was not asked to consider the merits of the application of the *lex domicilii matrimonii* rule as such in modern South African law, since this was not placed in dispute. He did, however, indicate that the current state of the law on this point was not entirely satisfactory, and that the legislature should decide whether it wished to retain the *lex domicilii matrimonii* rule (504E–F). Josman AJ's comments in this regard pertained specifically to the applicability of section 7(3) to foreign marriages, as well as the possible repeal of section 7(9), but it is submitted that the whole basis of the *lex domicilii matrimonii* needs to be reviewed as a matter of urgency. (See also the plea made by Roodt in 1995 *THRHR* 194 459.) Following the abolition of the wife's domicile of dependence (by s 1 of the Domicile Act 3 of 1992) any possible *ratio* for determining the matrimonial domicile with reference to the domicile of the husband at the time of marriage has fallen away completely. Moreover, in terms of the equality clause (s 9) of the Constitution of the Republic of South Africa, Act 108 of 1996, exclusive reference to the domicile of the husband seems to be unconstitutional. (See also the comments in this regard by Forsyth 259 fn 126; Neels "Die internasionale privaatreg en die herverdelingsbevoegdheid by egskeiding" 1992 *TSAR* 336.) With the growing economic strength and financial independence of women, the present conflicts rule will come under increasing pressure; yet the South African Law Commission opted to retain the rule in its *Report on domicile* Project 60 (1990) pars 6.2–6.8. The time has surely come for the Law Commission to investigate the basis of the *lex domicilii matrimonii* rule and evaluate its merits afresh. It may be that, even though spouses often share the same domicile at the time of marriage, the domiciliary law is not necessarily the most appropriate legal system to govern the proprietary consequences of their marriage.

3 South African internal law

The correct application of the South African conflict-of-laws principles resulted in section 7(3) not being available to the plaintiff in *Esterhuizen*, as far as the proprietary consequences of the marriage were concerned. Josman AJ, however, also held that an order under section 7(3) can serve two distinct purposes. It may be used not only to compensate a spouse for past contributions rendered to the maintenance or increase of the other spouse's estate but also to provide for the applicant spouse's maintenance needs.

This view was based on a journal article referred to above (1992 *TSAR* 336) in which Neels contends, *inter alia*, that section 7(3) of the Divorce Act not only covers the proprietary consequences of the marriage by allowing redistribution of the spouses' property based on past contributions by one spouse to the other spouse's estate, but also extends to the provision of maintenance for a spouse. In support of his view, Neels refers to the decisions of the Appellate Division (now the Supreme Court of Appeal) in *Beaumont v Beaumont* 1987 1 SA 967 (A) and *Katz v Katz* 1989 3 SA 1 (A), where it was held that there is an interrelationship between redistribution of property and maintenance, since just as a redistribution order under section 7(3) is taken into account when a maintenance order in terms of section 7(2) is considered, so a maintenance order under section 7(2) is taken into account when the nature or extent of a redistribution order under section 7(3) is to be determined. (S 7(2) expressly mentions a redistribution order in terms of s 7(3) as one of the factors to be taken into account when a maintenance order is made. S 7(3), however, does not contain a corresponding provision in terms of which a maintenance order under s 7(2) must be taken into account when a redistribution order is made. Despite this, the Appellate Division found that the two provisions are interrelated.) In *Beaumont v Beaumont* the court further held that the proper approach should be to take

> "an overall view, from the outset, of how justice could best be achieved between the parties in the light of possible orders under either ss (2) or ss (3) or both subsections, in relation to the means and obligations, and the needs of the parties, and all the other relevant factors" (992E–F).

In *Katz v Katz supra* the Appellate Division again adopted this approach. (On the interrelationship between s 7(2) and s 7(3), see also *Kroon v Kroon* 1986 4 SA 616 (E); *Kritzinger v Kritzinger* 1989 1 SA 67 (A); *Kretschmer v Kretschmer* 1989 1 SA 566 (W); *Archer v Archer* 1989 2 SA 885 (E).)

From the view adopted by the Appellate Division about the interrelationship between redistribution and maintenance, Neels deduces that section 7(3) covers not only the proprietary consequences of the marriage but also the provision of maintenance. He therefore concludes that section 7(3) can be applied to foreign marriages, provided that the spouse's claim is limited to

> "die eiser se *toekomstige onderhoudsbehoeftes* en dat dit nie *haar bydrae tot die groei of instandhouding van haar man se boedel* mag weerspieël nie" (1992 *TSAR* 341 (emphasis in original); see also 338).

Accepting Neels's argument, Josman AJ concluded that, because our conflict-of-laws rules provide that post-divorce maintenance is not a proprietary consequence of marriage but a divorce issue governed by the *lex fori* (South African law in the present case), the court may make a redistribution order in terms of section 7(3) in respect of a foreign marriage to the extent that the order provides for a spouse's maintenance needs. In other words, Josman AJ held that an order

may be made in terms of section 7(3) in respect of a foreign marriage in so far as that order provides purely for a spouse's maintenance needs – if, of course, the prerequisites set out in that provision are met, namely that the couple failed to reach an agreement about the division of their assets, and were married before 1 November 1984 with an antenuptial contract which excludes community of property, community of profit and loss and any form of accrual sharing.

It is submitted that this aspect of the decision in *Esterhuizen v Esterhuizen* is wrong.

First, and most importantly, the result of the decision is that spouses in a limited category of case (those in which they failed to reach an agreement about the division of their assets and were married before 1984-11-01 with an antenuptial contract providing for complete separation of property) can obtain a lump-sum maintenance award by way of a redistribution order under section 7(3). In other marriages the divorce court cannot order maintenance to be paid by way of a lump sum, since section 7(2) of the Divorce Act has been interpreted to exclude such awards.

Maintenance payments under section 7(2) must occur by way of periodical amounts because section 7(2) empowers the court to make an order for the payment of maintenance only for "any period until the death or remarriage of the party in whose favour the order is given." (See *Zwiegelaar v Zwiegelaar* 1999 1 SA 1182 (C), also reported in 1998 4 All SA 151; see also *Purnell v Purnell* 1989 2 SA 795 (W); Hahlo *The South African law of husband and wife* (1985) 357; Van Zyl "Maintenance" in Clark (ed) *Family law service* (1988) par C36; Visser and Potgieter *Introduction to family law* (1998) 190; Sinclair "Financial provision on divorce – need, compensation or entitlement?" 1981 *SALJ* 469 477; Sinclair "The financial consequences of divorce in South Africa: Judicial determination or private ordering?" 1983 *ICLQ* 785 793. The same interpretation was given to the comparable phrase "periodical payment" in section 1 of the Maintenance Act 23 of 1963 (*Schmidt v Schmidt* 1996 2 SA 211 (W); *Martin v Martin* 1997 1 SA 491 (N)). Under the new Maintenance Act 99 of 1998, which came into operation on 1999-11-26 (Proc R116 *GG* 20627 1999-11-15 (*Reg Gaz* 6675)), the *maintenance court* does, however, have the power to make a lump-sum maintenance award – in terms of the definition of "maintenance order" in s 1 of the 1998 Act, an order for periodical payment of maintenance is merely one of the orders which the court can make. It should be borne in mind that divorcing spouses may in a settlement agree to a lump sum being paid by the one to the other and that, in terms of s 7(1) of the Divorce Act, this agreement may be incorporated in the divorce order.

Affording only a limited category of spouse the right to obtain a lump-sum maintenance award on divorce is unconstitutional as it unjustifiably infringes the right to equality before the law, and equal protection and benefit of the law, of those spouses who are denied this right (see s 9(1) of the Constitution of the Republic of South Africa, Act 108 of 1996).

Secondly, the implication of Josman AJ's decision (and Neels's argument which underlies it) is that a redistribution order actually amounts to two separate orders which have been rolled into one – one being an order dealing with the division of the parties' matrimonial property, and the other a maintenance order.

The main underlying basis for this view is that a court which makes a redistribution order may consider the applicant's maintenance needs, and may adjust the scope of the redistribution order upwards or downwards depending on whether or not the applicant is in need of maintenance, and depending on how much he or she needs. In other words, the interrelationship between maintenance and redistribution lies at the core of Josman AJ's decision. That the court has the power to consider a spouse's maintenance needs in making its redistribution order is true – indeed, the court may even achieve a clean break between the parties by making a large redistribution order which altogether does away with the need to award maintenance to the applicant. (In accordance with the clean-break principle, the financial obligations of the spouses to each other end on divorce, or as soon as possible after it. A clean break can be effected only if the court does not make an order compelling one party to pay permanent maintenance to the other. In the case of redistribution of assets, a clean break can be achieved by making only a redistribution order in terms of section 7(3) and no maintenance order. On the clean-break principle, see also *Archer v Archer supra*; *Katz v Katz supra*; *Klerck v Klerck* 1991 1 SA 265 (W) 273E–G.) But this does not mean that the redistribution order becomes two orders rolled into one. An interrelationship between two different orders does not mean that the one becomes the other. If this conflation of redistribution of assets and maintenance were the correct approach to section 7(3), one would surely also be justified in applying it to section 7(2), for in making a maintenance award under section 7(2), the court also has the power to adjust its order upwards or downwards. It exercises this power in the light of, *inter alia*, the property ("means" (see s 7(2) of the Divorce Act)) available to the party who is to receive maintenance. Thus if a court were to make a substantial maintenance award because the spouse who is entitled to maintenance has no or very little property, it could be argued that the court is actually redistributing the other spouse's property in part. The implication would be that the court could, in effect, order a redistribution of property (by way of periodical amounts) in favour of any divorcing spouse, provided that he or she needs maintenance. This could surely never have been the intention of the legislature, for otherwise it would not have enacted section 7(3) and, moreover, would not have limited the availability of redistribution orders under section 7(3) to couples who married subject to complete separation of property before 1 November 1984, or 2 December 1988 in the case of civil marriages of blacks.

4 Conclusion

The decision in *Esterhuizen* cannot be supported. Once it is decided that redistribution of assets as set out in section 7(3) is, in terms of conflict-of-laws rules, not available in the case of a marriage the proprietary consequences of which are governed by a foreign *lex causae*, redistribution cannot be slipped in through the back door in the guise of maintenance. Such an approach cannot be justified on jurisprudential grounds, and will only lead to even more uncertainty in this area of the law.

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DIE REGSPLIG VAN DIE POLISIE OM DIE REG OP DIE FISIES-PSIGIESE INTEGRITEIT TE BESKERM

Mpongwana v Minister of Safety and Security 1999 2 SA 794 (K)

Daar word 'n hoë premie in die Suid-Afrikaanse reg geplaas op die erkenning en beskerming van die liggaam (*corpus*) as selfstandige persoonlikheidsgoed (sien Neethling *Persoonlikheidsreg* (1998) 103 ev; sien ook bv *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 145–146; *Minister of Law and Order v Monti* 1995 1 SA 3 (A) 39). Hierdie erkenning van die persoonlikheidsreg op die fisies-psigiese integriteit is op die spits gedryf deur die grondwetlike verskansing van die reg op die sekerheid van die persoon, waarby die reg op liggaamlike en psigiese integriteit inbegrepe is (sien a 12 van die Grondwet, Wet 108 van 1996). Onder eersgenoemde word ingesluit die reg op vryheid van alle vorme van private en openbare geweld, enige vorm van marteling en wrede, onmenslike of vernederende behandeling of straf (a 12(1)(e)–(e)), terwyl laasgenoemde onder andere die reg op sekerheid van en beheer oor die eie liggaam, asook vryheid van mediese of wetenskaplike eksperimente omvat (a 12(2)(b)–(e)). (Die regte op vryheid van slawerny of dwangarbeid (a 13), 'n gesonde omgewing (a 24), gesondheidsorgdienste en voldoende voedsel en water (a 27(1)(a)–(b)), asook die reg van 'n kind op beskerming teen mishandeling, verwaarlosing of misbruik (a 28(1)(d)) sluit hierby aan. Vir 'n uitvoerige bespreking van die grondwetlike bepalings sien Visser "Enkele gedagtes oor die moontlike invloed van fundamentele regte ten aansien van die fisies-psigiese integriteit op deliktuele remedies" 1997 *THRHR* 495–504.) Die grondwetlike verskansing van die onderhawige reg het die algemene effek dat die beskerming daarvan versterk word en dat dit 'n hoër status bekom in die sin dat dit op alle reg van toepassing is (vgl Neethling *Persoonlikheidsreg* 21 94–95) – dus ook op gemeenregtelike beginsels van deliktuele aanspreeklikheid. So gesien, kan die grondwetlike beskerming van die fisies-psigiese integriteit 'n verruimende invloed op die toepassingsgebied van deliksremedies uitoefen (*idem* 103 135; Visser 1997 *THRHR* 495 ev).

Nou is dit belangrik om daarop te let dat die Grondwet (a 7(2)) die staat – waarvan die polisiediens 'n bepaalde orgaan is – in die besonder verplig om die regte in die Handves van Regte te eerbiedig, te beskerm, te bevorder en te verwesenlik. Gevolglik rus daar 'n groot verantwoordelikheid op die polisie om onderdane se reg op die liggaamlik-psigiese integriteit te handhaaf, en vir huidige doeleindes kom die polisie se plig om onderdane teen aanranding deur derde partye te beskerm, onder die loep – 'n situasie wat hom in *Mpongwana v Minister of Safety and Security* voorgedoen het. Regter Comrie skets die agtergrond waarteen die saak afspeel, treffend soos volg (796C–E):

> "Over the past 20 years or so minibus taxis have become a major form of public transport throughout South Africa. It would be an understatement to say that competition between taxi owners, drivers and taxi associations is keen. The bad road manners of many taxi drivers represent but one manifestation thereof. The last decade has seen another development: the influx of firearms and their frighteningly ready availability to all and sundry, including those interested in the taxi industry. Competition has been taken to unbridled lengths, guns and all. The phenomenon of 'taxi violence' has become endemic. Inevitably, some innocent passengers and bystanders have been injured, and even killed in the competitive crossfire. The aforegoing facts are so well known, so notorious, that I can and do take judicial

> notice of them so far as may be necessary. What is more, the police must be no less well aware of this regrettable state of affairs than I am."

Die feite was kortliks die volgende. Die eiseres was 'n passasier in 'n taxi van onderneming A toe sy getref is deur 'n skoot uit 'n verbygaande konvooi taxis wat aan 'n mededingende onderneming (B) behoort het. Sy word verlam in haar onderlyf en stel 'n eis in teen die minister verantwoordelik vir die polisiediens. Haar eis word daarop gebaseer dat, gesien die plofbare omstandighede wat die betrokke dag tussen lede en ondersteuners van die twee mededingende taxi-groepe geheers het, daar 'n regsplig op die polisie gerus het om die nadeel wat sy gely het, te voorkom, welke plig op nalatige wyse deur die polisie versaak is.

Ten einde te bepaal of bedoelde regsplig op die polisie gerus het, moet soos in alle gevalle waar onregmatigheid by aanspreeklikheid weens 'n late beoordeel word, die toets van die regsoortuigings van die gemeenskap in die lig van alle relevante feite ingespan word. Regter Comrie verklaar (800I–801C):

> "The Court's perception of the legal convictions of the community has subsequently been applied in a number of leading cases. It has come to be recognised as an instrument of judicial policy . . . The test relates to the existence or otherwise of a duty of care owed to the claimant, being part of the enquiry into lawfulness. It does not, it seems to me, relate to negligence. English law appears to have developed an additional step, namely public policy. Liability can be denied on the ground of policy notwithstanding the existence of a duty of care . . . I apprehend that in South African law both stages, that is duty of care and public policy, are compressed into a single enquiry. In other words, I understand the more recent decisions, at any rate, to acknowledge that public policy plays a role in the duty of care decision. There may be room for some refinement in this regard."

(Hierdie benadering verdien instemming. Daar word nl duidelik onderskei tussen onregmatigheid en skuld as selfstandige delikselemente – ook by aanspreeklikheid weens 'n late (sien Neethling, Potgieter en Visser *Law of delict* (1999) 153–154; *Longueira v Securitas of South Africa (Pty) Ltd* 1998 4 SA 258 (W) 261–262; Neethling "Vertroue op die skynverwekking van beveiliging: 'n Faktor by aanspreeklikheid weens 'n late?" 1999 THRHR 144–148; 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).) Ongelukkig gebruik die hof vir doeleindes van die onregmatigheidsvraag steeds die verwarringstigtende begrip "duty of care" in plaas van die benaming *regsplig* ("legal duty"). soos reeds deur die appèlhof aan die hand gedoen is (sien bv *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27; sien ook *Longueira v Securitas of South Africa (Pty) Ltd* 1998 4 SA 258 (W) 261–262).)

Ten einde die aanwesigheid van 'n regsplig by die polisie *in casu* te beoordeel, bespreek die hof (802G–805A) 'n hele aantal relevante faktore. Dié wat op die bestaan van 'n regsplig dui, is onder andere dat die polisie *geweet* het van die plofbare situasie tussen die twee taxi-groepe, dat lede van B vuurwapens in hulle besit kon hê en dat passasiers in A se taxis dus aan 'n groot risiko van benadeling blootgestel was; dat die polisie se teenwoordigheid op die betrokke dag ten einde reg en orde te handhaaf en misdaad te voorkom, daarop dui dat daar 'n *spesiale verhouding* tussen die polisie en A se taxis tot stand gekom het; dat die eiseres *ernstige liggaamlike beserings* opgedoen het wat skadevergoeding regverdig; en dat daar *statutêre voorskrifte* bestaan wat 'n plig op die polisie geplaas het om redelike en geskikte stappe te doen ten einde persone en eiendom te beskerm. Aan die ander kant is daar regspolitieke oorwegings wat die erkenning van 'n regsplig weerspreek, of soos die regter dit stel (803A), "[t]o impose liability on

the police for the plaintiff's injury and damages would, I think, tend to be counter-productive". Hulle is onder andere dat dit daartoe kan lei dat die polisie hulle werk op 'n oorversigtige wyse sou doen; dat dit tot 'n oorvlocd aksies aanleiding kan gee (bv waar die polisie 'n verdagte nie gou genoeg gearresteer het nie en hy gevolglik verdere misdade kon pleeg); dat die voorbereiding vir sodanige verhore baie tyd en menslike hulpbronne sou vereis wat weer die aandag sou aftrek van die polisie se primêre taak, te wete die voorkoming van misdaad. Die hof kom tot die volgende slotsom:

> "The law requires me to bring in a value judgement. Let it not be forgotten that I am asked to do so on exception, however well and fully pleaded the plaintiff's particulars of claim may be. The plaintiff has laid the foundation for some sort of a special relationship between herself and the police, for a proximity which may just have been sufficient to warrant a duty of care. Against this, the wider consideration of public policy tend, as I have indicated, to operate against the plaintiff. At best for the plaintiff, on her own pleaded version, it is a borderline case. I am far from convinced that she will succeed at the trial. But I think she has an arguable case – I put it no higher – on the issue of a duty of care. I cannot exclude the possibility that, when all the evidence is in, the trial Court may find that the police owed the plaintiff a duty of care. I have accordingly reached the conclusion that it would be premature to uphold the exception, which is dismissed with costs."

Alhoewel die hof se bevinding instemming verdien, is dit miskien tog wenslik om 'n paar (verdere) gedagtes uit te spreek oor die aanspreeklikheid van die polisie weens hul versuim (*omissio*) om 'n inwerking op die fisiese integriteit van 'n persoon deur 'n derde te verhinder. Eerstens word aandag gegee aan die grondwetlike imperatief in hierdie verband, daarna aan relevante regspraak en laastens aan faktore wat 'n rol kan speel ten einde die bestaan van die polisie se regsplig te bepaal.

(a) Hierbo is daarop gewys dat die grondwetlike verskansing van die reg op die sekerheid van die persoon – waarby die reg op vryheid van alle vorme van private en openbare geweld inbegrepe is (a 12(1)(c) van die Grondwet) – onder andere 'n besondere plig op die polisie as staatsorgaan plaas om hierdie fundamentele reg te beskerm (sien a 7(2) en 205(3) van die Grondwet). Verskeie skrywers het dan ook reeds verklaar dat artikel 12(1)(c) sterk aanduidend is van 'n regsplig wat op die polisie rus om redelike stappe te doen ten einde die aanranding van 'n persoon deur derdes te verhinder. (Sien bv Visser 1997 *THRHR* 499–500. Hy noem die volgende voorbeeld: "Dit is duidelik dat as die polisie byvoorbeeld weet dat talle aanrandings in 'n bepaalde straat plaasvind, die staat waarskynlik deliktueel aanspreeklik kan wees as dit blyk dat X skade gely het wat waarskynlik voorkom sou gewees het indien die polisie nie versuim het om binne hulle vermoë redelike stappe te doen (bv deur patrollering, ens) om misdadigers beter af te skrik nie." Sien ook Carpenter "The right to physical safety as a constitutionally protected human right" in Carpenter (red) *Suprema lex: Opstelle oor die Grondwet aangebied aan Marinus Wiechers* (1998) 139 cv 146–158; Jones "Battered spouses' actions for damages against unresponsive South African police" 1997 *SALJ* 356 ev 369–370; Neethling *Persoonlikheidsreg* 103 vn 6; vgl Burchell "The role of the police: Public protector or criminal investigator?" 1995 *SALJ* 211 wat die regsplig van die polisie ver buite die beskerming van die fisiese integriteit neem; Neethling en Potgieter "Regsplig van die polisie om suiwer ekonomiese verlies te voorkom" 1996 *THRHR* 333.) In die lig hiervan is dit verbasend dat die hof in *Mpongwana* hoegenaamd nie van die konstitusionele imperatief kennis gencm het nie.

(b) Wat relevante regspraak betref (sien hieroor ook *Mpongwana* 801–802; Carpenter 146–147), is die *locus classicus* sekerlik *Minister van Polisie v Ewels* 1975 3 SA 590 (A), waar die eiser op die perseel van 'n polisiestasie in die teenwoordigheid van polisiebeamptes wat aan diens was, aangerand is. Die hof bevind dat die polisie wel verplig was om die aanranding te verhinder en staan die eis toe. 'n Ouer beslissing is *Mtati v Minister of Justice* 1958 1 SA 221 (A). Hier is die eiser in sy tronksel aangerand deur 'n polisieman nadat laasgenoemde toegang tot die sel verkry het weens die nalatige optrede van die konstabel in beheer van die sleutels. Volgens appèlregter Hoexter (229) was daar by laasgenoemde "a clear breach of his duty to protect the [plaintiff] from an unlawful assault". In *Nkumbi v Minister of Law and Order* 1991 3 SA 29 (OK) het die polisie onderneem om die oorledene – wat verwant was aan 'n polisie-informant – en sy familie onder polisiebeskerming uit 'n woongebied te begelei. Die polisie faal egter hierin toe 'n gewelddadige skare, wat die oorledene as 'n politieke informant gebrandmerk het, 'n petrolbom na hom geslinger, hom agtervolg, aangerand en vermoor het. Die hof beslis (39) dat "where the police accompanied the deceased . . . for the specific purpose of affording him protection, there was a legal duty on them to protect him". Teenoor hierdie drie sake staan die beslissing in *Carmichele v Minister of Safety and Security and Minister of Justice* 1997-11-11 ongerapporteer (K) (bespreek in *Mpongwana* 802). Die eiser is aangerand deur C terwyl C op borgtog vrygelaat was. Verskeie belanghebbende persone het tevergeefs gepoog om die polisie en aanklaer te oorreed om nie aan C, wat 'n geskiedenis as geweldenaar gehad het, borgtog toe te staan nie. Regter Chetty beslis dat die polisie en aanklaer nie 'n regsplig teenoor die eiser verbreek het en bygevolg nie onregmatig opgetree het nie. (Die volgende sake betrek ook die versuim van die polisie om op te tree ten einde skade te voorkom maar gaan nie oor die afweer van aanranding op derdes nie: *Minister of Police v Skosana* 1977 1 SA 31 (A); *Minister of Law and Order v Kadir* 1995 1 SA 303 (A).) Hieruit blyk dat, alhoewel die howe in beginsel nie ongeneë is om 'n regsplig op die polisie te plaas ten einde derdes teen aantasting van hulle fisiese integriteit te beskerm nie, 'n tersaaklike bevinding soms uiters problematies kan wees (soos blyk uit *Mpongwana* en *Carmichele* hierbo). Dit bring 'n mens by die faktore wat 'n rol kan speel om die howe se taak in hierdie verband te vergemaklik.

(c) (i) Eerstens moet weer gekonstateer word dat die *konstitusionele imperatief* sterk aanduidend is van 'n regsplig wat op die polisie rus om redelike stappe te doen ten einde die aanranding van 'n persoon deur derdes te verhinder. (ii) Hierdie vingerwysing word versterk deur sowel die algemene *statutêre verpligting* van die polisie om misdaad te voorkom en onderdane te beskerm, as soortgelyke besondere statutêre verpligtinge wat daar van geval tot geval kan bestaan (sien *Mpongwana* hierbo; sien ook Neethling, Potgieter en Visser *Delict* 66). (iii) 'n Faktor wat in al bovermelde sake 'n belangrike rol gespeel het, is dat die polisie *geweet* het van die aanranding of dreigende aanranding (Carpenter 154; vgl Neethling, Potgieter en Visser *Delict* 63 vn 126). Dit spreek eintlik vanself dat sonder sodanige wete of kennis daar nie van die polisie verwag kan word om op te tree nie. (iv) In *Ewels*, *Mtati* en *Nkumbi* het die feit dat polisie die aanranding *waargeneem* het, waarskynlik die besluit beïnvloed dat daar wel 'n regsplig op hulle was om die aanranding te verhinder. (v) Soos in *Nkumbi*, is 'n *kontraktuele onderneming* deur die polisie om 'n persoon te beskerm uiteraard ook 'n gewigtige oorweging by die vraag na 'n deliktuele regsplig in hierdie verband. (vi) Insgelyks is die feit dat die polisie *feitelike beheer* of kontrole oor 'n (potensieel) gevaarlike toestand geneem het (vgl *Nkumbi*; *Mpongwana*

798–799 802), 'n faktor by die vraag of die polisie inderdaad beheer moet uitgeoefen het, dit wil sê stappe moet gedoen het om die gewraakte aanranding te voorkom (vgl Neethling, Potgieter en Visser *Delict* 62–64; *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 361). (vii) 'n Verdere faktor is die waarskynlike of moontlike omvang van die nadeel wat die eiser kon ly (vgl *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 361; in *Mpongwana* is die ernstige aard van die eiseres se liggaamlike beserings ook beklemtoon). (viii) Laastens, en miskien uit 'n praktiese hoek die belangrikste vir huidige doeleindes, is die vraag of die voorsorgmaatreëls wat die polisie volgens die eiser moet getref het om die betrokke aanranding te voorkom, redelikerwys (en uit 'n praktiese oogpunt) van hulle geverg kon word (vgl *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 361). Appèlregter Olivier verduidelik (*ibid*; sien ook Carpenter 154):

> "Die onderliggende filosofie is dat 'n gevolg slegs onregmatig is indien in die lig van al die omstandighede redelikerwys van die verweerder verwag kan word om positief op te tree en die voorgestelde voorsorgmaatreëls, vir die versuim waarvan hy deur die eiser verwyt word, te tref. Ten einde vas te stel of 'n positiewe handeling of late sodanig is dat dit as onregmatig aangemerk kan word, moet gevolglik onder andere die onderskeie belange van die partye, die verhouding waarin hulle tot mekaar staan en die maatskaplike gevolge van die oplegging van aanspreeklikheid in die betrokke soort gevalle, versigtig teen mekaar opgeweeg word. Faktore wat 'n belangrike rol speel in die opwegingsproses is, onder andere, ... of daar redelik doenlik maatreëls vir die verweerder beskikbaar was om die nadeel te vermy; wat die kanse was dat gemelde maatreëls suksesvol sou wees; en of die koste verbonde aan die neem van sodanige maatreëls proporsioneel sou wees tot die skade wat die eiser kon ly."

(Terloops, die regverdigingsgrond *onmoontlikheid* sluit hierby aan (sien Neethling, Potgieter en Visser *Delict* 90–91). Waar dit redelikerwys onmoontlik is om die gevaar van aanranding af te weer (soos waar die polisie nie oor voldoende menslike en/of finansiële bronne beskik nie), kan onregmatigheid ook op hierdie grond uitgesluit word.)

Indien veral laasgenoemde faktor noukeurig en versigtig deur die howe ingespan word, behoort die regspolitieke vrese – waarna regter Comrie in *Mpongwana* 803 met verwysing na die Engelse saak *Hill v Chief Constable* [1988] 2 All ER 238 (HL) 243–244 verwys – grootliks besweer te word. Die Engelse (en Amerikaanse) reg in hierdie verband moet in elk geval met groot omsigtigheid hanteer word. Carpenter 151 verklaar:

> "I would suggest that the British jurisprudence is altogether out of step with our present constitutional system and that our courts should approach the American examples with a great deal of caution."

Dit bring 'n mens weer by die beslissing in *Mpongwana*. Alhoewel faktore (i), (ii), (iii), (vi) en (vii) hierbo sterk aanduidend is daarvan dat daar 'n regplig op die polisie gerus het om die eiseres teen die gewraakte verwonding te beskerm, sal sodanige bevinding in laaste instansie afhang van die vraag of daar redelikerwys (verdere) praktiese stappe was wat die polisie kon doen om haar te beveilig (soos om B se taxis vir vuurwapens te deursoek het), wat die kanse was dat gemelde maatreëls suksesvol sou wees, en of die koste verbonde aan die neem van sodanige maatreëls proporsioneel sou wees tot die skade wat die eiseres kon ly. Dít is 'n feitevraag wat uiteraard net met inagneming van alle relevante omstandighede deur die verhoorhof beantwoord kan word.

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STRAFBEVRYDENDE TERUGTREDE UIT 'N POGING TOT MOORD (DOODSLAG)

Bundesgerichtshof, Urt v 10/2/1999, NStZ 1999, 300

1 Inleiding

In dié saak was die relevante feitestel soos volg: Die beskuldigde, A, het in die loop van 'n stryd sy (tweede) vrou uit woede met 'n Switserse offisiersmes, met 'n lem van sewe sentimeter lank, in die buik gesteek en 'n wond van 15 sentimeter diep gelaat. Sy het skreeuend opgespring en in die rigting van die woning se deur beweeg. A het haar gevolg, van agter af aan haar klere vasgehou en haar woedend twee steke van 10 en 13 sentimeter diep onder die skouerblad asook twee steke in die omgewing van die sleutelbeen, minder as een sentimeter van die nekslagaar af, toegedien. A het hierdeur duidelik die dood van die slagoffer op die koop toe geneem. Die slagoffer het vervolgens, lêende op die vloer in die huis, om hulp geroep. Die verhoorhof, naamlik die Landgericht (LG) te Düsseldorf, het ten gunste van A in aanmerking geneem dat die slagoffer haar nie uit sy greep losgeruk het nie, maar dat hy haar vrywillig gelos het. Die LG het egter nie ingegaan op die rede waarom hy haar losgelaat het nie. Hierdie rede kon byvoorbeeld wees dat hy van mening was dat hy genoeg gedoen het om haar dood te bewerkstellig of dat hy spyt gekry het en haar geleentheid wou bied om hulp te bekom. Deur haar roep om hulp het die bure tot haar redding gekom en haar na hulle woning geneem. A het, nadat een van die bure geweier het om op sy versoek sy woning binne te kom, die polisie geskakel en meegedeel dat hy sy vrou doodgesteek het. Sonder 'n onmiddellike noodoperasie sou die messteke sonder twyfel tot die dood van die slagoffer gelei het. Die LG het ten gunste van A aangeneem dat hy met sy optrede die dood van die slagoffer wou voorkom en hom aan (wat in ons reg beskou sou word as) aanranding met die doel om ernstig te beseer (in die Duitse reg: "gefährliche Körperverletzung") skuldig bevind en tot gevangenisstraf van drie en 'n half jaar gevonnis. Die staat appelleer vervolgens teen dié beslissing na die Bundesgerichtshof (BGH). Laasgenoemde se bevinding word in die onderhawige bydrae onder die loep geneem. Hierdie beslissing is een van drie wat die BGH binne ongeveer 'n week oor dié onderwerp gelewer het. Na die ander twee sake sal in die loop van die bespreking verwys word. Hierdie bespreking moet voorts as 'n glos op my voorafgaande publikasies in dié verband gelees word. Onnodige duplisering van feite en argumente word doelbewus vermy (Labuschagne "Vrywillige terugtrede uit 'n misdaadpoging en menslike gedragsbeheermeganismes: opmerkinge oor die persoonlikheidsregtelike begrensing van die strafreg" 1995 *Stell LR* 186; "Die strafregtelike effek van die regstelling van 'n meinedige verklaring" 1995 *Obiter* 158; "Strafbevrydende terugtrede uit 'n poging tot brandstigting" 1998 *THRHR* 158).

2 Uitspraak van die BGH

Dit moet ten aanvang duidelik gestel word dat in die Duitse reg, anders as in die Suid-Afrikaanse reg, nie 'n enkele misdaad vir die opsetlike doodsveroorsaking van 'n medemens, naamlik moord, bestaan nie. Volgens artikel 211 van die Duitse Strafwetboek (*Strafgesetzbuch*; *StGB*) word moord gepleeg indien iemand

'n ander mens dood uit moordlus, ter bevrediging van die geslagsdrang, uit hebsug of 'n ander lae of gemene beweegrede op 'n boosaardige of op 'n grusame wyse of op 'n algemeen gevaarlike wyse of om 'n ander misdaad te pleeg of te verberg. Kragtens artikel 212 *StGB* is 'n persoon aan doodslag skuldig indien hy 'n ander opsetlik ombring in omstandighede wat nie op moord neerkom nie. Artikel 222 *StGB* stel diegene strafbaar wat die dood van 'n medemens op 'n nalatige wyse veroorsaak (sien verder in dié verband Labuschagne "Dodingsmisdade, sosio-morele stigmatisering en die menseregtelike grense van misdaadsistematisering" 1995 *Obiter* 34 38–42).

In sy uitspraak wys die BGH daarop dat die LG verkeerdelik aangeneem het dat A op 'n strafbevrydende wyse uit 'n poging tot doodslag teruggetree het. Uit die uitspraak van die LG blyk nie of daar van 'n voltooide poging uitgegaan is nie. Die uitgangspunt van die LG, waarvolgens dit moontlik was dat A daarop vertrou het dat die slagoffer die messteke sou oorleef, vind nie ondersteuning in die vasgestelde feitekompleks nie: Trouens, die geweld van die steke, die ernstige beserings wat dit tot gevolg gehad het en A se uiting na die dood dat hy sy vrou doodgesteek ("abgestochen") het, spreek tot die teendeel. Die BGH het voorheen die reël vasgelê dat indien die dader bewus daarvan is dat, in die lig van die feitelike omstandighede van die saak, die moontlikheid van intrede van die dood volgens normale lewenservaring naby is, 'n voltooide poging daargestel word (BGH, Beschl v 19/5/1993, BGHSt 39, 221 231). Daarbenewens is dit nie nodig dat die dader seker hoef te wees dat die gevolg sal intree en op daardie tydstip die intrede van die dood wil of goedkeur nie. Die BGH het ook beslis dat by die verrig van gevaarlike geweldshandelinge en toevoeging van ernstige beserings aanvaar word dat die dader, indien hy die uitwerking daarvan waargeneem het, bewus was van die moontlikheid van die intrede van die dood. 'n Voltooide poging bestaan ook dan indien die dader na die laaste uitvoeringshandeling geen voorstelling oor die gevolge van sy optrede gemaak het nie (BGH, Urt v 2/11/1994, BGHSt 40, 304).

Die LG was bedag daarop dat A sy eerste vrou met meerdere messteke omgebring het en dat hy gevolglik kennis van die gevaarlikheid van sodanige beserings gehad het. Volgens die BGH moes bogenoemde omstandighede ook deur die LG in sy bevinding in aanmerking geneem gewees het. Uit die feit dat die slagoffer na die steke nie onmiddellik op die grond neergeval of andersinds 'n spesifieke reaksie getoon het nie of dat sy, soos deur A waargeneem, nog in die posisie was om van die toneel weg te beweeg, kan nie sonder meer afgelei word dat die poging onvoltooid was nie.

Artikel 24(1) *StGB* bepaal dat diegene wat die verdere uitvoering van die daad of die voltooiing daarvan verhinder, nie weens poging strafbaar is nie. Word die daad sonder toedoen van die terugtredene beëindig, word hy insgelyks nie gestraf nie indien hy hom vrywillig en ernstig bemoei het om die voltooiing te beëindig. Die LG het beslis dat A binne die trefkrag van artikel 24(1) *StGB* val. Die BGH wys egter daarop dat indien daar twyfel bestaan oor die vrywilligheid van die terugtrede, nie in beginsel sonder meer ten gunste van die dader beslis moet word nie. Daarvoor moet ten minste feitelike aanknopingspunte bestaan. Uit die beslissing van die LG blyk sodanige inligting nie. Dit blyk ook nie dat A bewustelik en doelbewus die intrede van die gevolg, naamlik die dood, wou verhinder nie. Dit is nie voldoende dat die optrede van die dader die intrede van die dood voorkom, maar sonder dat hy dit gewil, het nie. In die lig hiervan hef die BGH die beslissing van die LG op en verwys die saak terug vir herverhoor.

In 'n beslissing van 3 Februarie 1999 (NStZ 1999, 299) – dit wil sê 'n week voor die hierbo bespreekte saak – wat ook oor 'n messtekery gehandel het, wys die BGH daarop dat by oorweging van die toepaslikheid van artikel 24*StGB* dit in die eerste instansie daarop neerkom of 'n voltooide of onvoltooide poging voor hande is. Beslissend daarvoor is die voorstelling van die dader na die laaste uitvoeringshandeling, ook bekend as die terugtreehorison ("Rücktrittshorizont"). Beskou die dader in dié stadium die intrede van die dood van die slagoffer op grond van sy voorafgaande handelinge as moontlik of steur hy hom nie aan die effek wat sy optrede sou kon hê nie, is die pogingsmisdaad voltooi (sien ook BGH, Beschl v 11/12/1999, NStZ 1999, 299 en Kundlich "Gründfälle zum Rücktritt vom Versuch" 1999 *Juristische Schulung* 240 349 352–355). Die artikel 24*StGB*-verweer is gevolglik dan nie beskikbaar nie.

3 Suid-Afrikaanse reg en konklusie

In navolging van die Engelse reg word die vrywillige terugtrede uit 'n ("voltooide") pogingsmisdaad *nog nie* in ons reg as 'n strafregtelike verweer erken nie (sien *Haughton v Smith* 1973 3 All ER 1109 (HL) 1115; *R v Lankfurd* 1959 *Crim LR* 209; Wasik "Abandoning criminal intent" 1980 *Crim LR* 785 786–787; *S v Du Plessis* 1981 3 SA 382 (A) 400; Snyman *Strafreg* (1999) 291–293; Burchell *South African criminal law and procedure* vol 1 (1997) 349–350). Soos uit 'n voorafgaande publikasie blyk, is die erkenning van 'n strafregtelike verweer van vrywillige terugtrede uit 'n poging nie alleen in'n algemene sin geregtigheidsvriendelik nie, maar dit hou ook die potensiaal in om slagoffers teen verdere benadeling te beskerm (Labuschagne 1995 *Stell LR* 195–200). Daarom sal dit myns insiens onvermydelik in die toekoms in ons regstelsel erken moet word. Trouens, 'n analoë verweer word reeds deur ons howe by terugtrede uit 'n gemeenskaplike doel, indien ten tyde daarvan geen skade of nadeel veroorsaak is nie, erken (*S v Nomakhlala* 1989 1 SASV 300 (A) 304; *S v Nzo* 1990 3 SA 1 (A) 11).

Die Duitse reg ten aansien van die erkenning van 'n verweer van vrywillige terugtrede uit 'n "poging" is baie verfyn en goed ontwikkel. Wat uit onlangse beslissings van die BGH, soos hierbo bespreek, blyk, is dat die terugtrede vrywillig moet geskied en gerig moet wees op voorkoming of uitskakeling van (verdere) nadeel of skade. In gevalle waar nadeel of skade reeds veroorsaak is, bly die dader, vir sover sy optrede binne 'n ander misdaadsomskrywing val, natuurlik strafregtelik daarvoor aanspreeklik. Dit is interessant om daarop te let dat die BGH ook onlangs beslis het dat "vrywillige" terugtrede uit 'n poging moontlik is indien die misdaad in 'n toestand van swaar dronkenskap ("Vollrausch") gepleeg is (BGH, Beschl v 27/5/99 98, NStZ-RR 1999, 8. Sien ook BGH, Beschl v 22/2/1994, StV 1994, 304. Sien verder ten opsigte van Suid-Afrika a 1 van die Strafregwysigingswet 1 van 1988 en Snyman 227–234; Labuschagne "Strafregtelike aanspreeklikheid en vrywillige dronkenskap: is die voorrasionele steeds in beheer?" 1996 *SAS* 322). Dit bevestig 'n standpunt wat ek vroeër ingeneem het, naamlik dat die verweer van "vrywillige" terugtrede uit 'n poging op die strafregtelike respektering van die dader se inherente gedragsbeheermeganismes, as bestanddeel van sy individuele persoonlikheidsgoedere, gefundeer is (1995 *Stell LR* 199–200). Die beweegrede vir die terugtrede hoef gevolglik nie 'n rasionele basis te hê nie, dit wil sê dit hoef nie op kognitiewe vlak vrywillig te wees nie. Die term "vrywillig" kan gevolglik nie deurgaans in dié verband fiksievry aangewend word nie.

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THE DIFFICULTY OF PROVING THE ESSENTIALS OF ACQUISITIVE PRESCRIPTION

Minnaar v Rautenbach 1999 1 All SA 571 (NC)

The institution of acquisitive prescription was recently discussed in *Minnaar v Rautenbach* 1999 1 All SA 571 (NC). The case raised important questions about the application of the requirement of non-precarious consent, and the extent to which the period of possession of predecessors may be included in the prescriptive period. The maxim that prescription runs only against a person who is capable of challenging it was also addressed. In spite of numerous judicial pronouncements on this issue, it seems that there is still confusion about the application of the principles of acquisitive prescription in our courts.

The facts of the case may be briefly summarised as follows: In 1946, Gordon Spring Rautenbach (Gordon) inherited a one-seventh share in the farm Klipkolk, together with his five living brothers and sisters and his deceased brother. He was appointed as the executor of the latter's estate. In 1947, three-sevenths of Klipkolk was transferred into Gordon's name from his siblings, and in 1954 he received transfer of another two-sevenths, also from his siblings. He therefore became the owner of six-sevenths of Klipkolk. On 9 May 1958 Gordon transferred his six-sevenths of the farm, together with the neighbouring farms Fairview and Mooiriver, to the applicant's father, WA van Jaarsveld Minnaar ("Minnaar"). The latter died on 26 December 1964, and the property was left to his five children, subject to a usufruct in favour of his wife (the applicant's mother) until she died or remarried. The applicant's mother continued to possess the farm in terms of her usufruct until December 1979, when she remarried. She then leased the farm from her children. The applicant took over the lease from his mother at the beginning of 1986. In November 1990, he became the owner of the property (Mooiriver, Fairview, and six-sevenths of Klipkolk) by taking transfer from his siblings.

The applicant sought a declaratory order to the effect that he had become the owner of the one-seventh portion of Klipkolk (which was still owned by Estate Late Rautenbach) through acquisitive prescription. This was opposed by the respondent, David Sarel Rautenbach, a beneficiary of the estate which owned the disputed portion of Klipkolk. As the period of prescription started before and ended after the commencement of the Prescription Act 68 of 1969 ("the 1969 Act"), both the Prescription Act 18 of 1943 ("the 1943 Act") and the 1969 Act were applicable.

The 1943 Act requires that possession for 30 years of a movable or immovable of another be *nec vi, nec clam, nec precario* for the acquisition of ownership through prescription. The 1969 Act imposes virtually the same requirements on the potential owner, except that it replaces the *nec vi, nec clam, nec precario* requirement with the formulation "openly and as if he were the owner". The court held that the 1943 Act did not change the common-law requirement for acquisitive prescription, *possessio civilis*. The judgment in *Welgemoed v Coetzer* 1946 TPD 701 710 and a translation of Voet (cited in *Welgemoed v Coetzer* 712–713) were relied on as authority. The court went further to say that the 1969 Act in turn changed nothing in relation to the nature of the possession required by the 1943 Act. Van der Merwe *Sakereg* (1989) 280 was cited as authority for this.

Two main defences were raised by the respondent. The first revolved around the *nec precario* requirement in terms of the 1943 Act, which is incorporated in the formulation "as if he were the owner" in the 1969 Act. The argument was to the effect that the applicant was in possession of the land with the knowledge that he held it under sufferance, and thus under precarious consent. This meant, so it was argued, that his possession was *precario*. The second defence was that the respondent was not aware of his ownership of the said portion of land, and therefore could not interrupt prescription. A final argument was that the applicant and his predecessors could never have possessed the property as though they were owners, for they knew that they were not. Van der Walt J, however, paid practically no attention to this last argument as a result of its lack of merit. Neither will I.

The first point raised by the respondent was that Minnaar possessed the land under precarious consent. The argument was that when Gordon transferred the properties to Minnaar, he (Gordon) must have been aware of the fact that he owned only six-sevenths of Klipkolk, since he was the executor of the estate which owned the other seventh. The respondent argued that it was highly probable that Gordon would have informed Minnaar of the status of the one-seventh, and hence would have concluded an agreement with regard to the use of it, since the whole of Klipkolk was farmed as a single unit. If the respondent's argument was accepted, that agreement would constitute precarious consent, and one of the requirements for acquisitive prescription would be lacking.

The judge agreed with the applicant, and ruled that the arrangement or agreement ("reëling of ooreenkoms") (576b) referred to by the respondent amounted to mere speculation, as there was no factual proof of its existence. Since the respondent had failed to prove that such an arrangement or agreement existed, let alone what its content would or could have been, the court was not prepared to make any assumptions on the basis of such a supposed arrangement.

The onus is on the applicant to prove that his possession complied with the various statutory requirements – in this case, that he possessed the one-seventh portion of Klipkolk *nec precario*. The respondent made allegations in relation to the existence of some sort of agreement which might have cast doubt on whether the applicant's possession was *nec precario* or not. All that Van der Walt J said, however, was that the applicant had discharged his onus *prima facie*:

> "Ek is van mening dat sy bewerings in die verband *prima facie* aan die nodige vereistes voldoen" (575b).

Was the court correct in accepting, without more, that the applicant had discharged the onus of proving that his possession had been *nec precario*? Did the submission of the respondent in relation to the existence of an agreement not raise sufficient doubt for the judge to have required more solid proof from the applicant to discharge the onus? Could the court simply reject the respondent's allegations and state that they amounted to mere speculation ("Ek stem saam met die applikant se standpunt dat hierdie bewering van die respondent bloot op spekulasie neerkom . . ." (576b))?

In *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972 2 SA 464 (W) Colman J stated that the possibility that the applicant may have asked permission to use the disputed portion of land was enough to create doubt about whether his possession was *nec precario*:

> "Another possibility is that Mr E Morkel, before he began to make use of the open ground, properly and honourably sought and obtained precarious permission to do so . . .

> "I would be inclined to say, on that analysis alone, that the plaintiff had failed to discharge its *onus* of proving that its tenure and that of its predecessors was *non precario*" (471H–in fine).

Van der Walt J commented on the validity of the alleged agreement in a puzzling *obiter dictum*. He stated that even if Gordon had concluded such an agreement, the fact that he as executor of the estate did not have the capacity to do so, would render the agreement invalid, which would mean that it would have no effect on the running of prescription:

> "Om enige effek op verjaring te hê moes dit 'n ooreenkoms of reëling wees of gewees het waartoe Gordon op daardie stadium bevoegdheid gehad het" (576b).

The court then held that Gordon did not have the capacity to grant permission to Minnaar for unrestricted use of the farm, to the exclusion of the beneficiaries:

> "Beslis sou hy nie bevoeg gewees het om 'n reëling of ooreenkoms aan te gaan waarvolgens applikant se vader [sc Minnaar] vergunning tot onbeperkte gebruik van 'n bate van die boedel verkry het tot nadeel van die regte van die erfgenaam nie . . ." (576f–g).

In my view, it may be argued that if the precarious consent (agreement) was invalid, the possessor could still have been in possession *nec precario*. Was Van der Walt J correct in concluding that, since the agreement (precarious consent) was invalid, it would have no effect on prescription? In my submission, the invalid consent would surely affect acquisitive prescription, for the *animus* of the possessor would not then be the *animus domini* (the will of an owner). If the possessor believes that his possession is subject to precarious consent, he does not have the intention to be the owner, even though the consent is invalid. *Nec precario* is only one of the requirements of acquisitive prescription, and in this case possession might have been *nec precario*, but it was definitely not *animo domini*.

The second defence raised by the respondent – on the authority of *Barker v Chadwick* 1974 1 SA 461 (D) 466A – was that he did not have a legal right to oppose the running of prescription. Gordon was the executor of the estate (which included one-seventh of Klipkolk) of which the respondent was a beneficiary. At his (Gordon's) death in 1960, no new executor was appointed and the respondent claimed that there was no official to oppose the running of prescription on behalf of the estate. The judge refused to accept this argument, as a new executor could have been appointed at any time to interrupt the period of prescription on behalf of the estate. The further argument was that the respondent was not aware of the fact that he was the owner of the disputed portion of land, and was therefore not in a position to oppose the running of prescription. This argument could have been dismissed on the basis that the respondent never was the owner of the land, as he had never taken transfer from the executor. On the supposition that he was in fact the owner, Van der Walt J rejected the argument, relying on *Pienaar v Rabie* 1983 3 SA 126 (A) as authority for the proposition that a person who has no knowledge of his ownership, can lose his ownership by means of prescription even if there is no negligence on his part. With reference to Van der Merwe *Sakereg* 2 ed (1989) 280, the judge accepted that the rationale for the acquisition of ownership by prescription is not based on the negligence or fault of the owner.

Unfortunately, there is one fundamental aspect of acquisitive prescription which was not argued by the respondent: that of *accessio possessionis*, or the addition of the possession of predecessors in title to make up the required 30 years needed to acquire ownership by means of prescription.

Minnaar had not yet become owner of the disputed one-seventh portion of Klipkolk by the time he died. Ownership of the other six-sevenths was passed to his children, subject to a usufruct in favour of his wife. The wife was then the possessor, and if she wished to continue the period of possession of her husband in order to become owner, she too would have had to comply with the requirements for acquisitive prescription. In *Welgemoed v Coetzer* it was held that when the applicant's son farmed the farm, he was operating subject to revocable permission from his father. This constituted an interruption in the period of acquisitive prescription claimed by his father, for the son's *animus* was not the *animus domini* and his period of possession could therefore not be added to the period of possession of his father in order to acquire ownership by means of prescription:

> "The limited *possessio naturalis* of a lessee, *commodatarius* or the like, is not sufficient, for each of these persons lacks the intention of acquiring and keeping the property for himself" (1946 TPD 713).

I submit that the occupation by the applicant's mother of the one-seventh portion of Klipkolk did not amount to *possessio civilis* and therefore caused a voluntary interruption of the period of prescription. She never intended to own the one-seventh portion of Klipkolk, since she intended only to use it in terms of her usufruct. By recognising her status as usufructuary, she tacitly acknowledged that she was not the owner of the six-sevenths portion of Klipkolk, and by implication she would not have been able to exercise control over it with the *animus domini*. Unless it could be proved that she exercised physical control as agent of her children for the duration of her usufruct, the running of prescription would have been interrupted. The effect of such an interruption in the prescriptive period is that prescription starts to run *de novo*. The applicant's mother remained in possession in terms of the usufruct until 1979, after which she hired the farm from her children until 1986. Her lease of the farm would still not give her the required possession to acquire the disputed portion of the farm through acquisitive prescription (see *Welgemoed v Coetzer*). Then there is the period from 1986 to November 1990 when the applicant himself leased the six-sevenths of Klipkolk from his siblings. During this period he surely did not possess with the *animus domini*.

In conclusion, it must be said that, for the two reasons stated above, there is doubt as to the correctness of the judgment. First, the onus which rested on the applicant to prove his possession to be *nec vi, nec clam, nec precario* was perhaps too easily discharged. Secondly, and more notably, the possession of one of the applicant's predecessors (his mother) did not comply with the statutory requirements for it to be reckoned in the necessary prescriptive period of 30 years. From the judgment it appears that certain aspects of the notion of *possessio civilis* are still not properly understood, specifically the required *animus* of the possessor. The possessor must be in possession with the intention of being owner (*animus domini*), or must be an agent on behalf of a person with the *animus domini*, in order for ownership to be acquired through prescription. If the possessor believes that he possesses under sufferance (even if he is mistaken), or if he recognises that he is not and will not be the owner (eg by possessing in terms of a usufruct), then he does not have the necessary *animus* to acquire ownership through prescription.

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DELIKTUELE AANSPREEKLIKHEID WEENS BEVRUGTING AS GEVOLG VAN 'N NALATIGE WANVOORSTELLING: DIE FUNKSIES VAN ONREGMATIGHEID, NALATIGHEID EN JURIDIESE KOUSALITEIT ONDER DIE LOEP

Mukheiber v Raath 1999 3 SA 1065 (SCA)

Makheiber v Raath is die eerste gerapporteerde uitspraak in die Suid-Afrikaanse reg wat erkenning verleen aan 'n deliktuele eis gebaseer op bevrugting (en die daaropvolgende geboorte van 'n kind) weens 'n nalatige wanvoorstelling. (*In casu* was die wanvoorstelling daarin geleë dat die betrokke ginekoloog (verweerder) 'n valse voorstelling teenoor eiser en sy vrou gemaak het dat hy haar gesteriliseer het en dat hulle hul voortaan nie oor geboortebeperking hoef te bekommer nie.) Hierdie uitspraak moet daarom onderskei word van 'n eis weens "wrongful conception" wat 'n aksie om skadevergoeding deur die ouers van 'n normale kind omvat wie se geboorte die gevolg van 'n *mislukte sterilisasie* deur 'n geneesheer was. So 'n geval het in *Administrator, Natal v Edouard* 1990 3 SA 581 (A) voorgekom waar die eis in ieder geval op kontrakbreuk, en nie delik nie, gegrond was (sien ook *Mukheiber* 1068E–G).

Appèlregter Olivier beklemtoon dat die huidige eis om deliktuele skadevergoeding weens suiwer ekonomiese verlies (kraamkoste en die onderhoud van die kind totdat hy/sy selfonderhoudend is) as gevolg van 'n nalatige wanvoorstelling buiteom kontrakbreuk handel (vgl 1068H–I 1069C–E). Hy vervolg (1069F–1070C):

> "Reflecting the general principles and requirements of Aquilian liability in our law, the action now under discussion is available to a plaintiff who can establish:
>
> (i) that the defendant, or someone for whom the defendant is vicariously liable, made a misstatement (whether by *commissio* or *omissio*) to plaintiff;
>
> (ii) that in making the misstatement the person concerned acted unlawfully;
>
> (iii) that such person acted negligently;
>
> (iv) that the plaintiff suffered loss;
>
> (v) that the damage was caused by the misstatement; and
>
> (vi) that the damages claimed represent proper compensation for such loss . . .
>
> In all the cases cited above this Court cautioned against the danger of limitless liability produced by the application of the extended Aquilian action. The danger is ever present, particularly where a medical practitioner runs the risk of having in effect to maintain the child of his patient without having any real control over the vicissitudes that attend the child's upbringing. In order to keep the cause of action within reasonable bounds, each and every element of the delict should be properly tested and applied . . .
>
> The danger of limitless liability in particular as far as negligent misrepresentation as a cause of action is concerned can be averted if careful consideration is given to the dictates of public policy, keeping in mind that public policy can easily become an unruly horse."

Vervolgens pas die regter bedoelde algemene beginsels op die feite van die saak toe. Hy bevind eerstens, op 'n oorwig van waarskynlikheid, dat die verweerder wel die wanvoorstelling gemaak het dat hy die eiseres gesteriliseer het (1070–1075). Tweedens, wat onregmatigheid betref, maak hy eers die volgende algemene opmerkings (1075C–F):

> "There are different ways in which the unlawfulness of a misrepresentation can be approached. Common to all approaches is the fundamental principle that tortious liability is founded not upon the *act* performed by the defendant, but upon the *consequences* of that act . . .
>
> Further, common to all approaches is that unlawfulness, in the relevant sense, is to be found in the violation of the rights of the person suffering damage as a consequence of the act complained of and that whether or not there was a violation of a right of the claimant (or the converse, a dereliction of a duty by the defendant) depends on a number of considerations, including in the final instance, public policy."

Daarna vervolg hy met betrekking tot wanvoorstelling (1076D–E):

> "It seems to me that in the context of misrepresentation one must ask the question: was there in the particular circumstances an invasion of the rights of the claimant as a consequence of the misrepresentation? Conversely, was there a legal duty upon the defendant before making the representation, to take reasonable steps to ensure that it was correct . . .?"

Volgens appèlregter Olivier dui die volgende faktore op die bestaan van sodanige regsplig *in casu* (1076E–I): die besondere verhouding tussen die partye (geneesheer, pasiënt en dié se gade); die risiko of gevare verbonde aan die wanvoorstelling, naamlik bevrugting en die geboorte van 'n ongewenste kind; die feit dat die wanvoorstelling die eisers beweeg het om nie voorbehoedend op te tree nie; die feit dat die eisers klaarblyklik op die geneesheer se voorstellings sou staatmaak; en die feit dat die wanvoorstelling verband gehou het met tegniese aangeleenthede rakende 'n operasie waarvan die geneesheer, anders as die onkundige eisers, kennis gehad het (of moes gehad het). Hy vervolg (1076J–1077A):

> "A failure on a doctor's part to take reasonable steps to desist from making the sort of representations now under discussion unless and until he has taken all reasonable steps to ensure the accuracy of the representation would, in my view, render the misrepresentation unlawful."

Hierdie gevolgtrekking word egter gekwalifiseer deur die moontlikheid dat in verband met onregmatigheid sekere beleidsoorwegings ("public policy") nogtans die eisers hul eis kan ontsê (1077A–B), 'n vraag wat die hof eers beantwoord nadat die ondersoek na nalatigheid afgehandel is. In laasgenoemde verband pas die hof die gesaghebbende toets vir nalatigheid, soos in *Kruger v Coetzee* 1966 2 SA 428 (A) geformuleer, toe en kom tot die slotsom dat die eisers se skade redelikerwys voorsien- en voorkombaar was (1077C–H). Die verweerder se nalatigheid staan dus vas.

Ten slotte geniet die vraag na kousaliteit aandag (1077I–1079D):

> "The next enquiry . . . then relates to *causation*. On this issue, our law is not as clear as it should be. As far as *factual causation* is concerned, this Court follows the *conditio sine qua non* – or 'but for'- test . . .
>
> Once factual causation has been established, however, the question of limiting the defendant's liability for the factual consequences of his or her conduct arises. It is here that views differ radically. There are two main schools of approach amongst our academic writers and in the case law . . . [Die hof haal dan uit Boberg *The law of delict* (1984) 381 aan wat onderskei tussen die sogenaamde "relatiewe benadering" tot nalatigheid en onregmatigheid, en juridiese kousaliteit.]
>
> In general our Courts have in the past on occasions followed the first-mentioned, relative, approach. Among others, Boberg . . . at 382 has pleaded for a rejection of the second approach on the grounds that
>
> 'the need to have recourse to remoteness is a self-imposed burden of those who refuse to see that negligence, being a failure to act as a reasonable man

> would have done in *particular circumstances*, cannot be divorced from those circumstances and therefore contains all the ingredients for the effective limitation of liability'.
>
> Nevertheless, this Court has applied the test of so-called legal causation in recent times on more than one occasion, and counsel for [die verweerder] has relied on these cases for his argument that the damages now claimed by [die eisers], or part of it, are too remote and should either be refused *in toto* or limited . . .
>
> What appears from the 'legal causation' cases is that *public policy* plays a role, even a decisive role, in limiting liability. On the other hand, in the relative approach, public policy plays the very same role in establishing which consequences of an act are to be regarded as wrongful, thus creating and at the same time limiting liability.
>
> The two approaches differ in methodology and approach, but not in substance. If properly applied, they would generally give the same legal result in each case. What is clear in the present case is that the element of *factual causation*, the 'but for' test, is not in issue: but for [die verweerder se] misrepresentation, the [eisers] would have taken contraceptive measures, and the child, Jonathan, would probably not have been conceived and born."

Sonder om aan te dui of dit nou oor onregmatigheid of juridiese kousaliteit handel, is die enigste oorblywende vraag volgens die hof of openbare beleid ("public policy") die aanspreeklikheid van die verweerder uitsluit of beperk (1079E). Appèlregter Olivier kom tot die slotsom dat openbare beleidsoorwegings – onder andere dié wat in *Edouard* aandag geniet het – nie die verweerder van aanspreeklikheid vrystel nie. Vir ons doeleindes is die volgende beleidsoorweging van belang (1081H–J):

> "[H]ow far is [die verweerder se] liability to go? As far as the confinement cost is concerned, there can be no defence: such costs were reasonably foreseeable and there is no reason to limit them. The problem arises in connection with the maintenance claim. The cost of maintaining the child Jonathan is a direct consequence of the misrepresentation. It was foreseeable by a gynaecologist in [die verweerder se] position. In principle he is, by virtue of considerations of public policy, not protected against such a claim, as pointed out above. But the claim cannot be unlimited. His liability can be no greater than that which rests on the parents to maintain the child according to their means and station in life, and lapses when the child is reasonably able to support itself."

Alhoewel die uitspraak in *Mukheiber* die grense van aanspreeklikheid weens nalatige wanvoorstelling (sien in die algemeen hieroor Neethling, Potgieter en Visser *Delict* (1999) 300 ev) beduidend uitbou – in die sin dat erkenning verleen word aan 'n deliktuele eis op grond van bevrugting (en die daaropvolgende geboorte van 'n kind) as gevolg van nalatige wanvoorstelling – moet die toepassing van die deliksbeginsels onregmatigheid, nalatigheid en juridiese kousaliteit ernstig bevraagteken word.

Eerstens bereik die hof die onaanvaarbare resultaat dat nalatigheid bevind word voordat onregmatigheid vasstaan. Soos aangetoon, stel regter Olivier naamlik (1077A–H) die vraag na regmatigheid uit totdat uitsluitsel oor die rol van beleidsoorwegings verkry is – 'n vraag wat die hof ten onregte eers beantwoord nadat die ondersoek na nalatigheid afgehandel is. Dat hierdie werkswyse onaanvaarbaar is, blyk uit die volgende woorde van regter Olivier self in *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 364:

> "'n Bevinding dat appellant se late nie onregmatig was, bring mee dat daar geen sprake van nalatigheid kan wees nie. Nie alleen is dit dus ondoenlik om oor moontlike nalatigheid aan die kant van appellant te spekuleer nie, maar dit is

> trouens juridies onmoontlik. Die nalatigheidsvraag kan naamlik slegs beantwoord word as presies vasstaan welke regsplig op 'n verweerder gerus het en dat *daardie* regsplig verbreek is."

Tweedens word die funksies en toepassingsgebiede van die delikselemente onregmatigheid, nalatigheid en kousaliteit in die uitspraak verwar. Volgens die regter is daar hoofsaaklik twee benaderings tot die begrensing van 'n delikspleger se aanspreeklikheid, naamlik die sogenaamde relatiewe benadering waarvolgens onregmatigheid en nalatigheid telkens met betrekking tot elke skadepos vasgestel word, en juridiese kousaliteit wat – as selfstandige delikselement – die toerekening van skade aan 'n delikspleger onafhanklik van onregmatigheid en nalatigheid bepaal. In beide benaderings speel openbare beleid ("public policy") volgens die regter presies dieselfde rol – naamlik om aanspreeklikheid te beperk (en, in die geval van onregmatigheid, terselfdertyd te skep) – en sal in die algemeen dieselfde resultaat in elke geval lewer (sien 1078A–1079D, hierbo aangehaal). Gevolglik word "public policy" deur die regter as kriterium of toets vir die verweerder se aanspreeklikheid gebruik sonder om aan te dui of dit oor onregmatigheid dan wel juridiese kousaliteit gaan (1079E–1082A). Sodoende word die onderskeid tussen onregmatigheid, nalatigheid en juridiese kousaliteit verdoesel en juridiese kousaliteit as selfstandige en noodsaaklike delikselement ondergrawe. Dit blyk daaruit dat regter Olivier klaarblyklik eweveel gesag verleen aan Boberg se 1984-standpunt dat juridiese kousaliteit goedskiks ten gunste van die relatiewe benadering laat vaar kan word, as aan vele gesaghebbende appèlhofbeslissings – en talle beslissings van die hooggeregshof op hulle voetspoor – wat juridiese kousaliteit veral sedert 1990 onomwonde as selfstandige delikselement (ook in gevalle van nalatige wanvoorstelling) gevestig en uitgebou het (sien bv *S v Mokgethi* 1990 1 SA 32 (A) 39 ev; *International Shipping Co Ltd v Bentley* 1990 1 SA 680 (A) 700–702; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 763 ev; *Smit v Abrahams* 1994 4 SA 1 (A) 14; *Napier v Collett* 1995 3 SA 140 (A) 143; *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 215–217; *Groenewald v Groenewald* 1998 2 SA 1106 (A) 1113; *Clinton-Parker & Dawkins v Administrator Transvaal* 1996 2 SA 37 (W) 55; *Vigario v Afrox Ltd* 1996 3 SA 450 (W) 464; *Gibson v Berkowitz* 1996 4 SA 1029 (W) 1039–1040; *Ncoyo v Commissioner of Police, Ciskei* 1998 1 SA 128 (CkSC) 137–139; *Bonitas Medical Aid Fund v Volkskas Bank Ltd* 1992 2 SA 42 (W) 49; *Clarke v Hurst* 1992 4 SA 630 (D) 659; *Ebrahim v Minister of Law and Order* 1993 2 SA 559 (T) 564–566; *Minister of Police v Skosana* 1977 1 SA 31 (A) 34–35; *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 914; *Standard Bank of South Africa Ltd v Coetzee* 1981 1 SA 1131 (A) 1134–1140; *Majiet v Santam Ltd* [1997] 4 All SA 555 (K) 561–562 568–569; *Concord Insurance Co Ltd v Oelofsen* 1992 4 SA 669 (A); *Meevis v Sheriff, Pretoria East* 1999 2 SA 389 (T) 397–398; *Thandani v Minister of Law and Order* 1991 1 SA 702 (OK); *Minister of Finance v EBN Trading (Pty) Ltd* 1998 2 SA 319 (N) 329).

So 'n benadering, wat die (verouderde) standpunt van 'n skrywer van sestien jaar gelede sonder voldoende verduideliking gelykstel met 'n hele reeks direk teenoorstaande resente beslissings van die hoogste hof van appèl, kan nie goedgepraat word nie. Feit is dat die reg aangaande juridiese kousaliteit soos vergestalt in die soepele benadering van die appèlhof, anders as wat regter Olivier (1077I, hierbo aangehaal) te kenne gee, beslis nie onduidelik is nie (sien hieroor Neethling, Potgieter en Visser *Delict* 185–187) en daarom as *de lege lata*

toegepas kan en moet word. Hoe ook al, daar kan min twyfel wees dat die uitspraak in *Mukheiber* verwarring oor die waarde en belangrikheid van juridiese kousaliteit as selfstandige delikselement sal veroorsaak en regsonsekerheid in die hand sal werk – 'n ongewenste resultaat wat die hoogste hof van appèl sekerlik kon vermy het. Ons vereenselwig ons met die standpunt – soos deur die appèlhof ontwikkel tot voor die onderhawige uitspraak en in talle belangrike ontwikkelde regstelsels toegepas – dat juridiese kousaliteit 'n noodsaaklike komponent van 'n delik uitmaak. 'n Onregmatige daad is 'n komplekse regsfeit wat tradisioneel in 'n hele aantal elemente ingedeel word: handeling, onregmatigheid, skuld, skade en kousaliteit. Hierdie indeling berus op billikheids-, doelmatigheids- en logiese oorwegings en moet nie ligtelik verontagsaam of afgewater word nie. By juridiese kousaliteit gaan dit om die vraag vir welke van die skadelike gevolge wat feitelik deur 'n dader se onregmatige, skuldige handeling veroorsaak is, hy aanspreeklik gehou moet word; met ander woorde, watter gevolge hom toegereken moet word (Neethling, Potgieter en Visser *Delict* 181 ev). Die vraag na die aanspreeklikheid vir 'n verwyderde gevolg ("remote consequence") is 'n heeltemal ander vraag as die vraag of die dader se optrede volgens die regsopvattings van die gemeenskap onredelik en daarom ongeoorloof was (die onregmatigheidsvraag: sien *idem* 35 ev), en die vraag of die dader regtens verwyt moet word omdat benadeling met so 'n graad van waarskynlikheid voorsienbaar was dat die redelike man stappe sou gedoen het om die benadeling te vermy (die nalatigheidsvraag: sien *idem* 127 ev). Hy wat byvoorbeeld 'n onregmatigheidselement by die skuld- of skadevereiste insleep of 'n onregmatigheids- of skuldelement by die vereiste van regsoorsaaklikheid, word onvermydelik in die nette van sy eie begripsverwarring vasgevang (sien Potgieter en Van Rensburg "Die toerekening van gevolge aan 'n delikspleger" 1977 *THRHR* 382; Neethling, Potgieter en Visser *Delict* 200).

Boberg se standpunt (dat die relatiewe benadering tot onregmatigheid en nalatigheid terselfdertyd met toerekenbaarheid afreken) is 'n tipiese voorbeeld van die foutiewe gebruik van veral nalatigheid, in plaas van juridiese kousaliteit, as aanspreeklikheidsbegrensingsmaatstaf. Dit is klaarblyklik nie sinvol om die redelike voorsien- en voorkombaarheidstoets vir nalatigheid by die vraag na die toerekenbaarheid van verwyderde gevolge toe te pas nie. Dit is trouens onlogies 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 (sien Neethling, Potgieter en Visser *Delict* 198–200). Hart en Honoré (*Causation in the law* (1959) 239–240) stel dit só:

> "[T]here is a logical absurdity in asking whether the risk of further harm, arising from a harmful situation which a reasonable man would not have created, would itself have deterred a reasonable man from acting."

Hieruit volg dat die nalatigheidstoets nie geskik is om aanspreeklikheid vir verwyderde gevolge te bepaal nie en dat 'n doelgemaakte, selfstandige kriterium vir hierdie doel noodsaaklik is. Dat dit by juridiese kousaliteit oor 'n heel ander vraag as skuld gaan, word onderstreep deur die noodsaaklikheid van die toepassing van eersgenoemde by skuldlose aanspreeklikheid (sien *Meevis v Sheriff, Pretoria East* 1999 2 SA 389 (T) 397–398; *Minister of Finance v EBN Trading (Pty) Ltd* 1998 2 SA 319 (N) 326 329; *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, Potgieter en Visser *Delict* 200–201).

Insgelyks is appèlregter Olivier se gevolgtrekking (in die lig van sy standpunt dat dieselfde beleidsoorwegings 'n rol by sowel onregmatigheid as juridiese kousaliteit speel en, indien reg toegepas, in die algemeen dieselfde resultaat lewer: sien 1077B–D, hierbo aangehaal) dat sowel die verweerder se aanspreeklikheid as die grense daarvan *in casu* bloot aan die hand van "public policy" bepaal kan word, vatbaar vir kritiek omdat dit verwarring tussen onregmatigheid en regsoorsaaklikheid in die hand werk. Dit kan in die onderhawige verband aan die hand van veral een beleidsoorweging geïllustreer word, naamlik dat die verweerder se aanspreeklikheid nie onbegrens moet wees nie sodat die vrees vir moontlike oewerlose aanspreeklikheid besweer kan word (sien *Mukheiber* 1069I–1070C 1081H–J, hierbo aangehaal; sien ook mbt aanspreeklikheid weens suiwer ekonomiese verlies en nalatige wanvoorstelling, Neethling, Potgieter en Visser *Delict* 299–300 305 en die sake daar aangehaal). Nou is dit so dat die regspraak – waarskynlik onder invloed van die Engelse "duty of care"-benadering (vgl *Barnard v Santam Bpk* 1999 1 SA 202 (A) 215) – die moontlikheid van oewerlose aanspreeklikheid gewoonlik oorweeg by die vraag of daar 'n regsplig op die verweerder gerus het om die betrokke suiwer ekonomiese verlies te vermy (oftewel die korrekte inligting te verstrek in die geval van nalatige wanvoorstelling), dit wil sê die vraag na onregmatigheid (sien Neethling, Potgieter en Visser *Delict* 299–300 305). Hierdie benaderingswyse is egter op goeie gronde bevraagtekenbaar. Van Aswegen (*Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (1991) 177–178; "Policy considerations in the law of delict" 1993 *THRHR* 192–193; sien ook Neethling, Potgieter en Visser *Delict* 299 vn 137; vgl Neethling "Deliktuele aanspreeklikheid weens senuskok as gevolg van hoorsê" 1999 *THRHR* 315–316) verduidelik dit helder en logies soos volg:

> "Ten aansien van die bepaling van die regsplig, dit wil sê onregmatigheid [by suiwer ekonomiese verlies], speel veral twee beleidsfaktore 'n belangrike rol, naamlik die moontlikheid van oewerlose aanspreeklikheid en die subjektiewe wete of kennis van die dader. Op die oog af lyk dit of die twee faktore albei aanvaarbare beleidsfaktore is wat by die vasstelling van onregmatigheid ter sprake kan kom. Nietemin kom dit my voor of die feit dat te wye skade of skade van onbeperkte omvang deur bepaalde optrede veroorsaak word, nie sodanige optrede sonder meer regmatig behoort te maak nie. Ek twyfel of dit strook met die gemeenskapsordende funksie van die privaatreg. Een van die onwenslike konsekwensies van so 'n houding is dat geen interdik verkry sou kon word teen dreigende veroorsaking van oewerlose suiwer ekonomiese verlies nie. Myns insiens sou 'n beter oplossing wees om so 'n oorweging by die juridiese kousaliteitsvraag in aanmerking te neem deur te bevind dat daar nie 'n nou genoeg verband tussen die handeling en die uiteindelike gevolg, naamlik onbegrensde aanspreeklikheid, is nie. Dan sal sodanige skadeveroorsakende optrede steeds onregmatig wees, maar die dader se aanspreeklikheid sal binne redelike perke gehou word."

Die benadering om die moontlikheid van oewerlose aanspreeklikheid by onregmatigheid tuis te bring, word, interessant genoeg, klaarblyklik ook nie deur appèlregter Olivier *in casu* (sien 1081H–J, hierbo aangehaal) gevolg nie. Die regter gebruik naamlik sowel die redelike voorsienbaarheid van 'n skadelike gevolg as die feit dat 'n skadepos 'n "direct consequence" van die wanvoorstelling was, as maatstawwe om die aanspreeklikheid van die verweerder te beperk – maatstawwe wat subsidiêr (steeds) 'n rol by die soepele benadering tot juridiese kousaliteit speel (sien Neethling, Potgieter en Visser *Delict* 185–187 190–192 201–203). Dat hierdie afleiding ook geregverdig is wat redelike voorsienbaarheid

betref, blyk uit die volgende. Aangesien die hof die vraag na nalatigheid reeds vroeër gefinaliseer het, kan aangeneem word dat dit by die regter se toepassing van redelike voorsienbaarheid nie oor nalatigheid gaan nie. Insgelyks word aanvaar – in die lig van sommige resente uitsprake van die appèlhof (sien bv *Simon's Town Municipality v Dews* 1993 1 SA 191 (A) 196; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27; *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 833; sien ook *Lougueira v Securitas of South Africa (Pty) Ltd* 1998 4 SA 258 (W) 261–262; *contra Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A); sien in die algemeen Neethling "Onregmatigheid, nalatigheid; regsplig, "duty of care"; en die rol van redelike voorsienbaarheid – Praat die appèlhof uit twee monde?" 1996 *THRHR* 682 ev; Neethling "Nogmaals 'duty of care' – onregmatigheid en nalatigheid by aanspreeklikheid weens 'n late" 1997 *THRHR* 730–733) – dat die vraag na onregmatigheid ook nie die redelike voorsienbaarheid van 'n skadepos betrek nie. Daarom het regter Olivier na alle waarskynlikheid redelike voorsienbaarheid slegs as regsoorsaaklikheidskriterium ingespan. Wat sy gebruik van die "direct consequences"-maatstaf betref, moet daarop gewys word dat hierdie kriterium al aan skerp kritiek onderwerp is en dat dit eintlik nog net sinvol by regsoorsaaklikheid aangewend kan word in gevalle waar die dader ook aanspreeklik gehou word vir gevolge wat nie redelikerwys voorsienbaar was nie, soos by die sogenaamde eierskedelgevalle (sien Neethling, Potgieter en Visser *Delict* 192).

Laastens is die aanwending van die sogenaamde "but for"- of *conditio sine qua non*-toets vir feitelike kousaliteit (1077I 1079D, hierbo aangehaal) 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 vooraf bepaalde 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 *in casu* sou wees om op grond van getuienis te bepaal of die swangerskap en die finansiële verliese wat dit meegebring het, feitelik uit die wanvoorstelling gevolg het (vgl Neethling, Potgieter en Visser *Delict* 180–181).

Daar word vertrou dat die gesonde tendens wat die hoogste hof van appèl ten aansien van die vestiging en ontwikkeling van juridiese kousaliteit as selfstandige delikselement daargestel het, nie deur die *Mukheiber*-uitspraak gekortwiek sal word nie maar dat die hoogs verdienstelike en funksionele "soepele benadering" van die hof weer bevestig en verder uitgebou sal word.

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The truth is that it is often not possible to reach a final solution of a difficult problem all at once. It is better to put up with some uncertainty – confusion if you like – for a time than to reach a final solution prematurely. The problem often looks rather different the second time you deal with it. Second thoughts are not always the best but they generally are.

Lord Reid 1972–1973 Journal of the Society of Public Teachers of Law 29.

REDAKSIONELE KOMMENTAAR

Met die nuwe millennium reeds 'n paar maande oud en al die J2K-spoke en -bedreigings teen hierdie tyd begrawe, is dit dalk gepas om nou oor die huidige en toekomstige posisie van tydskrifte – regstydskrifte en ook alle ander akademiese tydskrifte – te besin. Die uitgewers, bydraers, intekenare en ander lesers van tydskrifte word deur veral drie aangeleenthede geraak.

In die eerste plek is daar die aanslag van die tegnologie en elektronika op die (gewone) gedrukte woord. 'n Jaar of twee gelede was dit eintlik nog as 'n duur en "spoggerige" foefie beskou indien 'n tydskrif bloot slegs sy inhoudsopgawe of enkele uittreksels ("abstracts") op die Internet geplaas het. Vandag is dit byna alledaags om webblaaie te sien waar tydskrifte *in toto* elektronies beskikbaar is. Talle van hierdie tydskrifte is ook reeds op die Internet beskikbaar lank voordat die gewone gedrukte weergawe die intekenare deur die pos bereik. (Daar is selfs tydskrifte, as 'n mens dit so kan noem, wat *slegs* elektronies beskikbaar is.) Dit staan vas dat die tradisionele tydskrif duur is en lank neem om gepubliseer en versprei te word. Die digitale model daarteenoor is relatief goedkoop en *statim*.

Dit is gevolglik nie ongewoon nie dat uitgewers en redakteurs gekonfronteer word deur 'n maatskappy wat graag die elektroniese sy van 'n tydskrif op die Internet wil aanbied en bemark – natuurlik nie met liefdadigheid as motief nie. Van hulle bied selfs aan om gratis 'n webblad vir die tydskrif op te stel en in stand te hou en om koppelings ("links") daar te stel tussen artikels in een tydskrif en verbandhoudende artikels in ander. Die verbruiker (navorser) kan dus na willekeur tussen artikels rondswerf, ongeag die tydskrif of uitgewer. Uit 'n verbruikersoogpunt is dit natuurlik ideaal: onmiddellike en wêreldwye toegang tot verwante inligting. Uit 'n ander hoek bekyk, beteken dit natuurlik ook dat die uitgewer en die betrokke tydskrif self skielik die internasionale mark en oog tref en dus 'n baie groter gehoor bereik as wat voorheen die geval was.

Natuurlik is daar nog talle ander verbruikersvriendelike voordele van so 'n elektroniese een-stopdiens en is dit geen wonder nie dat kenners en kundiges al hoe meer die standpunt huldig dat die tradisionele wetenskaplike tydskrif in sy huidige vorm heeltemal sal verdwyn. Dit is natuurlik 'n debatteerbare standpunt. Daar sal altyd die (handjievol?) behoudendes wees wat die papierproduk self ter hand wil hê; of hul intekengetalle egter steeds sodanig sal wees dat dié produk bekostigbaar in hul posbusse sal beland, is 'n ander vraag.

Die tweede aspek sluit aan by bogenoemde en is naamlik die kollig wat globalisering en die oop wêreld van wêreldwye toegang tot inligting nou op bestaande tydskrifte plaas. In hierdie verband staan die moderne toetssteen van internasionale relevansie voorop. (Die dissipline wat 'n tydskrif bedien, moet natuurlik nie hier uit die oog verloor word nie – mens sou beswaarlik kon sê dat byvoorbeeld die *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* nie internasionaal relevant is nie bloot omdat dit nie deur regsgeleerdes in Kanada gelees word nie terwyl dit hoog aangeslaan word in Leiden en Rotterdam.)

Hierdie aangeleentheid is veral van belang vir akademici wat gereeld bydra tot sogenaamde geakkrediteerde tydskrifte en wat een of ander vorm van subsidie ontvang vir navorsingsuitsette wat daarin gepubliseer word. In die lig van die groot transformasieproses wat die wetenskap en tegnologie tans ondergaan, is dit

bykans onafwendbaar dat akkreditasie en subsidie binnekort weer deur die Departement van Onderwys onder die loep geneem sal word. Nasionale en veral internasionale aspekte sal ongetwyfeld 'n rol speel in die herevaluasie van bestaande tydskrifte. Dit sal na alle waarskynlikheid beteken dat tydskrifte met 'n eksklusiewe, regionale seksionele karakter nie weer vir onderhawige doeleindes gekeur sal word nie. Dit wil voorkom asof veral sogenaamde "inhuis" tydskrifte wat deur 'n bepaalde akademiese instelling of afdeling daarvan self uitgegee word en waarin feitlik uitsluitlik deur sy eie personeellede of navorsers gepubliseer word, voortaan die wind van voor sal kry. Die oomblik dat akkreditasie en die gepaardgaande subsidie verdwyn, sal die oorgrote meerderheid potensiële bydraers tot so 'n (gedoemde) tydskrif opdroog.

Die derde aangeleentheid hier ter sprake hou verband met die bekostigbaarheid van akademiese tydskrifte. Die intekenfooi styg jaarliks terwyl die aantal bladsye van die tydskrif dieselfde bly. Benewens die verlies aan intekenare wat om hierdie rede kanselleer, is dit uiters moeilik om nuwe intekenare (byvoorbeeld onder studente) te werf: die elektroniese tydskrif ("e-journal") is nie alleen goedkoper nie, dit blyk ook meer gewild te wees onder nuwerwetse (jonger!) lesers wat die rekenaarmatige ontsluiting van kennis/inligting as vanselfsprekend aanvaar.

Talle tydskrifte word derhalwe gedwing om bladfooie te hef om publikasiekoste te bestry. Dit bring mens by die vraag of die geldgogga nie ook hier sy bytmerke gaan laat nie: 'n outeur verdien byvoorbeeld net soveel subsidie vir 'n vonnisbespreking van drie bladsye as vir 'n vollengte artikel van twintig bladsye. Waarom sal enigeen steeds die ruggraat van 'n tydskrif ('n behoorlike artikel) wil skryf, terwyl hy (weens die groter bladfooi) aan die einde finansieel swakker daaraan toe is as sy kollega met 'n drie-bladsy poging?

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Limitations on and threats to university autonomy and academic freedom*

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OPSOMMING

Beperkings op en bedreigings vir universiteitsoutonomie en akademiese vryheid

Alhoewel akademiese vryheid deur die Handves van Menseregte beskerm word, is dit onderworpe aan verskeie beperkings en bedreigings. Die Witskrif wat tot die aanname van die Wet op Hoër Onderwys 101 van 1997 gelei het, aanvaar dat koöperatiewe bestuur van universiteitsaangeleenthede deur die regering en universiteite aan akademiese vryheid en universiteitsoutonomie onderworpe moet wees. Sekere beleidsrigtings wat in die Witskrif en in die Wet self ingeslaan is, sal egter die inkorting van akademiese vryheid tot gevolg hê, veral in die vorm van institusionele outonomie.

Die feit dat die regering universiteite subsidieer, lei dikwels tot 'n verwagting dat universiteite lojaal teenoor die regering behoort te wees. Die regering mag derhalwe voor die versoeking swig om onbehoorlike voorwaardes vir die betaling van subsidies te stel.

Statutêre beperkings op universiteitsoutonomie word geskep deur veral die Wet op Hoër Onderwys, wat ingrypende magte aan die Minister van Onderwys verleen. Dit mag wees dat die Minister sy bevoegdhede vir politieke – in plaas van opvoedkundige – doeleindes uitoefen.

Die maatskaplike en politieke verandering wat vandag in Suid-Afrika plaasvind, bring ook dreigemente aan universiteitsoutonomie mee wat betref, byvoorbeeld, toelating tot universiteite, die taalprobleem, Westers-georiënteerde leerplanne, verteenwoordiging van studente op universiteitsbeheerstrukture en maatreëls vir die bevordering van slagoffers van rassediskriminasie.

Dit sal gevolglik nie maklik wees vir akademiese vryheid om te floreer nie, ten spyte van die grondwetlike beskerming daarvan. Maatskaplike verandering moet nie toegelaat word om akademiese vryheid te troef nie. Akademici behoort nie aan druk blootgestel te word wat betref hulle navorsing en die onderrig van studente nie. Alhoewel akademici verantwoordelik moet optree, behoort toerekenbaarheid positief, dienstig en aanmoedigend te wees.

1 INTRODUCTION

The concept of university autonomy and academic freedom was defined and discussed in an earlier article[1] and its constitutional protection highlighted. The purpose of the present article is to point out that, despite the constitutional protection of academic freedom, it is subject to certain limitations and threats. The protection

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

1 Dlamini "Academic freedom and institutional autonomy in South Africa" 1999 *THRHR* 3.

therefore does not constitute an indefeasible bulwark. It will then be necessary to discuss these limitations and threats and to analyse their impact on academic freedom in general.

2 THE NATIONAL COMMISSION ON HIGHER EDUCATION

Before the limitations and threats to academic freedom can be discussed, it is necessary to refer to the report of the National Commission on Higher Education.[2] The reason for this is that the recommendations of the Commission influenced the white paper on higher education and ultimately led to the passing of the Higher Education Act,[3] both of which have had an impact on academic freedom in general. The Commission acknowledged that academic freedom is indispensable to the effective functioning of the higher education system. This was nothing new, as similar commissions had previously done the same,[4] but it demonstrated that academic freedom is still regarded as important, and that it will remain relevant only if each generation reinterprets it and makes the interpretation its own. The Commission regarded academic freedom as a precondition for critical, experimental and creative thinking and, therefore, for the advancement of intellectual inquiry, knowledge and understanding. It further acknowledged that academic freedom can only be upheld in institutions with a certain degree of autonomy. While the Commission conceded that neither individual academic freedom nor institutional autonomy can be absolute, since they have to be balanced with accountability, it none the less stressed the importance of upholding the principles of academic freedom and institutional autonomy as key conditions for a well-functioning system of higher education.[5]

The Commission also advocated the concept of co-operative governance, which should ensure that different interests are acknowledged and that all stakeholders should be committed to a code of conduct based on the acceptance of joint responsibility for the future of higher education in South Africa.[6] One of the main role players is the government which, in terms of this idea of co-operative governance, must exercise its authority and its powers over the higher education system in a transparent, equitable and accountable manner, and in discernible pursuit of the public good. In its relationships with institutions and to the system as a whole, the Commission felt that there should be a recognition of the maximum degree of practicable autonomy and a commitment to consultation and negotiated solutions to problems.[7]

Although the Commission advocated the idea of co-operative governance, it was at pains to point out that this should be implemented with due regard to the principles of academic freedom and institutional autonomy. It also noted the provisions of the Constitution on academic freedom and concluded that the Constitution makes the principle of co-operative government and inter-governmental

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2 NCHE *A framework for transformation* (1996).
3 Act 101 of 1997.
4 See *Report of the Commission of Enquiry on Separate Training Facilities for Non-Europeans at Universities* (1953–1954) (also known as the Holloway Commission) pars 33–45; *Report of the Commission of Inquiry into Universities* (1974) (also known as the Van Wyk de Vries Commission) 74ff.
5 NCHE 177.
6 *Idem* 178.
7 *Idem* 194.

relations applicable to all spheres of government and all organs of state within each sphere. It also noted that higher education institutions could be regarded as falling within the ambit of the definition of "organs of state".[8] "Organs of state" are defined in section 239 of the Constitution as including, *inter alia*, any functionary or institution which exercises a public power or which performs a public function in terms of any legislation. If the provision of higher education is regarded as the performance of a public function, the university would be regarded as an organ of state. This is, however, debatable.

The inclusion of higher education structures in the definition of "organ of state" in the Constitution, the Commission further noted, would imply the obligatory application of the basic values and principles governing public administration to higher education institutions. This would result in the adoption of national legislation to facilitate the promotion of these values and principles affecting higher education institutions. These principles include responsiveness to public needs, encouraging the public to participate in policy-making, as well as accountability and transparency fostered by providing the public with accurate information.

The Commission was of the opinion that while these principles are closely linked, they should be differentiated in any understanding of academic freedom, which means the right of individuals to pursue the goals and procedures of academic thinking without outside interference or censure based on any political, religious or social orthodoxy. Such freedom is the prerequisite for the effective advancement of teaching, learning and creative research.[9]

Taking into account the meaning of institutional autonomy and individual academic freedom, and the limitations imposed on them by the demands of accountability, the Commission proposed that the principles of academic freedom and institutional autonomy be retained as key conditions for a vibrant higher education system. Such a plea was, however, unnecessary, since academic freedom is protected in the Constitution, and any purported rejection of it would be unconstitutional. It emphasised that the proposals on co-operative governance preclude any form of state control over, or arbitrary state interference in, the affairs of institutions. It was quick to add that co-operative governance does not mean government indifference to higher education, but is based on the assumption that both government and higher education institutions are committed to the same societal goals.[10] Admittedly this is an assumption and what happens in practice may be something else.

In order to achieve these goals, the Commission proposed a new configuration of functions and responsibilities for the relationship between government and institutions. This new configuration would require institutions to make adequate provision for stakeholder consultation, sensitivity to the changing needs and expectations of society and appropriate consideration of the public interest. On the part of the government, it would require the creation of a new organisational and regulatory framework which can facilitate negotiated planning, responsible interaction and productive partnerships.

These will undoubtedly have an impact on the scope of institutional autonomy in that they require a culture of co-operation and will lead to increased accountability. Increased accountability will, however, not be the product of repressive external

8 *Ibid.*
9 *Ibid.*
10 *Ibid.*

control, but is the counterpart of a greater interest in and estimation of the social role of higher education institutions, involving not only political authorities but also society in general:

> "Within the framework of negotiated planning and responsible interaction, institutional autonomy might indeed be enhanced as a dynamic achievement through imaginative mission development and operational initiatives, inspiring the trust and confidence of organised society and ensuring the indispensability of higher education."[11]

While this may be conceded, it is not necessary that these should come from the government. Universities themselves will realise that in order to survive and to be effective they need to be focused and competitive and that they need to develop mission statements.

The effect of the Commission's proposals would be that certain things in higher education institutions would change, while others remained as they are. There would, for instance, be no change in the structures for the day-to-day management of institutions. The system of funding would also remain largely the same, except that there could be earmarked funding which must be spent on designated areas. The issues of staff and staffing, their conditions of service and appointments would remain in the hands of the individual institutions, except that equity demands should be met and all forms of discrimination on grounds of race or gender should be eliminated,[12] as is required by the Constitution.

There will be some changes in regard to student recruitment, where external authorities will have a say. Individual institutions will still be free to set their own entrance requirements beyond statutory minimums for specific courses and to decide which students are to be offered the allocated and available places. On course or curriculum planning, the proposals on accreditation and incorporating higher education qualification programmes into a national qualifications framework will entail a degree of curtailment of existing autonomy. Autonomy will be extended on the modes of teaching and learning, by the proposals on the freedom to introduce distance learning at traditionally contact institutions. Institutional autonomy will, however, no longer be the final word in assessing academic freedom.[13] This view seems to be misconceived if it implies that academic freedom has to be assessed from the outside.

The Commission was of the opinion that the best safeguard of academic and educational standards is not external validation and control, but the development of a responsible, self-critical academic community. A realistic quality assurance policy would require a combination of internal and external valuation and control.[14] For these reasons, the Commission recommended that all authorities should recognise the right to academic freedom for all individuals engaged in responsible academic work, and the right to autonomy for higher education institutions in fulfilling their educational and academic roles, within the context of an increased accountability implied by the principle and system of co-operative governance.[15]

The Commission's report led to the Green Paper and ultimately the White Paper on higher education. The White Paper accepted both academic freedom and

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11 *Idem* 195.
12 *Ibid.*
13 *Ibid.*
14 *Idem* 196.
15 *Idem* 196–197.

co-operative governance. The report also led to the adoption of the Higher Education Act and certain policies in higher education, some of which are in the process of being implemented. There is no doubt that while the White Paper pays lip service to academic freedom and co-operative governance, certain policies will have the effect of whittling away academic freedom, especially in the form of institutional autonomy, and will result in increased control by the government. It is too early to come to any definite conclusion, but it seems that the Commission has paved the way for greater government involvement in the operation of universities. The test, however, is whether such involvement is compatible with the Bill of Rights.

3 LIMITATIONS ON UNIVERSITY AUTONOMY

Despite many statutory and other legal limitations, universities in South Africa at present still enjoy a reasonable measure of autonomy and academic freedom. The situation is, however, not static and is changing. Nor is there unlimited autonomy anywhere in the world, especially because many universities depend on the government for their subsidies.[16] Once a university is subsidised by the government, there is an implicit expectation that it will owe some loyalty to the government. Ideally, this loyalty should mean that the university should be subject to and obey the laws of the country and not necessarily that the government should dictate to the university what to do or what not to do in its internal affairs, or to the academic staff what views to hold. In practice, however, the government may be inclined to favour those universities that support it and its policies and to be sensitive to the views of those universities and their staff critical of its policies and practices. If there is no check against its use of power, the government could tend to suppress the views of those universities or academics that oppose its policies because they may be perceived as embarrassing to the government. Such suppression may be direct or indirect. Indirect suppression may take place via the stipulation of improper conditions for the granting of subsidies. Direct suppression may take the form of the government dictating what views may be held by staff or of direct interference in the internal management of the university. This should not be so, since subsidies granted by the government to universities do not belong to the government but to the taxpayer; the government merely acts as a trustee, and as such should discharge this trust impartially and without taking into account irrelevant considerations. Fortunately, subsidies are currently granted in terms of a certain formula in South Africa, and the government has not stipulated improper conditions for their allocation. If the government were to be allowed to stipulate any condition for the grant of subsidies, this would compromise academic freedom and institutional autonomy. In the absence of critical inquiry, which could result from the atrophy of institutional autonomy, the government is liable to err. Although there are other agents, university autonomy and academic freedom are there to ensure that this does not happen and that both universities and academics act as free agents of change, renewal and the strengthening of democracy. The constitutional protection of this right therefore means that it is taken seriously.

The Constitution also provides for the limitation of fundamental rights. Section 36 stipulates that the rights entrenched in the bill of rights, including university

16 Malherbe "Die regsbeskerming van akademiese vryheid en 'universiteits-outonomie' in 'n nuwe Suid-Africa" 1993 *TSAR*; Bickel "The aims of education and the proper standard of the university" in Seabury (ed) *Universities in the Western world* (1976) 6.

autonomy and academic freedom, may be limited by a law of general application if this limitation is reasonable and justifiable in an open and democratic society based on freedom, equality and human dignity. Before that limitation can be regarded as permissible, it must be established, not only that there is a limitation, but also that it is reasonable and justifiable in an open and democratic society based on freedom, equality and human dignity. This is indeed not an easy task, because it is often difficult to prove, in respect of certain civil and political rights, that what a democratically elected government does is not justifiable in an open and democratic society. Before coming to the conclusion that the limitation is justified, the court must consider all relevant factors including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose. The element of proportionality is therefore emphasised.[17]

Besides the constitutional limitation of university autonomy mentioned above, there are other forms of limitation upon university autonomy which demonstrate, as I have stated, that university autonomy is not absolute, but has to be balanced with the other rights provided for in the Constitution. Thus if a university were to mete out discriminatory treatment on the basis of race, gender or sex in violation of the equality provision in section 9, the individual so affected by discrimination could challenge the measure in court. If the conduct of the university in relation to a staff member is challenged in court, the university cannot raise the defence of autonomy. Similarly, if a university takes a decision that adversely affects the interest of a staff member, it cannot act arbitrarily on the pretext of autonomy, but has to observe the principles of administrative justice.[18] This includes giving reasons for its decision if these are demanded. A university cannot refuse to disclose reasons for its decision on the grounds of autonomy. Although the university is autonomous, its autonomy is autonomy within the law and has to be exercised in fairness and with due regard to the interests of others.

Although universities are autonomous institutions, it is important to point out that a university is dependent on the government for its existence. A university is established by law and must comply with certain legal requirements.

4 THREATS TO UNIVERSITY AUTONOMY

Apart from the constitutional and other statutory limitations to university autonomy just mentioned, there are other threats to institutional autonomy. These threats may take various forms, constitutional, statutory, social or political. They are distinguishable from limitations in that they may not be operative like limitations, but remain a potential danger to institutional autonomy.

A disturbing provision in the interim Constitution was one under the heading of transitional arrangements. Section 247(2) provided that the national government and provincial governments were not entitled to alter the rights, powers and functions of controlling bodies of universities and technikons under the laws existing before the coming into operation of the Constitution unless agreement had been reached with such bodies and this had emanated from genuine negotiations.

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17 See in general Woolman "Riding the push-me pull-you: constructing a test that reconciles the conflicting interests which animate the limitation clause" 1994 *SAJHR* 60; Devenish "The limitation clause revisited – the limitation of rights in the 1996 Constitution" 1998 *Obiter* 256.

18 S 24 of the Constitution of the Republic of South Africa Act 200 of 1993.

If, however, agreement could not be reached as stated, the national government and the provincial governments were competent to alter the rights, powers and functions of the controlling bodies of universities and technikons, although interested bodies could always have recourse to the courts to challenge such intervention in terms of the Bill of Rights.[19]

These provisions, as initially drafted, caused great consternation among universities and were considered a threat to university autonomy. Even if they were not applied, they hung over the heads of universities like the proverbial sword of Damocles, thereby causing anxiety to the universities. There was strong reaction to this from university principals and senior academics. The provisions were perceived as a pretext for giving the government the power to interfere with the senates and councils of universities, probably with the purpose of packing them with its supporters. But reference to rights, powers and functions did not include interference with or alteration of the composition of such bodies or their abolition.[20] It merely meant tampering with their competencies. This in itself was unacceptable. Those who objected to this provision felt that the provisions of the Bill of Rights were sufficient to deal with issues of discrimination. This threat of government intervention was obviously unwarranted and was regarded as reminiscent of the negative intervention of the National Party government into the running of universities in the past,[21] which would obviously not be in the best interests of universities.

Despite these protests, the said provisions were retained in the interim Constitution – albeit in a watered-down form. While they gave the national government power to interfere with the powers and functions of the structures of governance for universities, universities would be entitled to challenge such conduct in terms of the Bill of Rights. For this reason, it was unlikely that the government would meddle unnecessarily in the domestic affairs of universities, especially in view of the fact that there had to be *bona fide* negotiations before the government could interfere. Moreover, whatever the government intended doing should not be in conflict with the provisions of the Constitution.[22]

What was meant by *bona fide* negotiations was not easy to define. It was suggested that whether negotiations were *bona fide* could be determined by asking whether the provisions of section 24 of the interim Constitution concerning administrative justice had been complied with.[23] This meant that the government would have to inform the university or technikon concerned that it proposed to alter the powers and functions of the governing body of the institution. There would have to be discussions with the governing body concerned about the necessity for or reasonableness of the proposed changes and these changes should not be in conflict with the essential function of the university or technikon. Fortunately this provision was never applied and was not included in the final Constitution.

Another threat to university autonomy is to be found in the provision on public administration in the final Constitution.[24] In terms of the Constitution, the public administration is subject to a number of principles which may be regarded as

19 S 247(3).
20 Malherbe "Die onderwysbepalings van die 1993 Grondwet" 1995 *TSAR* 11–12.
21 "Varsities face new state threat" *Sunday Times* 1993–12–05 4.
22 Malherbe (1995) 12.
23 *Ibid.*
24 S 195.

incompatible with the idea of university autonomy. These principles may constitute a threat to institutional autonomy in that, although they may not be strictly applied to universities in practice, they may none the less be applied if universities are regarded as organs of state. If applied, the provisions would restrict institutional autonomy in that legislation may be adopted to ensure the promotion of the values of accountability, transparency and responsiveness in relation to public needs. This may necessitate public participation in policy-making. The only saving grace is that this provision will always be treated as subservient to the provisions of the Bill of Rights. Moreover, it could be argued that even if the universities are regarded as state organs, they will be regarded as organs of state of a peculiar nature and, as such, entitled to autonomy.

A number of state universities exist in the United States of America. Although these universities have been established by the individual states, provision is made either expressly or impliedly for the limitation of the power of the state legislature to interfere in the internal decision-making process of the university, even though the university is supported by state appropriations. For this reason, state courts in various states have held state statutes unconstitutional because they reflect attempts by state legislatures to interfere with academic decision-making.[25] This means that these universities are not regarded as organs of state *stricto sensu*. There is no reason why a contrary view should be adopted in South Africa.[26] There are, no doubt, cases where the courts have been prepared to regard a university as a state organ.[27] The preferable view, however, is that a university is strictly speaking not a state organ.[28] Moreover, the fact that academic freedom is guaranteed in the Constitution is evidence that universities are treated differently from ordinary organs of state.

A further threat to university autonomy is that posed by the provisions of section 5 of the South African Qualifications Authority Act.[29] Section 5(2) provides, *inter alia*, that one of the functions of the South African Qualifications Authority (SAQA) is to pursue the objectives of the national qualifications framework provided for in section 2 of the Act. These objectives include the following: to create an integrated national framework for learning achievements; to facilitate access to, and mobility and progression within education, training and career paths; to enhance the quality of education and training; to accelerate the redress of past unfair discrimination in education, training and employment opportunities; and thereby to contribute to the full personal development of each learner and the social and economic development of the nation as a whole.

These objectives are in themselves laudable. The only threat to university autonomy is that this external body, the South African Qualifications Authority, is empowered to pursue the objectives of the national qualifications framework mentioned above and to perform functions such as those mentioned in section 5(1)

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25 Byrne "Academic freedom: a special concern of the first amendment" 1989 *Yale LJ* 327.

26 Venter "Die staat en die universiteitswese in Suid-Afrika: Nuwe wedersydse grondwetlike verantwoordelikhede, regte en verpligtinge" 1995 *THRHR* 385ff.

27 *Baloro v University of Bophuthatswana* 1995 8 BCLR 1018 (B); 1995 4 SA 97 (B); *Motala v University of Natal* 1995 3 BCLR 374 (D); cf s 239 of the Constitution.

28 *Directory, Advertising and Cost Cutters CC v Minister of Posts, Telecommunications and Broadcasting* 1996 2 SA 83 (T).

29 Act 58 of 1995.

> "with due regard for the respective competence of Parliament and the provincial legislature ... and the rights, powers and functions of the governing bodies of a university or universities and a technikon or technikons as provided in any Act of Parliament".

The implications of the phrase "with due regard" are uncertain. It does not necessarily mean that SAQA will be bound to respect those powers and functions or to consult the governing bodies. What has happened, is that universities have had no choice but to follow the national qualifications framework. Failure to do so will have serious implications for the institutions concerned. That provision, however, will always be interpreted subject to the Bill of Rights which entrenches academic freedom. But the incorporation of higher education qualification programmes into the national qualifications framework will involve a significant infringement on or curtailment of institutional autonomy. The only reason why universities may not have challenged it may be because they believe it is to their benefit to comply with the national qualifications framework. For some time, however, universities were reluctant to be part of this.

4 1 The Higher Education Act

Another piece of legislation which has had and will continue to have an impact on university autonomy and academic freedom is the Higher Education Act 101 of 1997. This Act supersedes any other legislation which applies to universities, including the private acts of universities and their institutional statutes. It is therefore important to analyse this Act in some detail in order to establish how much it impinges on institutional autonomy.

4 1 1 The Higher Education Act in general

In general, the Higher Education Act aims at bringing about a co-ordinated higher education system, redressing past discrimination and ensuring representativeness in governance structures. This in itself is commendable. There are, however, certain aspects of the Act which are open to serious criticism and which detract from some of the principles it purports to promote. Before these are considered, it is essential to point out that the Act has not altered some of the structures of governance of universities to any great extent. Provision is made for universities and other higher education institutions to have a council, a senate, a principal, a vice-principal, a student representative council, an institutional forum and other structures deemed desirable and provided for in the institutional statute.[30] Apart from the institutional forum, the other structures of governance are well established. It is debatable whether it was necessary to provide for the institutional forum. The idea of such a forum did not come from suggestions by universities themselves, but was imposed by the Ministry of Education – which implies a violation of institutional autonomy. The functions of the institutional forum are largely advisory and there is no reason why it had to be prescribed for universities. None the less this structure will not pose any great problem. The Act also initially provided for the governance structures to elect a chairperson, a vice-chairperson and other office bearers from among its members in the manner determined by the institutional statute or an Act of Parliament.[31]

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30 S 26(1).
31 S 26(2).

While it is fairly well established among universities that the chairpersons of councils are elected, the general practice when it comes to the chairperson of the senate is that the vice-chancellor or principal is the chairperson. The reason for this is that the principal is regarded as the academic leader of the institution and should therefore chair the chief academic body of the university, which is the senate. It was therefore unnecessary to change this. The change was definitely aimed at undermining the autonomy of universities. It has, however, been reversed by the Higher Education Amendment Act[32] a move which is to be commended.

Similarly, the general practice among most universities is that the registrar is the secretary of both the council and the senate. The registrar is generally not a member of these structures. To stipulate that other office-bearers (which include the secretary) should be elected from among the members of these bodies, created many problems for universities because the registrar is usually in charge of the secretariat and committees and has to co-ordinate their activities. To have a secretary who is not in charge of committees is problematic and is a violation of institutional autonomy, in that it disregards local arrangements for political reasons. These provisions have also been reviewed and amended,[33] a change which is also supported.

4 1 2 Powers of the Minister

The Act gives the Minister of Education considerable powers which could be liable to abuse, and which pose a threat to university autonomy and academic freedom. In terms of section 20, for example, he is empowered to establish higher education institutions. The current practice is that universities are established by separate Acts and technikons by an Act of Parliament, and not by the Minister. Admittedly, provision is also made in section 20(2) that a university may also be established by an Act of Parliament. There is no valid reason why the Minister should be given extra powers to establish a university in addition to the power of Parliament to do this. The main reason why it should not be permissible for the Minister to establish a university is that a university is an expensive institution and only Parliament should have the prerogative to establish it. Moreover, to have a new breed of universities established by the Minister, would be reminiscent of the late fifties where certain universities were established by the state and had little autonomy.[34] These were different from the independently established universities. We do not need to repeat that experience. There is no doubt that universities established by the Minister would be subject to government control to a far greater extent.

Section 21(1) provides that the Minister is entitled to declare any educational institution providing higher education as a university, technikon or college or a subdivision of such an institution. This is another provision which could be abused, since the minister has the last word. The Council for Higher Education (CHE) which he must consult, has no binding power over him. Admittedly, the Minister must give reasons if the advice is not followed.[35]

In terms of section 23, the Minister may, after consulting the CHE and by notice in the *Gazette*, merge two or more public higher education institutions into a single institution. In terms of section 24, the Minister may order a merger of a subdivision of one public higher education institution with another.

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32 Act 55 of 1999.
33 S 3(c) of Act 55 of 1999.
34 Behr and Macmillan *Education in South Africa* (1966) 216.
35 S 5(3).

Although it may be argued that institutions may be ordered to merge in order to cut costs, there is no evidence that such mergers result in substantial cost savings. The greatest likelihood is that this power will be used for political reasons. If, for instance, the Minister does not like a particular chancellor or vice-chancellor he might order that certain institutions merge under a pretext of cost-cutting, whereas he may in fact be doing it because he is certain that in the merger only one chancellor and vice-chancellor will emerge and the ones he does not want will not survive. It may be argued that such a possibility is far-fetched, but it is a possibility none the less. Moreover, mergers imposed from above have very little chance of success. These provisions could be regarded as unconstitutional, in that they violate academic freedom: a minister could order a merger for political reasons and thus compromise the institutional autonomy of the institutions concerned. The only check on the Minister's abuse of that power is that he may be required to give reasons for such a decision. If he knows beforehand that he will be expected to give reasons, that might cause him to be circumspect in taking that decision. This is part of responsive and accountable democracy.[36] He will also be expected to consult the governing body of the institution concerned.

The same may be said about section 25 of the Act, in terms of which the Minister is empowered to close down a public higher education institution. This is unprecedented in the history of universities in the country. This power could be used by the Minister for political reasons and is therefore open to abuse. Moreover, as already indicated, this provision could be regarded as unconstitutional. The fact that the Minister has these powers means that universities may not be free to hold views which are in conflict with those of the Minister. Admittedly, the Minister will not use that power lightly because of the consequences such use might precipitate. But the fact that he has this power remains a serious threat to institutional autonomy. Some perceive the current debate on shape and size as a threat to institutional autonomy.

What is disturbing is that the Ministry of Education pays lip-service to institutional autonomy and co-operative governance in the White Paper. These provisions, however, fly in the face of both institutional autonomy and co-operative governance and they could be used for political, and not necessarily educational, purposes. It is strange that after all the talk about democratisation in the NCHE report and the White Paper, one person is given these extraordinary powers. This does not mean that any specific minister will necessarily abuse these powers, but good legislation must depend on itself and not on the individual incumbent. The legislation itself must contain sufficient checks and balances to prevent abuse of power. After all, the whole purpose of democracy is to prevent abuse of power: the perennial problem of organised society is that of the hunger for and desire to abuse power, and, in the words of Cowen, "when entrusting power to human hands, it is essential not to believe in the sweet reasonableness of man".[37]

The fundamental question is whether these provisions can be regarded as reasonable and justifiable in an open and democratic society based on freedom, equality and human dignity. Although it is difficult to define with precision what is justifiable in an open and democratic society based on freedom, equality and human dignity, it is possible that some of these powers could be regarded as unconstitutional on the

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36 Mureinik "Reconsidering review: participation and accountability" 1993 *Acta Juridica* 36.
37 Cowen *The foundations of freedom* (1961) 118.

ground that they do not meet these criteria. The reason for this is that institutional autonomy is regarded as far more compatible with a democratic society, since it institutionalises freedom of research. It may also be asked whether less restrictive measures could not have been used to achieve the purpose in question. The great advantage of entrenching academic freedom in the Constitution is that, although it does not provide indefeasible security, it does make the path of the transgressing government or government official more difficult. It constitutes "so to speak, the outer bulwarks of defence".[38]

While one cannot quarrel with the establishment of the Council for Higher Education (CHE), there are problems with its composition[39] and its powers.[40] In its composition it is supposed to represent various stakeholders. Many of these are not experts in higher education. While even non-experts in higher education can indeed make a contribution to higher education, it is doubtful whether it is wise to allow them to predominate. University principals, in particular, should enjoy more representation because of their expertise and experience in higher education. The majority of the members of the CHE are appointees of the Minister and can hardly be expected to disagree with him. That may weaken the Council. The Minister is not bound to accept the advice of the CHE and this could lead to the CHE being ineffective and the Minister having immense powers, although the Minister is obliged to give reasons in writing to the CHE if he does not accept its advice. This may inhibit the Minister's power to act arbitrarily.

The fact that the CHE has been given both quality promotion and quality assurance roles, implies a further erosion of university autonomy. In the past, universities did not have an external body evaluating the quality of their programmes and offerings. The system of external examining was regarded as adequate to ensure quality. In terms of section 7 of the Higher Education Act the CHE must establish the Higher Education Quality Committee as a permanent committee to perform the quality promotion and quality assurance functions of the CHE. The CHE and the Higher Education Quality Committee are obliged to comply with the policies and criteria formulated by SAQA in terms of section 5(1)(a)(ii) of the South African Qualifications Authority Act. The Higher Education Quality Committee is empowered, with the concurrence of the CHE, to delegate any quality promotion or quality assurance functions to other appropriate bodies capable of performing such functions.

The provisions of section 42 of the Act are also disturbing. This section provides that the Minister may require a higher education institution to comply with a certain provision of the Act relating to the allocation of funds to the institution. This provision could also be abused in that the Minister may, in addition, stipulate a condition for the grant of the subsidy which may not have anything to do with education. This in fact happened in the past, but the Supreme Court declared that condition invalid.[41] It is submitted that this decision will still be binding on the Minister.

In *University of Cape Town v Ministers of Education and Culture (House of Assembly and House of Representatives)*,[42] the respondent Ministers purported to

38 Cowen 119.
39 S 8.
40 S 5.
41 *University of Cape Town v Ministers of Education and Culture (House of Assembly and House of Representatives)* 1988 3 SA 203 (A).
42 See fn 41.

stipulate conditions, in terms of section 25 of the now repealed Universities Act,[43] which had no bearing on higher education but fell within the scope of the maintenance of law and order in general. Section 25 made provision for the granting of subsidies to universities subject to conditions determined by the minister and with due regard to the requirements of higher education. Section 27 stipulated, *inter alia*, that upon failure by the university council to comply with certain conditions, the relevant Minister could withhold all or part of that university's subsidy. In terms of the provisions of section 25, the respondent Ministers imposed certain conditions upon all universities with effect from 19 October 1987. The university councils were commanded to take steps aimed at preventing and punishing certain conduct of staff and students at these universities. The Minister had to be notified of any incident of unrest or disruption or occurrence to which the preventive measures were directed and to report on the disciplinary steps taken or intended to be taken to prevent similar incidents in future.

These were challenged on the grounds that they were *ultra vires* the provisions of section 25; that they were also so vague that they did not convey with any reasonable certainty what the universities were required to do in order to avoid non-compliance; and that they entailed unreasonably oppressive or gratuitous interference in the applicant universities' rights. The court held that as these conditions were imposed solely for purposes of maintaining law and order, they were *ultra vires* and invalid. Moreover, the conditions were not clear and entailed unreasonably gratuitous interference in the rights of the universities. This demonstrates that even though the Minister has power to stipulate conditions for the granting of subsidies, this cannot be done arbitrarily. The courts will interpret such conditions strictly in order to forestall the unnecessary restriction of university autonomy. The conditions must be necessary and they must relate to the effective provision of higher education. Moreover, the conditions must be clear and capable of being understood and being implemented without unnecessary hardship to the institution concerned. If they are vague and unreasonable they may be struck down as invalid.

The fact that universities in South Africa are subsidised by the government severely restricts their autonomy. Although the courts may generally be relied upon to ensure that the conditions stipulated by the Minister in granting subsidies are not arbitrary, this does not deprive the Minister of the power to prescribe such conditions. How the conditions are interpreted, may depend on the court that is seized of the matter. A court that is too sympathetic to the government may give the government greater latitude to interfere with university operations.

Although the saying that "he who pays the piper, calls the tune" must be applied with caution to universities, there is no doubt that there are those who feel that, because the government subsidises universities, it has the power to prescribe whatever conditions it deems appropriate. Some would even go so far as to assert that universities that are subsidised by the government have no autonomy at all. Although such views are obviously misconceived, they demonstrate the precarious nature of university autonomy. An interventionist government can certainly infringe such autonomy. The fact that academic freedom is protected by the Constitution obviously implies that the university can challenge such intervention. The decision to challenge government intervention may be a difficult one to take especially if it is against a democratically elected government.

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43 Act 61 of 1955.

In terms of section 44 of the Higher Education Act, the minister is empowered to appoint an independent assessor after consulting the council of a public higher education institution. This must be done if the council of such an institution requests such appointment or where circumstances arise at the institution which entail financial or other maladministration of a serious nature or which seriously undermine the effective functioning of the institution. This will be the case if the council has failed to resolve the problem and the appointment is in the interests of higher education in an open and democratic society. Although the appointment of an independent assessor is not necessarily incompatible with institutional autonomy, experience has shown that such an appointment might undermine the autonomy of the institution.[44] What is less clear are the powers of the independent assessor and his method of operation. It would appear that the assessor is supposed to investigate and to make certain recommendations about what has happened at a particular institution. What is controversial is whether or not the council of that institution may act upon that recommendation even if they are in conflict with legislation. The independence of the assessor is also questionable.

Provision has also been made for the Minister to appoint an administrator to perform the functions relating to governance or management on behalf of the institution for a period of not more than six months. This can take place if an audit of the financial records of a public higher education institution or an investigation by an independent assessor reveals financial or other maladministration of a serious nature or the serious undermining of the effective functioning of the institution. Where practicable, the Minister must consult the council of the institution concerned before this is done.[45] There is no doubt that the appointment of an administrator will seriously undermine the autonomy of the institution, because circumstances may be caused by factors beyond the control of the management of the institution, which will then be subjected to this appointment by the Minister. Other questions in this regard are: What happens to the principal and other senior members of management during this period? Should they be suspended? If they are suspended, will their right to administrative justice be respected? The appointment of an administrator could exacerbate the situation rather than alleviate it.

Although the Minister has wide powers in relation to universities, most of these powers are indirect in that his approval is required for the performance of a number of acts by a university. His approval is, for instance, required for the framing of statutes and regulations by university councils.[46] This acts as a further check on the various matters that are ordinarily governed by these regulations and statutes, such as the election, period of office, powers and functions of the various university office-bearers, the procedure and quorums at meetings of university organs, the designation of degrees, the conferment of degrees and honorary degrees, disciplinary

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44 Thusfar the independent assessor has been appointed to investigate certain events at two technikons and two universities. The recommendations, which included that the principals of some of these institutions should be dismissed, have caused disquiet and controversy. The operation of the independent assessor, especially under conditions of anonymity, is also disturbing, especially if some of the allegations by informants threaten the rights of the officers of the institution and if the officers concerned are not given a hearing and the opportunity to challenge the veracity of those allegations through cross-examination.

45 S 41A(1) of the Higher Education Amendment Act.

46 S 33 of the Higher Education Act.

provisions and to other related matters. The Higher Education Act and other university Acts confer certain specific powers on the minister. These include:

(a) the making of regulations, binding all universities, on a wide variety of matters;[47]

(b) the granting of loans and subsidies to universities;[48]

(c) the withholding of loans and subsidies to universities;[49]

(d) prescriptions regarding the time and manner in which the university councils must report to him or her on the proceedings and management of the university concerned as well as on its financial affairs;[50] and

(e) approval for the alienation or hypothecation of its immovable property by the university.[51]

Other than in the exercise of these powers, the Minister has no authority or is not supposed to interfere in the internal management of a university. Such interference may be challenged on the basis of institutional autonomy. In a few cases the Minister has done things which could be interpreted as interference in the internal management of the university.[52] The problem with such intervention is that, unless requested and however well-intentioned, it tends to be selective and therefore to reveal political motives rather than a genuine desire to assist the institution concerned. Unwarranted political interference in the internal affairs of a university is obviously not to the benefit of such institution and compromises its autonomy.

4 2 Other threats to academic freedom

Apart from constitutional and statutory limitations and threats, there are other social and political threats to university autonomy to which universities are exposed today. These are precipitated by the social and political transformation that is taking place in the country. As a result of these, the university is once again called upon to descend from its ivory tower and to be active in the solution of many of society's problems. These include poverty, unemployment, urbanisation and illiteracy. Universities have also been expected to turn themselves into "people's universities".[53] In addition to the above-mentioned, the issue of access to tertiary education (especially on the part of black people disadvantaged by poor secondary-school education), the language problem and Western-oriented curricula, require attention.[54]

The democratisation of university structures of governance with the purpose of enabling students and junior staff to have a greater say in the governance of universities has generated a great deal of discussion. This has been part of a broader

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47 S 69 of the Act.

48 S 39 of the Act.

49 S 42(2).

50 S 41.

51 S 20(5).

52 This has happened where the minister, as a result of an appeal by students, intervenes and questions the way the university deals with certain students who have financial problems and who want to register; it has also happened where, in a matter where the council should take a decision, the Minister writes to the council virtually instructing it on what decision to take. These are clear instances of the violation of institutional autonomy.

53 Khutsong "Universities in post-apartheid South Africa" 1992 *SAJHE* 91; see also Meehan "The university and the community" 1993 *SAJHE* 89ff; Dlamini "Towards a definition of a people's university" 1995 *SAJHE* 44.

54 Khutsong 91; Malherbe (1993) 378.

mission to introduce democratic governance in all social institutions.[55] In itself this is nothing new and has happened in the other parts of the world. It would nevertheless be prudent to learn from the experiences of those countries. The lesson to be learned is that such uncritical democratisation is fraught with problems and has sometimes been reversed or altered later.[56] It is, however, not possible to ignore democratisation completely. The underlying rationale for democratisation is that, now that the political situation in South Africa has been democratised, the rest of society, including universities, should follow suit.[57] It has been contended that attempts by the government to introduce stricter applications of democracy in universities could face problems or be challenged as unconstitutional in the sense that they cannot be regarded as justifiable or reasonable, especially if they limit the number of academics as against students on all bodies that take academic decisions. If there have been such problems, they have not been widespread. The increased representation of students in the structures of governance, however, may pose its own problems because students lack both experience and expertise in the running of universities. This does not necessarily mean that students may not make a contribution in that regard. All it means is that their views cannot be decisive and must be subject to those of members of staff who are both knowledgeable and experienced, otherwise it would make no difference whether one knows or does not know.[58] Moreover, students could be more amenable to outside pressure. The positive aspect of student participation in governance is that this is part of their education and it enables other members of the governance structures to know how students feel about certain issues and decisions they take. The involvement of students could also compromise the autonomy of the governing body because they may tend to represent a particular constituency, that of students, whereas as members of the council, for instance, they are not supposed to represent any particular constituency.

A university as an academic institution places the highest premium on knowledge and expertise. That is why, when appointing academic and administrative staff, a university has to consider knowledge and expertise as a precondition. On the other hand, democracy, which has been defined as "any form of governance in which the ultimate power of decision belongs to and is divided equally amongst members (or the full members) of the relevant institution"[59] may not give the same prominence to knowledge and expertise. For this reason, there are those who do not regard the democratic model as the most appropriate for a university.

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55 This was largely because, in the past, the governance of universities was perceived to be in the hands of a certain section of the population.

56 In Germany eg a move was started in the nineteen-sixties to change the representation on governance structures so that professors and other tenured academic staff were in the minority, with the purpose of depriving professors of their decisive influence over academic issues. Legislation was adopted to effect this. But in the *Group University Case* (1973) 35 BVerfGE 79 the Constitutional Court decided that in teaching and research issues, professors must have a "sufficient" majority and that non-academic staff should have no vote at all in such matters; for a general discussion of this see also Nipperdey "The German university in crisis" in Seabury (ed) *Universities in the Western world* (1975) 119ff; Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (1989) 426.

57 Pauw *Die Westerse universiteit – sy ontstaan, aard en toekoms* (1975) 102; Malherbe (1993) 378; Smith "Constitutional academic freedom" 1995 *SALJ* 686.

58 Smith 688.

59 Pendlebury "Concerning the value, scope and limits of democracy" 1995 *Theoria* 40; see also Dahl *Dilemmas of pluralist democracy: autonomy vs control* (1982) 6.

Democracy is regarded as an appropriate form of governance if

> "the main purpose of the institution in question is to serve certain interests of its members, providing that they have an equal claim to consideration and may be presumed the best judges – and therefore equal judges – of the relevant interests".[60]

This is the case in the political arena where we regard ourselves as the best judges. The problem is that when reference is made to democracy in university governance, it may mean a variety of things. Sometimes what may be required is consultation on certain issues. At other times, there may be a need for a negotiated settlement of a certain conflict and at yet other times "plain equal representation on the political model" may be the goal.[61] Consultation and negotiation may play an important role in certain institutions because these practices may be

> "valuable and effective when focused on important points of principle, policy and potential conflict, for they are apt not only to promote co-operation and cohesion, but also to increase the range of possible alternatives which are considered".[62]

But these cannot be regarded as democratic in the sense described above.

It has been contended that democracy may also be regarded as valuable when an institution does indeed exist to serve the interests of its members – as long as its members are the equal and best judges of the interests the institution is supposed to serve and are committed to serving those interests. For this reason, members of an academic department are regarded as falling within this category because they "might be highly motivated to pursue relevant interests of their students and their discipline because of the possible adverse effects on their careers if they do not do so". Consequently, democracy could be appropriate in an academic department if all its members are more or less equally competent to judge whether the department is promoting the relevant interests. This may, however, not be the case in many academic departments in South Africa which may be "dominated by inexperienced and poorly qualified junior members". In such a case, democracy may not be appropriate, although it may be necessary to consult both junior members and students.[63] Some may regard this view as conservative.[64]

The issue of democratisation is regarded as a threat to university autonomy because it is extremely popular, especially in black society, and any university which is critical of it as inapplicable to university governance in its purest form, is liable to attack as being resistant to transformation. Once a university is attacked on the grounds that it is conservative and opposed to transformation, this tends to eclipse whatever good the university may be doing. This may also lead to things other than academic excellence being regarded as paramount. For many politicians, immediate palpable interests are more important than the pursuit of academic excellence. In order not to be seen as conservative and resistant to transformation, universities may simply give in to the pressure for democratisation. The consequences of such uncritical democratisation may be disastrous, as experience in other countries has demonstrated.[65]

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60 Pendlebury 44.
61 Smith 686.
62 Pendlebury 41.
63 Pendlebury 46; Smith 687.
64 This will be so, particularly in South Africa, where junior staff and students were involved in the liberation struggle in the past. The assumption seems to be that because of their involvement in the struggle, they should be allowed to dominate academic decision-making as some sort of reward.
65 For a general discussion of this see Seabury (ed) *Universities in the Western world* (1975).

Many of the issues and challenges that face universities may make the government feel that it is justified in intervening in the affairs of the university by way of rationalisation, financing and transformation, unless the universities themselves take the initiative. This has particularly happened in the area of transformation in particular, although to a limited extent. Transformation in itself is a positive phenomenon which should be encouraged. The main problem with it is that it is more difficult to define precisely or to unpack. It is also an emotive issue. The emotive nature of transformation tends to preclude any critical analysis of anything which comes in the name of transformation. Such uncritical acceptance tends to contradict the very nature of a university which is that of promoting free enquiry and critical analysis. Transformation simply means change, or rather fundamental change of any institution. In South Africa it is mostly, although not exclusively, used in relation to institutions of higher learning.[66] There is a tendency to define it according to one's individual predilections. This makes transformation idiosyncratic and less objective.

The fact that both democratisation and transformation have been advocated implies that transformation is not necessarily treated as a generic term for both. One could argue that transformation can be used in a broad or a narrow sense. In the narrow sense, transformation has been regarded as entailing an accelerated programme of affirmative action which is aimed at ensuring representative governing bodies for institutions of higher learning, which bodies should be representative in terms of race and gender.[67] In the broad sense, transformation means change in general. While transformation in the narrow sense may be commendable in that it may demonstrate that past discriminatory practices have been discarded and thus engender confidence in the new dispensation, what may be less appealing are the methods used to achieve this objective or the pace at which it is done. Moreover, while representativeness may be important, for purposes of legitimacy, what is more important is the contribution which members have to make to the development and welfare of universities in general. There is also the faulty assumption that an equitable demographic representation in the structures of governance will necessarily be a panacea for all the ills of institutions. Recent experience has proved the contrary. In many cases, democratically elected councils have been at loggerheads with the chief executive officers at universities and some of these councils have not been able to make a distinction between policy issues and management ones.[68] This tends to weaken the institution. This criticism should not be construed to mean opposition to equitable demographic representation. It means only that we should be less sanguine and more realistic about the effect of such equitable demographic representation. What is more important is the effective operation of the institution, the attainment of its goals and the performance of its role.

What makes democratisation all the more popular, especially among students, is that over the years students have contributed in no small measure to the transformation of tertiary education, and this is what may motivate them to continue to exert pressure on universities. They have clamoured for greater access and consequently

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66 Smith 688; Dlamini "The transformation of South African universities" 1995 *SAJHE* 39.

67 Moulder "Universities and Africanisation" 1995 *SAJHE* 7.

68 This has been the case among some historically black universities. Some of the councils have been so eager to transform that they would want to take over the management of the university. Being a transformed council, they would like to do something dramatic. This tends to overpoliticise a university and to ignore the fact that the university is an academic institution.

for the relaxation of admission criteria. They have also agitated for the general democratisation of tertiary institutions.[69] They may want to continue this trend. (It may also be more exciting to them than studying.) What has been disturbing is their method of doing this. They have made use of student power[70] which has entailed resorting to class boycotts, sit-ins in administration buildings, destruction of property, the trashing of campuses and hostage-taking.[71] There is, however, a recent change of attitude in this regard among some institutions. Whether this is permanent or temporary, is not easy to say. Once a culture has been created, it usually takes a long time to eradicate.

There has also been a stronger call for affirmative action. Affirmative action is provided for in the Constitution[72] and aims at redressing past injustices. It has rightly been contended that this should not be imposed by the government[73] or outside people on universities. The present government has passed the Employment Equity Act[74] which seeks to implement affirmative action. This has resulted in greater clarity on what affirmative action should involve. The Act defines affirmative action as

> "measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer".[75]

From this it is clear that affirmative action seeks to ensure that suitably qualified people from designated groups have equal employment opportunities and are not denied these opportunities simply because of race, colour, gender or other related attribute. It does not mean that suitably qualified people from previously advantaged groups are not employable. Moreover, it seeks to ensure that people from designated groups are equitably represented in all categories and levels of employment in the workforce of the designated employer. Barriers to the upward mobility of these groups must be removed. This implies that the designated employer must not be complacent about the mix of his or her workforce, but must take steps to ensure that people from designated groups are equitably represented in all categories of employment. These steps entail identifying and eliminating employment barriers which adversely affect designated groups, diversifying the workforce on the basis of dignity and respect for all people, making reasonable provision for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of the designated employer, taking measures to ensure such equitable representation, and developing and training people from designated groups.[76]

It was contended that, since the present provision in the Constitution does not create a right to affirmative action as such, this would still be subservient to the provisions of the Bill of Rights. The constitutional right of academic freedom must be weighed up against, and may override, affirmative action legislation.[77] The

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69 Dlamini 40.
70 O'Connell "Education and transformation: a view from the ground" in Unterhalter *et al* (eds) *Apartheid education and popular struggles* (1991) 5ff.
71 Some of these practices, like hostage-taking, are criminal.
72 S 9(3)(a); for a discussion of this see Klug "Rethinking affirmative action in a non-racial democracy" 1991 *SAJHR* 317; Smith "Affirmative action: its origin and point" 1992 *SAJHR* 234.
73 Smith 689.
74 Act 55 of 1998.
75 S 15(1) of the Act.
76 S 15(2) of the Act.
77 Smith 690.

problem with this view, however, is that affirmative action is intended not as a limitation or exception to the right to equality provided for in section 9 of the Constitution, but as an integral part of the attainment of such equality. It should therefore be seen as part of the right to equality.[78] The impression should therefore not be created that the choice is between institutional autonomy and affirmative action; the challenge is how to implement affirmative action without its being perceived as a threat to institutional autonomy. In other words, the university should implement affirmative action reflectively and rationally, with equity as the basis. We should not have a situation where a person feels disqualified for certain positions because of his or her colour. If members of certain sections of the population have the perception that they cannot obtain certain positions no matter what qualifications or expertise they possess, that will lead to a brain drain which will not be good for universities in the long run.[79] Ideally, universities should remain centres of excellence committed to the pursuit of academic excellence – whatever the situation.

In *Public Servants' Association of South Africa v Minister of Justice*[80] the court subjected the affirmative action provision in the interim Constitution to critical scrutiny and held that the affirmative action measure must be designed to achieve the adequate advancement of previously disadvantaged persons, but should not go beyond what is adequate in order to reach the objective of advancement and should not be haphazard and random. Both the ends to be attained and the means used are subject to review. In deciding whether the measure is appropriate, one must consider the interests of the target group, the rights of others and the interests of the community. Regard must also be had to possible disadvantages that the target group and other groups may suffer. Moreover, the word "promote" implies an incremental, not an immediate, attainment of the objective. This approach appears to be in line with the Act and although it was decided before the Act was passed, it is to be supported.

In *Motala v University of Natal*[81] a "gifted" Indian student who had obtained five distinctions and a B symbol in the senior certificate examination was not admitted to medical school because the medical school authorities decided to use affirmative action policy to address the problems caused by poor standards of education available to African students under the control of the then Department of Education and Training. African students who had obtained lower senior certificate results than students whose applications were rejected were accepted. It was contended that, since the Indian community was also disadvantaged by apartheid, discrimination between African students and Indian students resulted in unfair discrimination. The court held that the admission policy adopted by the medical school was a measure designed to achieve the adequate protection and advancement of a group disadvantaged by unfair discrimination. While it was conceded that the Indian community had undoubtedly also been disadvantaged by apartheid, it considered that the disadvantage to which African pupils were subjected under the "four-tier" system of education was significantly greater than that suffered by their Indian counterparts and therefore upheld the selection policy as being compatible with the Constitution. The decision, however, is open to criticism in that affirmative action is perceived as being insensitive to one group adversely affected. This is not in conformity with the Act.[82]

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78 Govender "The impact of the equality provisions of the Constitution" 1997 *Obiter* 265–266.
79 Waddington "The brain drain" 1999 *Focus* vol 10 no 33 8ff.
80 1997 5 BCLR 577 (T).
81 1995 3 BCLR 374 (D).
82 S 15(4) of the Act.

Although it may be understandable that the government may want to see more demographically accurate representation in student and staff numbers, it is not advisable that this should be done in a manner that will completely deprive institutions of control.[83] Fortunately, that is not the spirit of the Act. Such pressure may compromise university autonomy in that universities may merely give in to it without formulating clear policies on the issue. In that way, the university may be forced either to appoint or not to appoint a particular person, not because of his or her qualifications and competence or lack of these, but because of his or her colour. This would be a sad return to a new form of invidious discrimination. The Act does not stipulate that a person who is not suitably qualified should be appointed simply because he belongs to a designated group. If such a person is appointed and fails to rise to the challenge in spite of attempts to assist him and to develop his potential, it might be difficult to remove him because that might be perceived as discriminatory. Yet to retain a person who does not perform adequately may be contrary to the mission of the university. To remove that person may be worse than not having appointed him in the first instance, because the perception would be that he is being treated like that because of his race or colour. Admittedly, affirmative action also implies providing training after a person has been appointed. But in some cases such training will be cosmetic and will not properly equip a person for the challenges he or she has to meet. Usually universities provide free tuition for their staff. Thus a person must demonstrate potential or suitability by at least acquiring some further qualification. It is important that equity should go together with quality, since a university is an institution which has a specific purpose – namely, the generation and dissemination of knowledge and information through teaching and research.

The great challenge facing universities will be to find suitably qualified people in all spheres from the designated groups. While it may be easier to produce well-trained persons in the administration, or to fast-track them, it may not be so easy to produce well-qualified and competent academics over a short period of time. Moreover, there are few qualified people from the designated groups in certain fields, for historical reasons. There are extremely few black people in science, technology and finance, for instance. Those who are available are snapped up by the private and public sectors at comparably higher salaries. It is a notorious fact that salaries at universities are relatively lower than in the private and public sectors. For this reason, universities have difficulty retaining suitably qualified and experienced staff. Failure to appoint people from designated groups may be perceived as unwillingness to implement affirmative action. This perception may be unfortunate in genuine cases and may lead to reluctance to appoint well-qualified persons simply because they do not belong to a designated group. The fact that the Employment Equity Act provides for the devising of an equity plan[84] may, however, improve the situation and eliminate this perception.

What is important is that we should not inadvertently repeat the mistakes made by the National Party government in implementing its policy of apartheid. Universities were compelled by legislation to restrict student admission by race and colour with disastrous results. We now have the thankless task of reversing the effects of past policies and this is costing the country dearly in terms of human and financial resources. There is no doubt that when the government did this, it thought it was

83 In terms of s 37 of the Higher Education Act, each higher education institution is entitled to stipulate admission requirements.

84 S 20 of the Act.

doing the right thing and that this was in the national interest. As we now know, this was not the case. We would therefore be well-advised to learn from the mistakes of the past. Although affirmative action is not unique to South Africa, and has been applied in other countries with a history of discrimination, it has remained controversial even in those countries.[85]

It may be contended that it is highly improper or even irresponsible to compare the policies of the present democratic government with the discredited apartheid policies of the past. While this may be conceded, it should be pointed out that even a democratically elected government can make mistakes. Moreover, there is no one group that has a monopoly on good or evil; to err is human and this is common to all humanity. The point made here is that university autonomy and academic freedom are so important that they should not be sacrificed on the altar of political expediency and for whatever political motive, to a transient government. Academic freedom in the sense of institutional autonomy implies that even an elected government sometimes has to defer to the rights of the individual institution. Thus even the argument that a democratically elected government cannot be obstructed by an unelected group of individuals or institutions does not hold water in this context. The right to academic freedom is a constitutional right; this implies that it is fundamental and that the government should respect it and not be prescriptive about transformation. If a right is regarded as fundamental, it means that it is

> "entitled to special protection enjoying at least a *prima facie*, presumptive inviolability, bowing only to compelling societal interests, in limited circumstances, for limited times and purposes, and by limited means".[86]

Another problem is that transformation is a reaction to past injustices. Any reaction tends to lead to over-reaction. It often takes time to convince people that the answer lies not in extremes but somewhere in the middle. Such a view could also be misconstrued as support for the discredited policies of the past, whereas this may not be so. What is often overlooked is that not everything that comes with transformation is golden. History teaches us that many wrong and unjust things happen in the name of transformation during a period of transition.[87] That is why universities should remain critical and vigilant even in regard to transformation.

As transformation is meant to correct past injustices, it is regarded by the government as extremely important. The current government would like to be credited with the eradication of apartheid and its effects through transformation. For that reason, transformation may be rated more highly than academic freedom, especially in the form of institutional autonomy. The government may be assured of the support of the masses in this regard. The reason for this is that academic freedom does not enjoy wide support among the masses, because it is perceived as elitist or as an esoteric concern of university academic and administrative personnel. This view of academic freedom is, however, ill-conceived: academic freedom is essential for the stimulation of debate that is necessary for democracy. It is also necessary for the generation of knowledge, which is important for improving the quality of life of ordinary people.

While the sincerity of the present government may not be in doubt, it should be remembered that the National Party government of the past was sincere in its

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85 This is largely because it uses those attributes which were discredited in the past, although for different reasons.

86 Henkin *The rights of man today* (1978) 3.

87 This was the experience of the French Revolution where the reign of terror set in immediately.

policies. It thought it had the answer to the political problems of the country and had the mandate to solve them. But, as we all know, it was very much mistaken. If direct government intervention was wrong in the past, it should be wrong today, whatever the motive behind it. This is not to render inadvertent support to discrimination, which may be the target of those who advocate transformation. Any discriminatory practice can always be challenged in terms of the Bill of Rights.[88] What is not supported, is ill-conceived action on the part of the government which may do the universities great harm that will require remedial action. What should also be emphasised is that transformation is a process and, contrary to the views of many, not a cataclysmic act.

It could also be argued that if the government is not allowed to intervene, this could result in universities becoming a law unto themselves. They might therefore resist transformation. Moreover, to take the argument further, they may not have the will and the ability to transform because some of them may have vested interests in maintaining the *status quo*. After all, no leopard can change its spots. This could mean that autonomy may be used or abused to obstruct transformation. Furthermore, it may be doubtful whether universities are the best judges of whether or not they are sufficiently transformed.

While this may be conceded, it is necessary to reassert that university autonomy is regarded as good in itself, and that allowing government interference may be a greater evil than upholding university autonomy. That university autonomy is good in itself does not mean that it is absolute or that it may not be liable to abuse. What is supported, is autonomy relating to the core functions of the university, namely to determine for itself on purely academic grounds who may teach, what should be taught, how it should be taught and who should be admitted as students. It is also autonomy in relation to the management of the university. According to the philosophy of fundamental rights, the protection and promotion of fundamental rights constitutes a public good. Although there might be a perceived conflict between the protection and promotion of fundamental rights and other public good, the protection of fundamental rights should not be sacrificed on utilitarian grounds – the greatest good for the greatest number, or even for the good of all. The dichotomy between fundamental rights and other public interests may be transient and temporary and it is in the long-term interest to protect fundamental rights.[89] It would be a contradiction in terms to assert, on the one hand, that autonomy is a fundamental right and, on the other, to proceed to violate it with impunity. Moreover, the problem with government intervention is that it starts off being benign and later turns out to be in conflict with the nature and role of the university. It might later extend to areas where it militates against the role and purpose of a university.

It is not possible for the university to be totally impervious to transformation, because members of the university themselves may be divided on this issue, nor is it desirable. Division may tend to encourage debate. The debate on transformation may therefore continue, and while this debate is continuing, this may take the process of transformation a step further. What should also be emphasised, is that transformation as such is not opposed; on the contrary, it is supported. But transformation should be principled; it should be orderly and should not disrupt the main activities of the university or frustrate the attainment of its objectives. It should

88 S 9 of the Constitution.
89 Henkin 3.

be aimed at improving the situation, and should not degenerate into reverse discrimination or anarchy. Moreover, it should take place with the full participation and support of the university community, and should not simply be imposed on universities.[90] This is obviously not an easy task.

The position of those who are not satisfied with the pace of change in tertiary institutions may be entirely understandable. They may be impatient with what they perceive as window-dressing rather than real and fundamental change. But whatever change is brought about should not cause further problems. Another problem with transformation is that it may be interpreted by some as a chance to control the universities rather than genuinely to improve their quality and performance. The call for democratisation may be construed as a way of packing the structures of governance with people who are sympathetic towards or belong to a particular political party, which would ensure that the government maintains effective control over universities. If transformation is meant to achieve this, then it will constitute a threat to academic freedom as well as institutional autonomy.

A subtle threat to university autonomy may come from those who believe that, now that we have a democratic government in South Africa, university autonomy is no longer important because the democratic government will not be a threat to university autonomy.[91] In any case, the government may be trusted to do the right thing. In this sense, what is important to emphasise is not university autonomy, but rather co-operation and a sense of partnership between the government and the university. According to that line of reasoning, what the universities should emphasise is not autonomy but rather participation in the Reconstruction and Development Programme (RDP).

As a response to this contention, it should be pointed out that university autonomy does not mean hostility to the government. Autonomy implies that the university should remain critical of the policies of the government, including the RDP. But this should be constructive criticism, aimed at renewal and effective reconstruction. Moreover, autonomy is not emphasised only *vis-à-vis* undemocratic governments, but also *vis-à-vis* democratically elected governments, because even a democratically elected government can abuse power and threaten university autonomy.[92] Moreover, autonomy is much more compatible with democracy, because it institutionalises freedom of research and of speech. The university can participate in the RDP and still remain critical of it or of government policy in general. Obviously, the university itself should maintain a neutral stand, but allow its members to take particular positions on the matter.[93]

It has also been argued that some of the universities that are now strong supporters of autonomy did not support autonomy during the era of apartheid, and that they were much more prepared to support the erstwhile government's policy while neglecting university autonomy. This may render their support of university autonomy spurious in that it is not based on genuine conviction, but may rather be

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90 Whether this is the case, depends on individual institutions.

91 This is not unique, as a similar attitude existed in Britain – see Brook *The modern university* (1965) 146.

92 This has happened in the history of the United States, which is regarded as a democratic country.

93 Searle *The campus war: a sympathetic look at the university in agony* (1972) 183ff; Lowenthal "The university's autonomy versus social priorities" in Seabury (ed) *Universities in the Western world* (1975) 80.

a reaction to transformation and to the fact that we now have a "black" majority government. That may certainly be true. Whatever the merits of this argument, it must always be remembered that it was good for the prodigal son to return home. In any case, those universities which wrongly supported the government policies of the past did that government a disservice. Moreover, the truth remains the truth and a correct statement remains correct irrespective of who asserts it and irrespective of the motive for asserting it. Even those universities which do not support autonomy today may not be acting without any motive or may not be doing so with altruistic motives. It may be a question of enlightened self-interest. There is obviously nothing wrong with this, provided one allows room for the enlightened self-interest of others. Authoritarianism thrives only where one group feels that it has the right to prescribe to others what to do and those being prescribed to have to accept the prescription without so much as a whimper.

The very fact that those who were previously opposed to university autonomy for political reasons, may now be supporting the concept, may be evidence that those who supported it in the past were correct after all. This should strengthen their support rather than weaken it. Even those who may be sceptical about university autonomy today, may have supported it in the past; so the pot cannot call the kettle black. What may well weaken the support for university autonomy is the fact that universities may once again be divided for political reasons, and may therefore not speak with one voice on this important issue.[94]

Once again, it is essential to emphasise that university autonomy should be used for good ends and not be abused. If it is abused, the government could have a pretext for intervening in the internal management of the universities. As stated earlier, government interference may be a greater evil. Moreover, university autonomy should not be regarded as providing immunity to universities against criticism or as a shield against accountability. University autonomy should go hand in hand with responsibility and accountability. Nor should it be an obstruction to transformation, but transformation should not be imposed from above. It should take place with the full and active participation of university stakeholders. Moreover, it should be aimed at enabling universities to attain their goals and play their roles more effectively rather than simply to foster a particular ideology.

The many injustices which were perpetrated by the previous government may tend to weaken the argument of those who would be critical of the practices of the present government. Many institutions may acquiesce in a number of practices which may infringe university autonomy. Some of them may be plagued by guilt from the past, or they may be afraid that if they are critical of current government policies they could be accused of racism. This unfortunate attitude is nothing new. It was experienced in many of the African states in the past where people acquiesced in these governments' violation of fundamental rights, largely because blacks were in power.[95]

It is necessary to point out that some of the views on transformation are simplistic. They create the false impression that once a university is transformed, it will not experience any turbulence, but will be completely peaceful. This view is not borne

94 It is also well known that two wrongs do not make a right.

95 Many Western countries kept quiet when African countries violated human rights: they were afraid they would be criticised for having double standards because they did the same before independence; for a general discussion of the violation of human rights in Africa, see Dlamini *Human rights in Africa: which way South Africa?* (1995) 45ff.

out by the facts. Even universities that have transformed will still experience a certain measure of turbulence, especially during this era of transition; in fact some of them have already experienced this. Not everything has become new and the old is still coexisting uncomfortably with the new. We still have the legacy of the past. One of the problems of our universities is that many black students come from poor backgrounds and cannot afford to pay fees. This is exacerbated by the culture of entitlement that was created in the past and that is still so pervasive in our society. It is further compounded by the expectations that were created before the election of the first democratic government that there would be free tertiary education.[96]

This is why students have been insisting on a moratorium on "financial exclusions" in the hope that those universities which have huge student debts will write them off. This has not happened. These universities have difficulty in recovering these student debts because many of these students drop out before completing their degrees and are unemployed. When they drop out, the universities concerned lose their subsidies. This makes their financial position all the more parlous. Some of these universities, especially historically black ones, have student debts running into millions of rands. Although the government has introduced the student loan scheme,[97] this scheme does not help all students. Moreover, it is not unconditional, but has need and good performance as a precondition. Many of the historically black universities face this problem more acutely because of the poor secondary education that black students have acquired, which has left them ill-prepared for rigorous university studies. As a result, many of these students may not qualify for financial assistance. This may further weaken their performance, as they are beset by financial worries. Yet they may be unwilling to leave the institutions; hence the call for a moratorium on "financial exclusions".

When university administrators insist that students pay before registration or be excluded, students have resisted this to the extent of boycotting classes and disrupting academic activities. They have used the confrontational approach of the past instead of negotiating.[98] Moreover, the attitude of the students has demonstrated that transformation cannot take place overnight. It has also shown that we need not only structural transformation but also mental or attitudinal transformation.

Universities can play an important role in bringing about proper transformation through rational debate and analysis of the social and political situation. If they exercise their autonomy effectively they can challenge some of the simplistic views on transformation and thus spearhead effective transformation. In any case, universities are in a better position to deal with this because they are affected by the outcome. It is also important to point out that even a transformed council cannot always take popular decisions, something many transformed councils are realising. The transformation of the councils and other structures of governance is important for purposes of legitimacy, but it is not a panacea for all the ills of universities.

Although government intervention in the internal affairs and management of universities is not supported, the government may have to intervene in the affairs of

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96 Any person who tried to caution against these unrealistic expectations in the past was regarded as either a conservative or a reactionary. Today it is a reality that South Africa will not have free tertiary education for a long time to come.

97 This is now regulated by the National Student Financial Aid Scheme Act 56 of 1999.

98 Some of the historically black universities face severe confrontation at the beginning of a year when students insist on being registered without paying fees.

universities to restore law and order if there is lawlessness and a threat to property, life and limb. As I have said, while transformation is supported, certain methods of bringing about such transformation may be insupportable. The philosophy that the ends justify the means has long been discredited and does not belong in academic institutions.

5 CONCLUSION

From the aforegoing it is clear that universities do not exist in a vacuum, but in a social and political context. They are influenced by the society of which they form part and by the policies of the government. The government has considerable influence, especially because it is responsible for the subsidising of universities. Government subsidy is always given with an implicit expectation of loyalty to the government. Such an expectation could be in conflict with the proper role of a university. The greatest threat to academic freedom comes from the government precisely because it controls subsidies and might be tempted to use them to force universities to do certain things which they are not supposed to do.

Although the universities and the government are interdependent, they have distinct roles. It is not desirable that the government should prescribe to universities what to do or what not to do. It should allow them a great degree of autonomy and academic freedom so that they can play their role effectively. Whether or not the government does allow this autonomy and academic freedom depends on whether it is democratic and respects fundamental human rights in general. Authoritarian governments tend to be more interventionist than those that espouse liberal democracy, although the experience in the United States of America, especially during the McCarthy era, demonstrated that even democratic governments can limit autonomy and threaten academic freedom.[99] This led to the Supreme Court in the United States declaring academic freedom a First Amendment concern which is essential for the maintenance of democracy and the creation of a healthy society.[100] On the other hand, the government may see itself as having a legitimate interest in limiting institutional autonomy, in the interests of what it regards as higher ideals of accountability, transparency, responsibility and transformation.

Because academic freedom is protected in the Constitution, there is the probability that universities will be autonomous and enjoy academic freedom. That, however, depends on how the government of this country behaves in future. It will also depend on how this is interpreted and applied by the courts. The courts have not yet had enough time to do this. It is also hoped that the government will learn a lesson from the mistakes of the past government. This cannot be taken for granted, however, and universities themselves must jealously guard their autonomy and academic freedom. The challenge will not be easy, as universities are subjected to conflicting expectations as is invariably the case in a society in transition. The past universities themselves may not be united about the defence or assertion of academic freedom, since, for some it may not be "politically correct" to defend academic freedom.

When governments intervene in university affairs, they usually rely on various pretexts which may obscure their real motives. It is only a government that is not

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99 MacIver *Academic freedom in our time* (1955) 35ff.

100 *Sweezy v New Hampshire* 354 US 234 (1957); *Keyishian v Board of Regents of the State of New York* 385 US 589 (1967).

only committed to democratic values, but also sees the value of knowledge and the production of well-trained manpower that will respect the autonomy of universities – although even an interventionist government can claim this. The position is quite complex. But the universities which enjoy more autonomy and academic freedom are the ones that produce more knowledge and have a better chance of improving the quality of life of people.

Although it has been said that there is scope for the effective protection of academic freedom, a number of pieces of legislation have been passed which tend to erode academic freedom, especially in the form of institutional autonomy. If academic freedom is regarded as the freedom of the university to decide for itself on academic grounds only who may teach, what shall be taught, how it shall be taught and who may be admitted as students, there is no doubt that this is no longer the case. This legislation interferes with what is to be taught and how it must be taught as well as who may be admitted as students. Some of this is justifiable because of what has happened in the past.

Conflict between the universities and the government is often caused by the fact that the government has policies it wants to implement to which universities may be opposed, or of which they may be critical. This may be because these policies are not seen to be in the interests of the universities or society in general. Universities are supposed to be critical of government policies. Criticism is generally not pleasant, even for a democratic government. When governments try to pre-empt this criticism by controlling universities, universities may be opposed to this. But not all universities oppose government policies. Some do, while others may agree with the policies in question. This is largely a question of self-interest. Parochial self-interest, however, is not to the benefit of higher education in general. This was the case in the past in South Africa, and it will always be the case, whatever government is in power.

University autonomy and academic freedom are as vulnerable and as precarious as judicial independence, perhaps because they share some similarities, although, of course, they also differ. Judges are appointed by the executive and there may be an expectation that they should have some loyalty or indebtedness to the executive. If they do not, those who appointed them may either be angry or feel betrayed, especially if the judges give a decision that is unfavourable to the government on a sensitive issue. Similarly, although university staff are not appointed by the government, universities are highly subsidised by the government. With government subsidy comes some expectation of loyalty to the regime. If universities are critical and not supportive of government policy, the government may be irritated and may react by suppressing such criticism in various ways. Judicial independence is as crucial to the role of the judge as academic freedom is to that of the academic and of the university in general.

President Paul Kruger is said to have once remarked that a judge is as free and independent as a fish in a net. He was obviously cynical about judicial independence and was averse to judicial review, which he regarded as the principle of the devil which the devil had introduced in the Garden of Eden to test God's word.[101] This further demonstrates that governments in general do not feel comfortable if their acts are subjected to critical scrutiny, whether by academics or by the courts. To illustrate the point further, it is said that two South African Ministers of Justice, Tielman Roos and Oswald Pirow, both had occasion to complain that certain judges

101 Kotze *Memoirs and reminiscences* (1949) xi–xii; see also Dugard *Human rights and the South African legal order* (1978) 24.

found against the government which appointed them and said: "The trouble about these judges is that they get delusions of grandeur. Having acquired security of tenure, they imagine they were appointed on merit."[102] The same could be said about academics by some government officials. This may be the reason why the British government decided to abolish tenure, which is regarded as fundamental to academic freedom in America.[103]

Although academic freedom is protected in the Constitution, this does not mean that it will easily flourish. Academic freedom, which includes institutional autonomy, sometimes competes with other rights and policies which the government regards as more important. This is the case with transformation. Transformation is a major priority for the current government and sometimes the impression is created that it is regarded as more important than academic freedom. While transformation is important, it is not free from problems and it cannot always trump academic freedom.

Academic freedom cannot be regarded as fixed and immutable. There appears to be a shift in emphasis from academic freedom to accountability. The critical question is how to strike a healthy balance between the two. Academic freedom does not mean that academics should not be expected to account for how they expend the enormous financial resources that are put into university education. What they should not be subjected to, is direction or pressure on how they do their teaching and research and what they should teach or research.

It has been stated that academic freedom demands responsibility or accountability as a *quid pro quo*. Academic responsibility requires the utmost responsibility to other academics, students and the institution and should be encouraged through positive development, encouragement and acceptance of the procedures for safeguarding academic freedom.[104]

External responsibility may be either formal or informal. In a broad sense, responsibility is owed to society, which is the major funder of higher education and its primary beneficiary. Much tension has been experienced in this area over the years, in particular between the demands of academic freedom as against the demands of the funder for accountability. What is debatable, however, is where the boundary should be drawn between the funder and the funded, and to what extent higher education should be accountable to the government and whether such responsibility should be direct or mediated through some intermediary.

In more recent years, the boundaries have shifted and the government requires a greater degree of accountability. Whether or not the increased accountability which is now being demanded is reasonable or is itself an infringement of academic freedom, is debatable. What is important is that accountability, if properly handled, can and should be positive, useful and encouraging.

Finally, the words of Brook are apposite:

> "If university teachers retire into their ivory towers, they will find that they have lost the freedom that they have taken for granted. The best safeguards of academic freedom are: first, the conviction on the part of university teachers that it is worth preserving; second, their ability to convince laymen, whether in the government or the general public, that they are competent to control their own affairs; third, their willingness, in the last resort, to give up their posts if freedom is denied to them; and lastly, the ability to do their job so well that this willingness is a threat that will carry weight."[105]

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102 Cowen 151.
103 Education Reform Act of 1988.
104 Bray *The legal status of the South African university* unpublished LLD thesis UNISA (1993) 92.
105 Brook 158.

Die historiese onderbou van die privaatregtelike ouer-kind verhouding – fondament vir of struikelblok in die implementering van kinderregte?

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SUMMARY

The historical basis of the parent-child relationship in private law – the foundation of or obstacle to the implementation of children's rights?

The parent-child relationship finds expression in the concept of parental power. Parents occupy a position of authority and terminology such as "the right of access" and "the right to custody" strengthens perceptions of parental power. On the other hand, the concept of children's rights is based on the ideology of a child as an independent bearer of fundamental rights and as a family member. This ideology will surely impact on the parent-child relationship. The extent of the impact will be determined by the ideology of this relationship. It is therefore important to trace the historical development of the parent-child relationship on which this ideology is based.

1 INLEIDING

Die ouer-kind verhouding in die Suid-Afrikaanse reg vind uitdrukking in die algemene beginsel dat ouers oor ouerlike gesag beskik wat aan hulle die bevoegdheid verleen om besluite ten opsigte van hul kind se persoon, lewenswyse en boedel te neem.[1] Die algemene beginsel is stewig in die kultuur en struktuur van die gesin gevestig en die praktiese uitvoering daarvan geskied tipies ingevolge volwassenes se verwysingsraamwerk en standaarde. Ouers beklee 'n gesagsposisie en oefen gesagsbevoegdhede oor hul kind uit en terminologie soos 'n ouer se "reg op toegang" of 'n "reg op bewaring" versterk hierdie persepsie. Staatsinmenging in die ouer-kind verhouding is op die beskerming van die kind gemik. Die ideologie onderliggend aan die begrip kinderregte berus op die status van die kind as onafhanklike gesinslid wat ook oor regte beskik. Hierdie ideologie bevestig steeds die gesin as regtens erkende instelling en belangrike gemeenskapsfondament maar voorsien 'n groter mate van horisontale interaksie tussen ouers en kinders as bykomende element in die ouer-kind verhouding. Die ideologie verleen 'n tweeledige rol aan die staat. Daar

1 Van der Vyver en Joubert *Persone- en familiereg* (1991) 592; Spiro *Parent and child* (1985) 30; Erasmus *et al Lee & Honoré Family, things and succession* (1983) 152; Barnard *et al Persone- en familiereg* (1994) 365; Boberg *The law of persons and the family* (1977) 457–459.

word eerstens van die staat verwag om gesinsverhoudinge te respekteer. Tweedens word die staat in die gesinslewe betrek omdat elke gesinslid ook draer van regte is.

Die ratifikasie van die Verenigde Nasies se Konvensie op die Regte van die Kind 1989 (hierna die 1989 Konvensie) en die verlening van fundamentele regte ingevolge die Grondwet[2] bring mee dat hierdie ideologie nou deel van ons regstelsel uitmaak. Die Suid-Afrikaanse Regskommissie[3] wat met die hersiening van die Wet op Kindersorg[4] gemoeid is, het byvoorbeeld die raamwerk vir hul visie soos volg uiteengesit:

> "Accessible, appropriate, consistent and empowering legislation for the children of South Africa is urgently required and will need to be in harmony with the interesting framework of international law and the South African Constitution. In particular, the vision the committee proposes for the new children's statute is inspired by [the United Nations Convention on the Rights of the Child 1989], the OAU Charter on the Rights and Welfare of the Child[5] and relevant clauses in the Bill of Rights in our Constitution. At the heart of our envsiaged model is [the United Nations Convention on the Rights of the Child 1989], which permeates relations between child and family, child and state, child and child, and interstate obligations towards children."

Bogenoemde impliseer dat die erkenning van kinderregte onteenseglik 'n invloed op die ouer-kind verhouding gaan uitoefen. Die aard en omvang hiervan sal bepaal word deur die mate waarin daar versoening tussen die ideologie van kinderregte en die privaatregtelike ouer-kind verhouding is. Die oogmerk van hierdie bespreking is gevolglik om die historiese ontwikkelingsproses waaruit die ouer-kind verhouding uitgekristalliseer het na te gaan. Op hierdie wyse kan bepaal word of daar 'n eiesoortige ideologie onderliggend aan die ouer-kind verhouding is wat tot die erkenning en implementering van kinderregte in Suid-Afrikaa sal meewerk.

2 ROMEINSE REG

2 1 Die Romeinse gesin

Die Romeinse gesin of huishouding (*familia*) het 'n monokratiese regseenheid gevorm. Die gesin het uit 'n *paterfamilias* aan die hoof daarvan en persone onderworpe aan sy gesag (*patria potestas*) bestaan.[6] Die gesinslede het sy vrou ingesluit (indien sy *uxor in manu* was).[7] Die gevolg van 'n huwelik *cum manu* was dat 'n vrou die gesin van haar *paterfamilias* verlaat het en nou deel van haar man se gesinsgroepering gevorm het.[8] Daar is van die term "*manus*" in plaas van "*potestas*" gebruik gemaak om haar man se gesag oor haar uit te druk en vir alle praktiese doeleindes het dit beteken dat sy net soos die kinders aan haar man se *patria potestas* onderworpe was.[9] Uit 'n maatskaplike oogpunt het die *materfamilias* die

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2 Grondwet van die Republiek van Suid-Afrika 108 van 1996 a 7–39.

3 Suid-Afrikaanse Regskommissie *Review of the Child Care Act Issue Paper 13 – Project* 110 (1998) 6.

4 74 van 1983.

5 Onderteken deur SA in Sept 1997. Hierdie Handves sal in werking tree indien dit deur vyftien lidlande geratifiseer is en tot dusver het slegs sewe lidlande dit geratifiseer.

6 G 1 48; *I 8 pr* (vert Thomas): "There follows another division in the law of persons. For some persons are independent (*sui iuris*) while others are subject to another (*alieni iuris*): again, of those who are subject, some are in the power of their parent, others in the power of their master."

7 G 1 109; Thomas *The Institutes of Justinian* (1975) 25–26.

8 Van Oven *Leerboek van Romeinsch privaatrecht* (1948) 449; Van Zyl *Geskiedenis van die Romeinse privaatreg* (1977) 96; Van Warmelo *Inleiding tot die studie van die Romeinse reg* (1957) 72.

9 G 1 108 (vert Scott): "Now let us consider those persons who are in our hand, which right is also peculiar to Roman citizens;" G 1 109 (vertaling Scott): "Both males and females are under the

vervolg op volgende bladsy

hoogste agting in die gesin en in die samelewing geniet en kinders wat uit so 'n huwelik gebore is, het in die *patria potestas* van die man geval.[10] Oorspronklik was elke huwelik *cum manu,* maar gedurende die Republiek het 'n huwelik met uitsluiting van die *manus* tot stand gekom (*sine manu*).[11] Die ontwikkeling hou verband met familiebande wat losser begin word het en die vrou wat geleidelik 'n groter mate van selfstandigheid en onafhanklikheid begin verwerf het.[12] Gedurende die Prinsipaat (27 vC–284 nC) het die huwelik *cum manu* al hoe minder algemeen voorgekom en in die tyd van Justinianus (527 nC–656 nC) het dit heeltemal as instelling verdwyn. 'n Vrou wat *sine manu* getroud was, was geensins meer aan haar man se gesag onderworpe nie en maatskaplik was hulle gelykes in rang en aansien.[13] Die ander gesinslede van die *paterfamilias* was sy binne-egtelike kinders,[14] sy seuns se vrouens indien hulle *cum manu* getroud was, aangenome[15] en gewettigde kinders,[16] diegene in bondgenootskap aan hom verwant[17] en sy slawe.[18] Die Romeinse gesin was nie op bloedverwantskap of op *cognatio* gebaseer nie maar op *agnatio.*[19] Dit het beteken dat die *paterfamilias* ook ouerlike gesag uitgeoefen het oor alle afstammelinge wie se afkoms deur manlike verwante na hom teruggevoer kon word. Hierdie struktuur word in Justinianus se *Institutiones* verduidelik:[20]

> "Whoever, then, is born of you and your wife is in your power: in like manner, one born of your son and his wife, ie your grandson or granddaughter, is equally in your power, as also great-grandchildren and so on. The issue of your daughter, however, is not in your power but in that of his father."

Die *paterfamilias* was die mees senior manlike verwant in die Romeinse huishouding en hy het die middelpunt van die Romeinse gesin gevorm.[21] Die *patria potestas* is ongetwyfeld die belangrikste en kenmerkendste van die absolute regte in die Romeinse reg waardeur die *paterfamilias* sy omvattende mag en gesag oor die lede van die huishouding uitgeoefen het.[22] Van Oven verduidelik die *patriapotestas* soos volg:[23]

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authority of another, but females alone are placed in the hands." Sien ook Van Oven 449; Van Zyl 97; Van Warmelo 72.

10 Kaser/Dannenbring *Roman private law* (1980) 83; Van Zyl 97; Van Warmelo 72.

11 Van Oven 450; Van Zyl 97; Van Warmelo 74–75.

12 Van Zyl 97; Van Warmelo 74–75.

13 Van Oven 450; Van Zyl 97; Van Warmelo 75.

14 *D* 2 4 5 Paulus: Kinders deur die *paterfamilias* se vrou voortgebring, is weerlegbaar vermoed syne te wees ooreenkomstig die stelreël *pater est quem nuptiae demonstrant.* Sien ook G 1 55*; I* 1 9 *pr.*

15 G 1 97; *I* 1 11 *pr* (vert Thomas): "Not only our natural children, however, in accordance with what we have set out above, are in our power but also those whom we adopt."

16 G 1 65–75; G 1 94–95; *I* 1 10 13*; I* 3 12; Thomas 35–36.

17 G 1 49; G 1 116–123; *I* 1 8 *pr;* Van Zyl 81; Van Warmelo 52; Kaser/Dannenbring 74–75; Spiro 1; Van der Vyver en Joubert 593; Labuschagne "Die hoggeregshof as oppervoog van minderjariges – 'n historiese perspektief" 1992 *TSAR* 353.

18 G 1 52; *I* 8 1.

19 G 1 156; *I* 1 15 1.

20 *I* 1 9 3 (vert Thomas).

21 Van Zyl 81; Van Warmelo 52; Kaser/Dannenbring 74–75, 304–305; Spiro 1; Van der Vyver en Joubert 593.

22 G 1 55 (vert Scott): "In like manner, our children whom we have begotten in lawful marriage are under our control. This right is peculiar to Roman citizens, for there are hardly any other men who have such authority over their children as we have, and this the Divine Hadrian stated in the Edict which he published with reference to persons who petitioned for Roman citizenship for themselves and for their children, for he said: 'It does not escape my knowledge that the Galatians hold that children are in the power of their parents.'" *I* 1 9 2 (vert Thomas): "The power that we have in respect of our children is particular to Roman citizens: for there are no other men who have such power over their issue as we do."

23 Van Oven 476.

> "Er is wel geen instelling van Romeinsch privaatrecht, die zoo ver van ons modern rechtsgevoel af staat als deze juridische onderworpenheid van volwassen mannen en vrouwen aan die macht van hun vader of verderen ascendent. Ze bracht mee, dat de *pubertas,* de mondigheid, wat't privaatrecht aangaat, alleen van beteekenis was voor weezen, geëmancipeerden en hen die niet in een wettige Romeinsch huwelik geboren waren; ze paste volkomen in de patriarchale orde van den tijd der XII tafelen, maar was in de laat-republikeinsche en vooral in de klassieke periode een anachronisme geworden. Nergens krasser dan hier uitte zich heet Romeinsche conservatisme, dat ondanks alle verzachtingen en omwegen, het beginsel deed in stand houden zelfs nog in de Iustiniaansche codificatie."

Die *patria potestas* was in die vroegste tye bykans onbeperk en het onder andere beteken dat die *paterfamilias* oor die reg van lewe en dood (*ius vitae necisque*) ten opsigte van sy gesinslede beskik het en hulle selfs as slawe *trans Tiberim* of in Rome kon verkoop.[24] Die omvangryke inhoud van die *patria potestas* het baie duidelik nie tot 'n ouer-kind verhouding in die moderne sin van die woord meegewerk nie en was in beginsel gelyk aan die gesag wat 'n *dominus* oor sy slaaf gevoer het.[25] Die *uxor in manu* en afhanklikes was ook in die posisie dat hulle geen bates van hulle eie kon besit of verkry nie – alles wat die gesinslede verkry het, is tot voordeel van die *paterfamilias* verkry (onderworpe aan sekere uitsonderings).[26]

Die absolute mag van die *paterfamilias* het met verloop van tyd begin afneem. Die *ius vitae necisque* het teen die vierde eeu voor Christus finaal verdwyn en in die plek daarvan het die *paterfamilias* slegs 'n matige tugbevoegdheid behou.[27] 'n Soortgelyke afwatering het ten opsigte van ander inbreukmakings op die kind se persoonlikheid plaasgevind – die *noxae deditio* ingevolge waarvan die *paterfamilias* 'n kind wat 'n delik gepleeg het aan die benadeelde moes oorhandig, het teen die na-klassieke tyd in onbruik verval.[28] Die beperking van die *paterfamilias* se regte het gepaard gegaan met 'n verskeidenheid regte wat nou ontstaan het, byvoorbeeld die verpligting om onderhoud aan sy kinders te verskaf en 'n bruidskat (*dos*) aan sy dogter by haar huweliksluiting te gee.[29] Eersgenoemde verpligting het sedert Antonius (135–161 nC) ingevolge die keiserlike reg ontstaan en was wederkerig in dié sin dat kinders ook in gepaste gevalle vir hul ouers se skuld aanspreeklik gehou kon word.[30]

Die absolute mag wat die *paterfamilias* uitgeoefen het, kan na primitiewe tye teruggevoer word toe die gesin 'n hegte ekonomiese eenheid in 'n landbougeoriënteerde gemeenskap was, met slegs een persoon aan die hoof daarvan wat alle seggenskap gehad het.[31] Die basiese groepering van gesinseenhede het tot in die laat

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24 G 1 116; G 1 117; *I* 1 9 2; Van Oven 477; Kaser/Dannenbring 304–307; Van Zyl 82; Van Warmelo 53–54; Spiro 1; Van der Vyver en Joubert 593.

25 Van Warmelo 53.

26 G 2 86–87; G 2 89; *I* 2 9 *pr–3.*

27 Thomas 27; Van Oven 477; Kaser/Dannenbring 77 305; Van Zyl 83; Van Warmelo 53–55.

28 G 4 75; *I* 4 8 *pr.* Die *actiones noxales* het in werking getree waar 'n slaaf of *filius familias* of 'n ander persoon *in potestate 'n* delik gepleeg het: Kaser/Dannenbring 77 308; Van Zyl 352 353; Van Warmelo 351–353. Volgens Thomas 306 beperk Justinianus die *pater* se aanspreeklikheid slegs tot die gevalle waar 'n delik deur 'n slaaf gepleeg is en in *I* 4 8 7 is dit duidelik dat die *actiones noxales* tov *alieni iuris* in onbruik verval het.

29 *C* 5 12 14; Van Zyl 100 verduidelik dat die morele verpligting om 'n bruidskat aan die dogter te gee teen Justinianus se tyd in 'n regsplig ontwikkel het. Sien ook Kaser/Dannenbring 78 314; Van Warmelo 54–55.

30 *D* 25 3 5 *pr* Ulp; Kaser/Dannenbring 77–78, 314; Van Oven 459.

31 Kaser/Dannenbring 77; Van Warmelo 53.

Romeinse tydperk behoue gebly maar is vanaf die einde van die landboutydperk deur 'n geleidelike disintegrasie van gesinsbande en 'n toenemende mate van individualisering gekenmerk.[32] Daar is veral twee redes wat vir die proses van individualisering aangevoer kan word. Eerstens die verandering van 'n landbougemeenskap na 'n ekonomiese gemeenskap wat om handel en nywerheid sentreer.[33] 'n Tweede rede kan gevind word in 'n lewenswyse wat meer gesofistikeerd begin word het asook die ontwikkeling van ander denkrigtings, versterk deur Hellenisme.[34]

Die sosiale realiteit van 'n ontwikkelende Rome, soos hierbo aangedui, hou verband met die beperkings wat geleidelik op die *patria potestas* geplaas is. Die toenemende sosiale belang in die beskerming van afhanklikes verklaar ook die verpligtinge wat nou deel van die *patria potestas* gevorm het.

2 2 Aard en inhoud van die *patria potestas*

Gesinslede was aan die bykans onbelemmerde mag van die *paterfamilias* onderworpe. Kinders het aan die *patria potestas* onderworpe gebly, ongeag hul ouderdom, solank as wat die *paterfamilias* geleef het.[35] Dit was 'n besondere kenmerk van die Romeinse reg dat 'n vrou nooit die *patria potestas* kon verkry nie.[36]

Die omvang van die *paterfamilias* se gesagsbevoegdhede het byvoorbeeld beteken dat hy sy afhanklikes se huwelike kon verbied[37] of testamentêre voogde vir sy afhanklikes kon aanstel.[38] Volgens Thomas[39] is die treffendste voorbeeld van die *paterfamilias* se magsposisie dié van *substitutio pupillaris* wat verband gehou het met die *impubes* se onvermoë om 'n testament te verly. Hiervolgens kon die *paterfamilias* vir sy kind 'n testament opstel indien hy voorsien het dat sy kind, wat hy as erfgenaam benoem het, voor bereiking van puberteitsleeftyd sou sterf.[40] Die *paterfamilias* kon selfs sy kinders laat aanneem[41] of na willekeur emansipeer.[42] Die *patria potestas* het ook die volgende bevoegdhede ingesluit:

(a) Die reg op lewe en dood wat die ekstreemste van 'n *paterfamilias* se bevoegdhede was.[43] Die uitoefening van die bevoegdheid is waarskynlik so vroeg soos in die Twaalf Tafels (450 vC) onderworpe gestel aan die goedkeuring van 'n gesinsraad (*consilium domesticum*).[44] Teen die bewindstydperk van Konstantyn (306 nC–337 nC) het die reg op lewe en dood nie meer bestaan nie en is die doodmaak van 'n kind gelykgestel aan moord waarvoor die doodstraf opgelê kon word.[45]

(b) Die *paterfamilias* het die bevoegdheid gehad om sy kind te verkoop, waarna so 'n kind as vry Romeinse burger in *mancipio* by die koper gestaan het.[46] Die verkoop van pasgebore babas het tydens die tydperk van ekonomiese verval in die vierde eeu

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32 Kaser/Dannenbring 77; Van Warmelo 54.
33 Kaser/Dannenbring 77; Van Warmelo 54–55 66.
34 Kaser/Dannenbring 77.
35 Kaser/Dannenbring 77 305.
36 *D* 50 16 195 2/5 Ulp; G 1 104; *I* 1 11 10; Kaser/Dannenbring 83; Van Warmelo 52.
37 *I* 1 10 *pr*; Thomas 27 33; Van Oven 453–454; Van Zyl 82.
38 G 1 144; G 1 146; *I* 1 13 3.
39 Thomas 130–131.
40 G 1 179; G 2 180; *I* 2 16 *pr.*
41 G 1 134; *I* 1 11 2.
42 G 1 132; *I* 1 12 6; *I* 1 12 7.
43 Van Oven 477; Kaser/Dannenbring 77 305–306; Van Zyl 82; Van Warmelo 53–54.
44 Kaser/Dannenbring 305; Van Zyl 82; Van Warmelo 54; Thomas 27.
45 Kaser/Dannenbring 305; Van Warmelo 54–55.
46 G 1 116; G 1 117; Kaser/Dannenbring 306; Van Warmelo 54; Thomas 26.

voor Christus voorgekom. Justinianus het dié praktyk net in omstandighede van uiterste armoede toegelaat en onderworpe daaraan dat die kind onder sekere omstandighede weer terugverkry kon word.[47]

(c) Die *patria potestas* kon in die vroeë reg by wyse van 'n *vindicatio* beskerm word.[48] Dit het beteken dat die *paterfamilias* sy kind van 'n ander kon opeis deur op die *vindicatio* te steun. Die prosedure was baie soortgelyk aan dié van die *rei vindicatio*.[49] 'n Spesifieke prosedure is in die klassieke reg ingestel om die *patria potestas* te beskerm. Hierdie prosedure het op twee interdikte gesteun, naamlik die *interdictum de liberis exhibendis* en die *interdictum de liberis ducendis*.[50]

Die beperkings op die uitoefening van die *patria potestas* is aanvanklik deur instellings buite die privaatreg opgelê – veral deur goddelike reg en gewoontes.[51] Die betrokkenheid van die *consilium domesticum* by die *paterfamilias* se uitoefening van sy bevoegdhede het uit gewoonte voortgespruit.[52] Dit is eers vanaf die Prinsipaat dat beperkings van regsweë opgelê is.[53]

Die *censor* het in die Republiek oor die bevoegdheid beskik om politieke of ekonomiese strafmaatreëls in te stel teen 'n *paterfamilias* wat sy gesag misbruik het. Die *censor* se optrede was nie tot spesifieke situasies beperk nie en hy het van geval tot geval geoordeel of daar 'n skending was wat optrede regverdig het.[54] Sy betrokkenheid het teen die laaste eeu voor Christus tot 'n einde gekom en gedurende die Prinsipaat is beperkings op die uitoefening van vaderlike gesag geleidelik opgelê.[55] Thomas[56] wys daarop dat teen die bewindstydperk van Justinianus die instelling van *patria potestas* steeds bestaan het maar dat die inhoudsbevoegdhede baie afgewater was.

3 GERMAANSE REG[57]

3 1 Die Germaanse gesin

Germaanse reg was gewoontereg, tipies van 'n primitiewe gemeenskap in die landboufase van 'n beskawing.[58] Germaanse reg was stamgebonde, wat die gebrek aan eenvormigheid verduidelik, maar twee duidelike temas blyk tog.[59] Die eerste tema hou met 'n begrip eie aan primitiewe gemeenskappe verband, naamlik dié van mag en die persone- en familiereg was spesifiek op die idee van die *munt* gebaseer.[60]

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47 *C* 4 43 2; Kaser/Dannenbring 306; Thomas 26.
48 Kaser/Dannenbring 306–307; Van Warmelo 54.
49 Kaser/Dannenbring 306; Van Warmelo 54.
50 Kaser/Dannenbring 306–307; Van Warmelo 54.
51 Kaser/Dannenbring 75.
52 Kaser/Dannenbring 305; Stoljar "The social legal and historial position of children" in Rheinstein en König *International encyclopedia of comparative law* (1974) vol IV hfst 7 17.
53 *D* 48 8 2 Ulp; Kaser/Dannenbring 305.
54 Kaser/Dannenbring 305; Thomas 27; Stoljar 17.
55 Kaser/Dannenbring 305; Thomas 27.
56 Thomas 27.
57 Hahlo en Kahn *The South African legal system and its background* (1968) 330 verwys na die Germaanse tydperk as die periode vanaf die begin van tye tot en met die einde van die vyfde eeu nC. Die belang van die Germaanse reg vir doeleindes van hierdie studie lê in die tydperk vanaf die vierde tot die vyfde eeu nC.
58 Fockema Andreae *Het Oud-Nederlandsch burgerlijk recht I* (1906) 1; Hahlo en Kahn 342.
59 De Blécourt/Fischer *Kort begrip van het Oud-Vaderlands burgerlijk recht* (1959) 6; Hahlo en Kahn 342; Stoljar 19.
60 Hahlo en Kahn 342; Stoljar 19; Huebner *A history of Germanic private law* (1968) 585–587.

Die *munt* was die vaderlike gesag van die gesinshoof oor sy vrou, onmondige kinders en afhanklikes.[61] Die tweede tema behels die betekenisvolle rol wat die groter gesin (*sib*) in die beskerming van kinders gespeel het.[62]

Die *sib* het enersyds na die uitgebreide gesin verwys, soortgelyk aan die Romeinse *gens,* en het sentraal tot die Germaanse sosiale struktuur gestaan.[63] Die *sib* het uit 'n losse groepering van bloedverwante bestaan, ongeag hoe ver hulle van mekaar verwant was, met 'n patriarg aan die hoof daarvan.[64] Die patriarg is deur 'n familieraad bygestaan wat weer uit hoofde van die onderskeie huishoudings behorende tot die *sib* bestaan het. Die familieraad het byvoorbeeld dissipline oor lede uitgeoefen en as gesamentlike voog oor weduwees en weeskinders opgetree.[65] Dit is maklik om te verstaan hoekom die *sib,* as uitgebreide gesin, so 'n belangrike rol in die vroeë gemeenskap gespeel het:[66]

> "Het huwelijk was de bron der familie. Deze in ruimen zin speelde in het Germaansche recht eene groote rol, vooral in den oudsten tijd. Geen wonder; hoe zwakker de staatsmacht is, hoe minder afdoenden steun de staat den enkelen kan bieden, hoe nauwer zij, die elkaar het naast staan, zich aaneen sluiten, hoe zorgvuldiger zij bijeen blijven, elkaar helpende en schragende in alles waarin zich ieder op zich zelf te zwak voelt. Dat doen vooral zij, die door bloedverwantschap verbonden zijn."

Die term *sib* het andersyds na die gesin in die moderne betekenis van die woord verwys met 'n *paterfamilias* aan die hoof daarvan.[67] Hy het deur huweliksluiting gesag (*munt*) oor sy vrou gevestig en ook oor enige kinders uit haar gebore, ongeag of hy die vader was of nie.[68] Diegene wat aan die *munt* onderworpe was, is deur die *paterfamilias* in die familieraad verteenwoordig en dit is juis in hierdie noue integrasie met die uitgebreide gesin waardeur 'n effektiewe beskermingsmaatreël teen die misbruik van die *munt* geskep is.[69] Die *paterfamilias* kon byvoorbeeld net sy kinders swaar straf nadat die familieraad goedkeuring daartoe verleen het.[70] Op die wyse het die *sib 'n* mate van beheer oor die uitoefening van die *munt* gehad en het die *paterfamilias* nooit vanuit 'n geïsoleerde magsposisie opgetree nie.

Die *munt*[71] het uitsluitlik by die *paterfamilias* berus. Fockema Andreae verduidelik: "Van macht der moeder kon oudtijds geen sprake zijn; zij was zelve niet mondig."

Die vrou se regsposisie het egter geleidelik begin verbeter en sy het stelselmatig regte ten opsigte van haar kinders verkry.[72] Sy het byvoorbeeld die reg op voogdy

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61 Fockema Andreae *Het Oud-Nederlandsch burgerlijk recht II* 209; De Blécourt/Fischer 84; Hahlo en Kahn 342; Stoljar 19; Huebner 585–587, 657–659.

62 Fockema Andreae II 209–210: "Die macht, dat 'mundium' was reeds in den Germaanschen tijd beperkt geweest door een zeker toezicht van de familie; maar hoever dit laatste ging, en waar dus de grenzen van het mundium lagen, is niet met zekerheid te zeggen." Hahlo en Kahn 343–344; Stoljar 20–21; Labuschagne 1992 *TSAR* 354; Huebner 587–588.

63 Hahlo en Kahn 343; Stoljar 20–21; Labuschagne 1992 *TSAR* 354.

64 Hahlo en Kahn 343; Stoljar 20; Labuschagne 1992 *TSAR* 354.

65 Hahlo en Kahn 343; Stoljar 20–21; Labuschagne 1992 *TSAR* 354.

66 Fockema Andreae II 201. Sien ook De Blécourt/Fischer 97; Hahlo en Kahn 344.

67 Hahlo en Kahn 343; Labuschagne 1992 *TSAR* 354.

68 Fockema Andreae II 157; De Blécourt/Fischer 56 84; Hahlo en Kahn 344.

69 Hahlo en Kahn 343–344; Stoljar 20–21.

70 Stoljar 20–21.

71 Fockema Andreae II 2 1 0. Sien ook Huebner 664.

72 Fockema Andreae II 121–122 verwys na die verandering in maatskaplike toestande en opkoms van 'n sterk staatsgesag wat meegebring het dat die vrou se status in die samelewing verbeter het; De Blécourt/Fischer 84: "Ook op de moeder rustte de plicht tot opvoeding . . ."

van die kinders verkry nadat die man oorlede is en die voordele van moederlike sorg en ouerlike samewerking is al hoe meer op die voorgrond gestel.[73] In die geheel gesien, was 'n moeder se posisie steeds ondergeskik aan dié van die *paterfamilias* en verdere ontwikkelinge is as gevolg van die resepsie van die Romeinse reg, wat die ondergeskikte posisie van die vrou beklemtoon het, opgeskort.[74]

3 2 Die inhoud van die *munt*

Die gesin in die eng sin van die woord was aan die *munt* van die *paterfamilias* onderworpe. Die *munt* was aanvanklik, soos die *patria potestas* van die vroeë Romeinse reg, onbeperk en het wesenlik uit 'n versameling bevoegdhede bestaan.[75] De Blécourt/Fischer verduidelik soos volg:[76]

> "Gelijk bij alle andere gezagsverhoudingen, die onder het begrip mundium vielen, zo werd ook en vooral bij den vader en den voogd *aanvankelijk* de nadruk gelegd op het *recht* van hem, die het mundium had, . . ."

Die *paterfamilias* het ingevolge sy omvangryke gesagsbevoegdhede oor die reg op lewe en dood oor sy vrou en kinders beskik en kon hulle ook in slawerny verkoop.[77] Die uitoefening van die *munt* moet teen die agtergrond van die *sib* se toesighoudende rol gesien word en dit beteken dat uiterste optrede, soos hierbo genoem, nie sonder meer plaasgevind het nie.[78]

Die *munt* is met verloop van tyd getemper en die idee het ontwikkel dat die *paterfamilias* ook verpligtinge het teenoor diegene wat aan sy gesag onderworpe is.[79] Fockema Andreae[80] maak die volgende algemene opmerking oor die aard van die ouer-kind verhouding:

> "De bepalingen, die duidelijk licht geven over de rechtsbetrekkingen tusschen ouders en wettige kinderen staande huwelijk, zijn niet talrijk, wij zullen den grond hiervoor wel niet hebben te zoeken in het ontbreken van eene algemeene rechtsovertuiging hieromtrent, maar veeleer in het onnoodige van uitdrukkelijke regeling, omdat de natuurlijke verhouding van zelf den weg wees."

De Blécourt[81] verwys byvoorbeeld na die plig om onderhoud en opvoeding aan kinders te verskaf; die reg om as verteenwoordiger van 'n kind op te tree, en

> "[h]et recht om het meisje uit te huwelijken, en later dat om toestemming tot het huwelijk van het kind of den pupil te geven of te weigeren, vloeide eveneens uit het mundium voort".

Fockema Andreae bespreek die volgende elemente van die *munt*:[82]

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73 Fockema Andreae I 216–218 222; Studiosus "Die aard van die gesagsregte van ouers ten opsigte van hul minderjarige kinders" 1946 *THRHR* 32 34.

74 Fockema Andreae II 216: "Intusschen, als uitoefening daarvan [regte of pligte van ouers] door één noodig is, is het de vader, die er voor opkomt." De Blécourt/Fischer 84: "De *vaderlijke* macht is eerst in die 20e eeuw in *ouderlijke* macht veranderd" en "Aangezien vrouwen, om voor het gerecht op te treden, een gekoren voogd nodig hadden, kon de molder-voogdes natuurlijk haar kind niet voor het gerecht vertegenwoordigen, doch behoefde zij hiertoe den bijstand van een gekoren voogd." Stoljar 23; Studiosus 1946 *THRHR* 34.

75 De Blécourt/Fischer 84; Hahlo en Kahn 344; Huebner 657–658.

76 De Blécourt/Fischer 84.

77 De Blécourt/Fischer 84; Hahlo en Kahn 344; Stoljar 21–22.

78 Fockema Andreae II 209–210.

79 Fockema Andreae II 210; De Blécourt/Fischer 84; Hahlo en Kahn; Stoljar 21–22.

80 Fockema Andreae II 216.

81 De Blécourt/Fischer 84.

82 Fockema Andreae II 217–221.

(a) Die verpligting van ouers om hul kinders te beskerm.

(b) Die ouers se verpligting om hul kinders te onderhou en op te voed. Ouers kon in dié verband 'n matige tugbevoegdheid uitoefen.

(c) As teenkant van ouers se plig tot opvoeding van hul kinders, het hulle die vruggebruik van kinders se bates gehad.

(d) Ouers moes hul kinders in regshandelinge verteenwoordig.

(e) Ouers was aanspreeklik vir skade wat deur hul kinders veroorsaak is en boetes wat aan die kinders opgelê is.

'n Verklaring vir die geleidelike afwatering van die *munt* kan na die volgende stelling van Fockema Andreae teruggevoer word:[83]

> "Kinderen hebben verzorging noodig én om hunne geestelijke onrijpheid én om hunne lichamelijke hulpbehoevendheid. *Deze laatste was wel de gewichtigste grond,* waarom zij in de oud-Germaansche maatschappij niet voor vol konden gelden."

Bogenoemde verteenwoordig 'n nuwe benadering waar die ondergeskikte posisie van die minderjarige ingevolge liggaamlike hulpbehoewendheid verklaar word. Dit is in teenstelling met die vroeëre benadering waar die kind as ekonomiese bate beskou is en aan vaderlike gesag onderworpe was omdat dit vermoënsregtelik vir die vader voordelig sou wees.[84] Die nuwe benadering het beteken dat vaderlike gesag tot voordeel van die kind en nie tot voordeel van die vader nie uitgeoefen moes word.[85] Die *munt* as absolute en onbeperkte gesagsvorm is onversoenbaar met so 'n veranderde benadering ten opsigte van kinders en volgens Studiosus[86] "het die 'mundium'-begrip mettertyd heeltemal sy magskarakter verloor en al hoe meer 'n versorgingsplig geword".

Die regsgevolge van die *patria potestas* en die *munt* het breedweg ooreengestem maar die regsteorieë onderliggend aan elkeen van die twee konsepte het betekenisvol verskil.[87] In die geval van die *patria potestas* het die klem op die regte van die *paterfamilias* geval terwyl die *munt* 'n kompleks van regte en verpligtinge was.[88] Tweedens was die *patria potestas* 'n soort mandaat wat deur die staat aan die *paterfamilias* verleen is en waarmee hy met 'n groot mate van onafhanklikheid binne sy huishouding beklee is. Die *munt* was eerder 'n algemene riglyn vir optrede, stewig in gebruike gevestig en met die *sib* aktief betrokke by die praktiese uitoefening daarvan.[89] Laastens was die *patria potestas* 'n besonder rigiede konsep wat formeel slegs deur wetgewing verander is. Die *munt,* daarenteen, was 'n vloeibare konsep wat vatbaar was vir eksterne invloede, soos byvoorbeeld dié van die kerk, en dus sensitief vir veranderings soos deur die sosiale orde weerspieël.[90]

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83 Fockema Andreae I 112.
84 Hahlo en Kahn 344 en vn 54; Stoljar 4; Studiosus 1946 *THRHR* 33.
85 Studiosus 1946 *THRHR* 33.
86 *Idem* 33–34.
87 Stoljar 231.
88 *Ibid.*
89 *Ibid.*
90 *Ibid.*

4 FRANKIESE REG[91]

4 1 Die gesin in die Frankiese reg

Gedurende die Frankiese tydperk (tussen die vyfde en negende eeu) het die Germaanse volkere hul stamgebondenheid oorkom en in groter politieke eenhede saamgesmelt.[92] Die sosiale orde het nou ander magsgroeperings weerspieël wat in die reg in die algemeen en in die persone- en familiereg spesifiek neerslag gevind het. 'n Sterk sentrale regering was aan die orde van die dag en die idee van die *sib* as sosiale eenheid en gesagsliggaam het begin vervaag.[93] Die vader het as individuele voog op die voorgrond getree en die gesamentlike voogdy wat deur die *sib* oor minderjariges uitgeoefen is, vervang.[94] Met die dood van die vader is sy voogdy oor minderjarige kinders gewoonlik aan sy oudste seun oorgedra (of aan enige ander manlike verwant) wat dan as *tutor legitimus* opgetree het.[95] Die koning, as beskermheer van alle onweerbares teen geweld, is geleidelik as oppervoog van alle minderjariges gesien en het so die toesighoudende rol van die gesinsraad vervang.[96] Hy het sy voogdyskap deur die *curia regis* uitgeoefen en so die *Obervormundschaft* of *suprema tutela* oor alle minderjariges verkry. Daarmee is die gedagte van die hoër hof as oppervoog oor alle minderjariges gevestig.[97]

4 2 Die inhoud van vaderlike gesag

Volgens Hahlo en Kahn[98] is die uitstaande kenmerk van die Frankiese tydperk die transformasie van natuurlike voogdy as 'n somtotaal van regte of bevoegdhede na natuurlike voogdy as 'n somtotaal van regte en verpligtinge. Die Frankiese ryk was teen die agste eeu sodanig onder invloed van die Christelike leer dat dit as 'n Christendom bekend gestaan het – 'n feit wat onteenseglik 'n invloed op die ouer-kind verhouding moes uitgeoefen het.[99] Studiosus[100] verwys soos volg hierna:

> "Die besondere invloed van die Christendom op die onderlinge verhouding tussen ouer en kind blyk uit die herhaalde verwysings na die Heilige Skrif in die Romeins-Hollandsregtelike bronne. Dit is heeltemal verstaanbaar aangesien gesinsverhoudings in baie opsigte meer van sedelike as juridiese aard is."

By gebrek aan inligting tot die teendeel kan aanvaar word dat vaderlike gesag met die geboorte van 'n kind uit 'n wettige huwelik, deur wettiging van buite-egtelike kinders en deur aanneming ontstaan het.[101] Vaderlike gesag was steeds omvangryk, met 'n moontlike tempering daarvan onder invloed van die Christelike leer. Kinders was egter steeds in 'n ondergeskikte posisie.

Anders as in die Romeinse reg was 'n kind wel bevoeg om eiendomsreg van bates te verkry maar onderworpe aan die administrasie daarvan deur die vader.[102] Solank as wat die kind in die vader se huis gebly het, het laasgenoemde 'n soort vruggebruik oor die bates van die kind gehad.[103]

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91 Vyfde eeu nC-negende eeu nC.
92 Hahlo en Kahn 400.
93 Hahlo en Kahn 362–367, 400.
94 Hahlo en Kahn 386, 400; Labuschagne 1992 *TSAR* 354.
95 Fockema Andreae II 224; De Blécourt/Fischer 86.
96 Fockema Andreae I 122; Hahlo en Kahn 386.
97 Hahlo en Kahn 386; Labuschagne 1946 *THRHR* 355.
98 Hahlo en Kahn 400.
99 Hahlo en Kahn 367–368; Studiosus 1946 *THRHR* 34.
100 Studiosus 1946 *THRHR* 34.
101 Fockema Andreae II 209–221; De Blécourt/Fischer 83–88; Studiosus 1946 *THRHR* 35–36.
102 Hahlo en Kahn 383; Stoljar 23–24.
103 De Blécourt/Fischer 86–87; Hahlo en Kahn 383.

5 ROMEINS-HOLLANDSE REG

5 1 Die gesin in die Romeins-Hollandse reg

'n Stelsel van voogdyskap het ontwikkel wat weinig met die *patria potestas* van die Romeinse reg in gemeen gehad het.[104] Van Leeuwen skryf in dié verband:[105]

> "De grote en bysondre magt die de Romeynen over hare Kinderen hadden, komt met de manieren van ons Land niet over een. Sodanig dat deselve huydendaags by na nergens anders in bestaat; als in de eerbiedigheid, die de Kinderen, van Godes wegen, hare Ouders schuldig zyn: en aan de ander zyde, in een sekere bystand, en hulp by de Ouders in't mede uitwerken, of uitvoeren van hare Kinders saken te doen."

Die moeder het ook oor sekere regte ten opsigte van binne-egtelike kinders beskik en dit is daarom meer gepas om na ouerlike gesag te verwys en nie net na vaderlike gesag nie.[106] Met die dood van die vader het die ouerlike gesag in die moeder gesetel en ook andersom, selfs al is 'n voog aangestel om die kind se boedel te administreer.[107] Al het die ouerlike gesag oor binne-egtelike kinders albei ouers toegekom, was die moeder se regte ondergeskik aan dié van die vader en is hy as voog van die kinders gesien.[108] Die moeder was wel die voog van buite-egtelike kinders.[109]

Die verhouding tussen grootouer en kleinkind het ook betekenisvol van die posisie in die Romeinse reg verskil. Voet sit die posisie soos volg uiteen:[110]

> "By Roman law it was held that grandsons born to a son still under power were in the power of the grandfather, so that while he was alive the power of the midway father was hardly to be seen. But by the law of our country the better view is that the grandsons are in the power of the father alone, not of the grandfather, and that not even after the father's death will they be bound by the ties of the grandfather."

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104 De Groot 1 6 3; Groenewegen *De leg abr* 1 9 2; Van Leeuwen *RHR* 1 13 1; Van der Linden *Koopmans handboek* 1 4 1.

105 Van Leeuwen *RHR* 1 13 1.

106 De Groot 1 7 9: "Door uiterste wille werden voogden ghestelt zoo by de moeder als by de vader, de welcken in desen ghelijcke macht hebben, sulcks oock dat voogden by den eerstoverlijdende zijnde ghestelt, de langst-levende daer nae mede voogden mag stellen met gelijck recht, ende heeft dit plaets soo wel ten aenzien van geboren als ongheboren kinderen . . ."; Voet 1 6 3 (vert Gane): "Let him only keep in mind that those effects of paternal power which survived in the later Roman law have been to a great extent done away with by the customs of most nations; or, if not done away with, have been shared with the mother." Voet 27 2 1; Van der Linden *Koopmans handboek* 1 4 1: "Zij [de magt der ouders over hunne kinderen] komt niet slechts aan den vader, maar ook aan de moeder toe, en, na's vaders dood, aan de moeder alleen. Zij bestaat in een algemeen toevoorzigt over het onderhoud en de opvoeding hunner kinderen, en de beheering van derzelver goederen . . . De ouders zijn bevoegd om, bij hun overlijden, in de voogdije hunner kinderen te voorzien." Studiosus 1946 *THRHR* 35–42.

107 De Groot 1 7 8: "Wel is waer dat de langst-levende der ouderen, schoon by uiterste wille oft by d'overheid niet mede gestelt zijnde tot voogd, altijd behoud de opzicht die de zelve nae de aengeboren ende gegeven Goddelicke wet toekomt, ende over-zulcks in't huwelick van de kinderen het meeste zeggen heeft, gelijck oock in de opvoedinge der kinderen op des selfs raed zonderling werd gelet. Maer alle rechts-plegingen werden ghevoert op der voogden naem, dien oock het bewind der goederen toe-komt."; Van der Linden *Koopmans handboek* 1 4 1; Wessels *History of the Roman-Dutch law* (1908) 422–423.

108 De Groot 1 6 1: "Van dese onbestorvene kinderen komt de voogdije de vader toe, die als vader ende voogd voor de selven in rechte spreeckt: ende voorts 't bewind heeft van de goederen, die haer door erffenisse ofte anderzints mogen aengekomen zijn, op zodaniger wijze, als der wezen voogden doen"; Lee 36–37; Studiosus 1946 *THRHR* 42.

109 Van der Linden *Koopmans handboek* 1 4 2: "Kinderen, in onecht geteeld, staan niet onder de magt van den vader, maar wel van de moeder, als welke geen bastaard maakt." Fockema Andreae II 210; De Blécourt/Fischer 85.

110 Voet 1 6 4 (vert Gane).

Die implikasie was dat die grootouers regtens nie met die ouer-kind verhouding kon inmeng nie.[111]

Aanneming, wat so 'n belangrike rol in die Romeinse reg vervul het, het nie as instelling bestaan nie, behalwe in Friesland.[112] Dit verklaar waarom aanneming nie by die verkryging of beëindiging van ouerlike gesag bespreek word nie.[113]

Kinders onder die ouderdom van vyf-en-twintig jaar[114] is as minderjarig beskou en was onder die voogdy van hulle ouers of 'n ander voog.[115] Alle minderjariges waarvan een of albei ouers oorlede is, is as weeskinders gesien en een of meer voogde mocs vir hulle aangestel word.[116] Laasgenoemde voogde is kragtens testament of deur die toepaslike gesagsliggaam aangewys.[117] 'n Oorlewende ouer het steeds ouerlike gesag gehad maar dit is uitgeoefen naas die spesifieke verantwoordelikhede wat aan 'n aangewese voog opgedra is.[118]

5 2 Die inhoud van ouerlike gesag

Die aard, inhoud en omvang van ouerlike gesag het betekenisvol van die posisie in die Romeinse reg verskil en word soos volg deur Voet bespreek:[119]

> "Let him only keep in mind that those effects of paternal power which survived in the later Roman law have been to a great extent done away with by the customs of most nations; or, if not done away with, have been shared with the mother. A father cannot now sell his child in case of neediness. Nor does he with us get the usufruct of a son's property coming from sources other than the father. Nor does he make pupillary substitution with the consequences which it used to produce in Roman law. Nor does he enjoy the right of substitution to a greater extent than the mother. In respect of marriage also, while the father's consent is required, yet, if he is wanting, the mother's consent must be obtained up to the same age . . ."

Kinders was gehoorsaamheid aan hul ouers verskuldig, 'n verpligting wat De Groot op die natuurreg baser:[120]

> "Wat het zonderlinge opzicht aengaet, hoe wel het sijn gedaente bekomt uit de burgerwetten, heeft nochtans sijn oorspronck uit het aengheboren recht: want het zelve leert ons, dat de kinderen, als haer wezen naest God van haer ouders ontfanghen hebbende, de zelve haer ouders daer over alle eer, danck ende onderdanigheid schuldig zijn."

Dié verpligting tot gehoorsaamheid het na die bereiking van meerderjarigheidstatus voortgeduur.[121]

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111 Groenewegen *De leg abr* 1 9 3; Voet 1 6 4, 23 2 15; Van der Linden *Koopmans handboek* 1 3 6; Wessels 423.

112 De Groot 1 6 1, 1 6 3; Groenewegen *De leg abr* 1 11; Van Leeuwen *RHR* 1 13 3; Voet 1 7 7; Van der Linden *Koopmans handboek* 1 4 2.

113 Van der Linden *Koopmans handboek* 1 4 2.

114 De Groot 1 7 3; Groenewegen *De leg abr* 1 12 3; Van Leeuwen *RHR* 1 13 6; Van der Linden *Koopmans handboek* 1 4 3.

115 De Groot 1 6 1, 1 7 7–1 7 10, 1 7 13.

116 De Groot 1 7 2.

117 De Groot 1 7 9–1 7 10, 1 7 13, 1 7 16: "Welverstaende dat de wezen noit voogdeloos en moghen zijn, maer de voogden by overlijden ofte andersints ontbreeckende moete terstond anderen in haer plaetse ghestelt werden."

118 De Groot 1 7 8.

119 Voet 1 6 3 (vert Gane).

120 De Groot 1 3 8. Sien ook Van Leeuwen *RHR* 1 13 1: "De grote en bysondere magt die de Romeynen over hare Kinderen hadden, komt met de manieren van ons Land niet over een. Sodanig dat deselve huydendaags by na nergens ander in bestaat; als in de eerbiedigheid, die de Kinderen, van Godes wegen, hare Ouders schuldig zyn . . ."

121 De Groot 1 6 4: "De kinderen op een dezer wijzen van de vaderlicke hand zijnde ontslaghen, bekomen daer door het bewint haerder goederen ende macht om recht te spreecken: blijvende

vervolg op volgende bladsy

Ouerlike gesag het in die Romeins-Hollandse reg uit die volgende elemente bestaan:

(a) Ouers was vir hul kinders se opvoeding, versorging en beskerming verantwoordelik.[122] Die versorgingsplig is as teenprestasie beskou vir die gehoorsaamheid en eerbied wat kinders aan hul ouers verskuldig was.[123] Die versorgingsplig was omvangryk en het die verskaffing van kos, klere, huisvesting, mediese behandeling en verstandelike, sedelike en godsdienstige opvoeding ingesluit.[124] Die versorgingsplig was albei ouers se verantwoordelikheid, elkeen na sy of haar onderskeie vermoë.[125]

(b) Terwyl albei ouers geleef het, was die vader vir die bestuur en administrasie van die kind se boedel verantwoordelik.[126]

(c) 'n Minderjarige moes albei ouers of die oorlewende ouer se toestemming tot huweliksluiting verkry.[127] Van Leeuwen verklaar uitdruklik dat die ouers se bevoegdheid om toestemming tot die huwelik te verleen, deel vorm van hul ouerlike gesag.[128] Die toestemmingsvereiste is ook statutêr gereël by wyse van die Ewige Edik van Keiser Karel van 4 Oktober 1540 en die Politieke Ordonnansie van 1 April 1580.[129] 'n Plakkaat van Holland van 31 Julie 1671 het spesifiek bepaal dat die woord "ouers" in artikel 3 van die Politieke Ordonnansie van 1580 die vader en moeder beteken en nie die grootvader nie.[130]

(d) Kinders is deur hul vader in litigasie verteenwoordig.[131]

(e) Ouers kon uit hoofde van hul ouerlike gesag testamentêre voogde vir hul kinders aanstel.[132] Albei ouers het oor dié bevoegdheid beskik, 'n aspek wat deur De Groot beklemtoon word:[133] "Sulks oock dat voogden by den eerst-overlijdende zijnde ghestelt, de langst-levende daer naemede voogden mag stellen met gelijck recht."

'n Ouer kon nie met die aanwys van 'n testamentêre voog die ander ouer se beheer en toesig oor die kind ontneem nie. De Groot sit die posisie soos volg uiteen:[134]

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voorts altijd plichtig haere ouders gehoorzaemheid ende eerbiedinghe te bewijzen volgens de aengebooren ende Goddelicke gegeven wet." Van Leeuwen RHR 1 13 3: "De magt dan die, en sodanig de Ouders over hare Kinderen hebben, is niet geduyrig, maar houd op, en eyndigt by sekere voor-vallen: blyvende niet-te-min de Kinderen altijd schuld-pligtig, hare Ouderen gehoorsaamheid, en alle eerbiedigheid te bewysen, volgens de aangeboren, en gegeven Goddelijke Wetten."

122 De Groot 1 6 6; Van Leeuwen *RHR* 1 13 1, 1 13 7; Van der Linden *Koopmans handboek* 1 4 1.

123 Van Leeuwen *RHR* 1 13 8; Van Leeuwen *CF* 1 10 5; Voet 25 3 4; Groenewegen *De leg abr ad D* 34 1 15.

124 *Ibid.*

125 De Groot 1 6 1; Van Leeuwen *CF* 1 10 1; Voet 25 3 6–7.

126 De Groot 1 6 1, 1 6 4; Van der Linden *Koopmans handboek* 1 4 1.

127 De Groot 1 5 14–16; Groenewegen *De leg abr* 1 10 2; Van Leeuwen *RHR* 1 12 1, 1 12 4, 1 13 1, 1 14 *pr,* 1 14 6; Voet 23 2 11, 23 2 13; Van der Linden *Koopmans handboek* 1 3 2, 1 3 6, 1 4 1.

128 Van Leeuwen *RHR* 1 14 *pr.*

129 Studiosus 1946 *THRHR* 39–40.

130 *Idem* 40.

131 De Groot 1 6 1.

132 *Idem* 1 3 8: "Maer alzo kinderen, in haere jonge jaeren omnachtig zijnde haer zelven te bestieren, oock niet wijs genoeg en waeren om haer zelven een bestierder te kiezen, zo hebben de ouders hare vrunden verzocht, om by haer aflijvigheid die zorghe aen te nemen." Sien ook De Groot 1 7 9; Voet 27 2 1; Van der Linden *Koopmans handboek* 1 4 1.

133 De Groot 1 7 9; Wessels 422.

134 De Groot 1 7 8; Studiosus 1946 *THRHR* 41–42.

> "Wel is waer dat de langst-levende der ouderen, schoon by uiterste wille . . . niet mede gestelt zijnde tot voogd, altijd behoud de opzicht die de zelve nae de aengeboren ende gegeven Goddelicke wet toekomt; ende over-zulcks in 't huwelick van de kinderen het meeste zeggen heeft, gelijck oock in de opvoedinge der kinderen op des selfs raed zonderling werd gelet. Maer alle rechts-plegingen werden ghevoert op der voogden naem, dien oock het bewind der goederen toe-komt."

(f) Kinders was gehoorsaamheid aan hul ouers verskuldig en in dié verband kon ouers 'n matige tugbevoegdheid uitoefen.[135]

(g) Albei natuurlike ouers was vir die onderhoud van hul kinders (ook buite-egtelike kinders) aanspreeklik.[136] Die onderhoudsplig was wederkerig in dié sin dat kinders in gepaste gevalle vir die onderhoud van hul ouers aanspreeklik gehou kon word.[137]

6 SUID-AFRIKAANSE REG

6 1 Algemeen

Die Romeins-Hollandse reg is as gemenereg in Suid-Afrika aanvaar en reël tot op hede primêr die ouer-kind verhouding, onderworpe aan statutêre bepalings.[138] Die Wet op Voogdy[139] verteenwoordig byvoorbeeld die ingrypendste wysiging van die gemenereg en bepaal onder andere dat 'n vrou voog van haar minderjarige kinders gebore uit 'n huwelik is en dat sodanige voogdy gelykwaardig is aan dié wat 'n vader kragtens die gemenereg ten aansien van sy kinders het. Daar word met enkele opmerkings volstaan ten einde die aard van die ouer-kind verhouding in die moderne reg te illustreer.

6 2 Aard van die ouer-kind verhouding

In die moderne Suid-Afrikaanse reg word die ouer-kind verhouding tipies vanuit die ouers se posisie verklaar.[140] Weliswaar val die klem nie soseer net op ouerlike gesag ten koste van kinders nie maar word ouers se posisie in die konteks van 'n kompleksiteit regte, verpligtinge en verantwoordelikhede verstaan wat in die beste belang van die kind uitgeoefen moet word.[141] Spiro sien byvoorbeeld ouerlike gesag as die somtotaal van ouers se regte en verpligtinge teenoor hul minderjarige kinders wat uit hoofde van hul ouerskap ontstaan.[142] Dit is volgens hom juis die besondere wisselwerking tussen die regte en verpligtinge wat ouerlike gesag in die besonder kenmerk.[143] Van der Vyver en Joubert maak van die begrip "ouerlike mag" gebruik, wat volgens hulle uit kompetensiebevoegdhede bestaan en naas ouers se verpligtinge ten opsigte van hul minderjarige kinders, die inhoud van ouerlike mag vorm.[144]

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135 Van Leeuwen *RHR* 1 13 1; Van Leeuwen *CF* 1 9 4; Van der Linden *Koopmans handboek* 1 4 1.

136 De Groot 1 9 9; Van Leeuwen *RHR* 1 13 7–8; Voet 25 3 4–5; Van der Linden *Koopmans handboek* 1 4 1.

137 Voet 25 3 8.

138 Hahlo en Kahn 566–578; Hahlo en Kahn *The Union of South Africa and its Constitution* (1960) 13 345–391; Spiro (vn 1) 5–7; Lee (vn 108) 2–14; Studiosus 1946 *THRHR* 42–53.

139 192 van 1993 a 1(1).

140 Van der Vyver en Joubert 592; Spiro 81–82; Erasmus *et al* 152; Barnard *et al* 13; Boberg 457–459.

141 Erasmus *et al* 152; Boberg 457–458; *Landman v Mienie* 1944 OPD 59 61–66; *Hornby v Hornby* 1954 1 SA 498 (O) 500; *Lynch v Lynch* 1965 2 SA 49 (R) 152; *Meyer v Van Niekerk* 1976 1 SA 252 (T) 255–257.

142 Spiro 36 41–43.

143 Spiro 36 42.

144 Van der Vyver en Joubert 592.

Barnard, Cronjé en Olivier omskryf die ouer-kind verhouding as 'n *consortium omnis minoritatis* wat teen inbreukmaking deur derdes beskerm kan word.[145] 'n Uiteensetting van die inhoud van ouerlike gesag kom algemeen in regsliteratuur voor en word aan die hand van bewaring, voogdy en die onderhoudsplig teenoor kinders bespreek.[146] Daar word binne hierdie kategorisering klem gelê op aspekte soos die ouers se bystand aan 'n kind ten opsigte van regshandelinge, die administrasie van die kind se boedel en beheer oor die persoon van die kind.[147] Ouers beskik oor omvangryke bevoegdhede en kan byvoorbeeld hul kinders se vriende bepaal. Dit word as deel van ouerlike gesag aanvaar dat ouers oor 'n tugbevoegdheid beskik ten einde gehoorsaamheid by hul kinders af te dwing.[148] Gemeenregtelik is aanvaar dat ouers en kinders se belange ooreenstem en dat ouers in die beste posisie is om besluite rakende hul kinders te neem.[149] In die afwesigheid van wetgewing is dit ook die posisie in die moderne Suid-Afrikaanse reg.

Die staat toon 'n traagheid om in te meng met die uitoefening van ouerlike gesag in 'n "normaal" funksionerende gesin. Ouerlike outonomie en die reg op gesinsprivaatheid is steeds geldende gemeenskapswaardes. In die gevalle waar daar wel met ouerlike gesag ingemeng word, is die oogmerk beskermend van aard. Die staat verseker byvoorbeeld ingevolge die Wet op Kindersorg[150] dat minimum standaarde van ouerlike sorg nagekom word. Die statutêre bepalings ten opsigte van skoolopvoeding bevestig die staat se belang daarin dat kinders 'n minimum standaard van onderrig sal ontvang.[151] In ander gevalle omskryf die wetgewer presies hoe ouerlike gesag uitgeoefen moet word, byvoorbeeld dat beide ouers van 'n minderjarige kind toestemming tot huweliksluiting moet verleen.[152] Die gevalle waar die wetgewer uitdruklik handelingsbevoegdheid aan minderjariges verleen, beteken dat ouerlike gesag ten opsigte van spesifieke regshandelinge heeltemal uitgesluit word. Hierdeur word beskerming aan derdes verleen maar dit is onseker wat die implikasies daarvan binne gesinsverband is. Behalwe vir hierdie standaarde en riglyne word dit aan ouers oorgelaat om in die uitoefening van hul diskresie besluite vir en namens hul kinders te neem.

Die rol van die hooggeregshof as oppervoog van minderjariges is primêr beskermend van aard.[153] Gegewe die historiese ontwikkeling[154] van die hooggeregshof as beskermer van die weerloses is hierdie benadering geensins vreemd nie. Die hof se bevoegdheid om met spesifieke besluite van ouers in te meng, is tot dusver beperk

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145 Barnard *et al* 365.

146 Spiro 81–210 385–444; Van der Vyver en Joubert 607–614 626–632; Barnard *et al* 371–379; Erasmus *et al* 161–174; Boberg 457–526.

147 *Ibid.*

148 Boberg 466–468; Spiro 89; Van der Vyver en Joubert 610; *Meyer v Van Niekerk* 1976 1 SA 252 (T); *Coetzee v Meintjies* 1976 1 SA 257 (T); *Gordon v Barnard* 1977 1 SA 887 (K); *H v I* 1985 3 SA 237 (K); *L v H* 1992 2 SA 594 (K).

149 Barnard *et al* 320; Boberg 465; Erasmus *et al* 163; Spiro 89; Van der Vyver en Joubert 610; *Germani v Harf* 1975 4 SA 887 (A); *Du Preez v Conradie* 1990 4 SA 46 (B).

150 74 van 1983.

151 Suid-Afrikaanse Skolewet 84 van 1996.

152 Wet op Voogdy a 1(2)(a) en ook res van subartikel.

153 Die beskermende rol van die hof is histories sterk gefundeer: sien Labuschagne 1992 *TSAR* 353–357.

154 Boberg 412–413 en gesag aldaar; Labuschagne 1992 *TSAR* 353–357; Spiro 3 4 116 183 257–258 en gesag aldaar.

tot gevalle waar daar konflik tussen ouers of 'n ouer en 'n derde was.[155] Die primêre oorweging is die beste belange van die kind in hierdie tipe konfliksituasies. Dit was tot dusver nog nie vir die hof nodig om te beslis in watter omstandighede inmenging in 'n ouer-kind konfliksituasie geregverdig sal wees nie. Dit is gevolglik onseker of die hooggeregshof as oppervoog die beste belange van 'n kind byvoorbeeld so sal interpreteer dat ouerlike gesag ondergeskik gestel sal word aan selfstandige besluitneming deur die kind.

7 GEVOLGTREKKING

Die grondslag van die ouer-kind verhouding strek so ver terug as die Romeins-regtelike *patria potestas* en die Germaanse *munt*.[156] Die voorafgaande ontleding van die historiese ontwikkeling van hierdie verhouding regverdig die volgende gevolgtrekkings:

(a) Daar het 'n evolusie plaasgevind vanaf die alvermoë van die Romeinse *paterfamilias* tot by die Romeins-Hollandse reg waar albei ouers gesag oor binne-egtelike kinders kon uitoefen en ouerlike gesag deur 'n kombinasie van regte en verpligtinge gekenmerk word.[157] Op sy beurt is die Suid-Afrikaanse persone- en familiereg ryk aan die erfenis van die Romeins-Hollandse reg.[158]

(b) Die historiese oorsig illustreer duidelik 'n paternalistiese benadering teenoor kinders.[159] Hul natuurlike hulpeloosheid en afhanklikheid bring reeds eeue lank mee dat hulle as voorwerp van ouerlike versorging gesien word. Gevolglik word ouers, of ander persone in gesagsposisies, gesien as diegene wat in belang van kinders optree.

(c) Die historiese oorsig illustreer die mate waarin die status van kinders 'n sosiologiese verskynsel is wat saamhang met die siening van 'n betrokke samelewing. Dié verskynsel word in die reg weerspieël – die status van kinders in die gesin en in die samelewing word deur die aard en omvang van ouerlike gesag en die mate van staatsregulering van die gesinslewe bepaal.

Die voorafgaande bespreking bevestig dat ouerlike gesag omvattend is en dit skep die indruk dat ouers die primêre besluitnemers oor hul kind se beste belang is. Dit gebeur ongetwyfeld dat kinders in die gewone gang van sake deur hul ouers beskerm word en dat hulle ook die geleentheid gebied word om selfstandig op te tree. Hierdie situasies is egter insidenteel tot die uitoefening van ouerlike gesag en word nie verwesenlik omdat *kinders* spesifiek regte daarop het nie. Die ouer-kind verhouding is die resultaat van 'n evolusieproses oor baie eeue heen. Ook hierdie ouer-kind verhouding het 'n ideologie van sy eie wat uit drie kernelemente bestaan. Die eerste element behels die respek vir 'n privaatsfeer van gesinsverhoudinge. Die tweede element sentreer om ouers van wie daar verwag word om uit hoofde van hul ouerskap ouerlike gesag in die beste belang van die kind uit te oefen. 'n Derde element is gebaseer op die status van 'n kind as afhanklike en onvolwasse persoon wat beskerm moet word. Die beginsel dat 'n ouer se besluite "in die beste belang" van die kind moet wees, is op laasgenoemde element gebaseer.

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155 Kruger "Enkele opmerkings oor die bevoegdhede van die hooggeregshof as oppervoog van minderjariges om in te meng met ouerlike gesag" 1994 *THRHR* 304 ev.

156 Hahlo en Kahn 345–385; Lee 3–4; Wessels 405, 417–425; Studiosus 1946 *THRHR* 32–42.

157 Studiosus 1946 *THRHR* 30 32–42.

158 Hahlo en Kahn 566–578; Hahlo en Kahn 345–391; Lee 2–14; Studiosus 1946 *THRHR* 42–53.

159 Die aanvanklike beskerming was vermoënsregtelik van aard omdat die kind as 'n ekonomiese bate gesien is.

Dit blyk uit hierdie bydrae dat die idee van kinderregte sekere sosiale en juridiese veronderstellings ten opsigte van ouerlike outonomie en die status van kinders, wat histories fundeer is, bevraagteken. Dit is hierdie tradisionele sosiale en juridiese beskouing van die ouer-kind verhouding wat ideologies 'n groot struikelblok in die erkenning en implementering van kinderregte vorm. Ouerlike gesag sal byvoorbeeld gedefinieer moet word om ook vir horisontale interaksie met die kind in die uitoefening van ouerlike gesag voorsiening te maak. In aansluiting hiermee sal die ideologie van die staat as beskermer in die privaatreg moet verander in 'n ideologie van vennootskap met ouers en met die kind. Daar sal gevolglik fundamentele veranderings moet plaasvind voordat versoening tussen die ideologieë bewerkstellig kan word. Vanuit 'n sosiale oogpunt sal struikelblokke eers oorkom moet word indien kinderregte as deel van die geldende gemeenskapswaardes beleef word.

The presumption of innocence and, in particular, rules concerning the burden of proof (both its incidence and the standard required) exist because fact-finding by a court can never be without risk of error and because, at times, courts cannot determine the facts at all. Rules regulating the burden of proof seek to determine the acceptable level of risk and who should bear it in each case. . . We entrench the presumption of innocence in our Constitution to remind us that we wish to minimise as much as is reasonably possible the risk of error in the proceedings that determine whether a person is to be punished by the State for criminal conduct and to ensure that an accused is reasonably protected from the risk of error. However, like other rights, the presumption of innocence is not absolute. Once it is infringed, the question arises whether there are important reasons, outweighing the importance of the presumption, for increasing the risk of error through varying the burden or incidence of proof.

O'Regan J and Cameron AJ in S v Manamela (Director-General of Justice Intervening) 2000 5 BCLR 491 (CC) par 68E–H.

The "code" of Johannes van der Linden

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OPSOMMING

Die "kode" van Johannes van der Linden

In die geskiedenis van kodifikasie speel die Hollandse juris Van der Linden 'n beskeie rol. Alhoewel Van der Linden vandag bekend is vir sy werke oor die Romeins-Hollandse reg (veral sy *Koopmanshandboek*), het hy ook die Hollandse en die Suid-Afrikaanse reg beïnvloed deur die konsep-kode wat hy in 1807 in opdrag van Louis Napoleon geskryf het. Hierdie artikel bespreek Van der Linden se lewe en loopbaan as juris, die ontwikkelinge wat tot die opstelling van sy konsep-kode gelei het en die invloed daarvan op die regstelsel van die Zuid-Afrikaansche Republiek na 1859.

1 INTRODUCTION

In the history of codification, the Dutch jurist Van der Linden has played a modest role. When, in 1965, the Dutch legal historian Cerutti[1] devoted an essay to Van der Linden's draft for a Dutch civil code of 1807 he acknowledged the lackb of recognition of this aspect of Van der Linden's oeuvre.[2] The fact that Van der Linden's fame continues until today in South Africa is attributable to his works on the old Dutch law, in particular the rather basic *Koopmanshandboek*.

This contribution concentrates, however, on Van der Linden's direct and indirect influence on Dutch and South African law in his rather unusual role as codifier, and gives an account of the second life offered to Van der Linden's work in 1859.

2 VAN DER LINDEN'S LIFE AND CAREER

Van der Linden may be compared to Gaius, in that very little is known about the person of this Dutch jurist. Born in 1756 in Zuidscharwoude,[3] he studied at the University of Leiden and obtained his doctoral degree at the age of eighteen.[4] The lack of information about Van der Linden is exemplified by the fact that, by way of biographical information, mention is made of the fact that he was a student of Van

1 Cerutti "Het ontwerp Burgerlijk Wetboek van Joannes van der Linden (1807)" in *Opstellen over Recht en Rechtsgeschiedenis aangeboden aan Prof Mr BHD Hermesdorf* (1965) ("Cerutti") 39–72.

2 39.

3 On 1756-02-23. See Roberts *A South African legal bibliography* (1942) ("Roberts") 190.

4 *Dissertatio juridica inauguralis De Jure Viduarum* (Lugduni Batavorum 1774).

der Keessel.[5] This, however, must apply to hundreds of Dutch jurists, since Van der Keessel taught at Leiden for forty-five years from 1770 until 1815.[6]

After his studies, Van der Linden practised as an advocate at The Hague, Leiden and Amsterdam.[7] The most remarkable aspect of his life and career, however, was the quantity, quality and versatility of his publications. Here we encounter another similarity between him and Gaius, in that Van der Linden is remembered mainly for his introductory compendium of law for the businessman, his *Rechtsgeleerd practicaal en koopmanshandboek*.

Even his judgeship at the court of Amsterdam at the age of seventy[8] is shrouded in mystery and therefore open to multiple interpretations. In South Africa this judgeship is mostly viewed as the culmination of two brilliant careers, as legal practitioner and as versatile publicist. On the other hand, Cerutti provides us with information which shows that Van der Linden died virtually insolvent, with debts of f 3 906,27, a quarterly salary of f 427,41 and *activa* of f 5 187,36 of which f 3 431 were represented by his library.[9] This fact, combined with the ripe age at which the judgeship was bestowed on him, gives rise to the suspicion that this was given as a sinecure to a poor old man.

Whatever the success of his practice as an advocate or the financial rewards of his publications may have been, one fact remains beyond doubt, namely that Van der Linden was a multitalented, industrious jurist who published in various fields.

3 PUBLICATIONS

Van der Linden's publications ranged from manuals for legal practitioners[10] to a supplement on the commentaries of Voet,[11] from translations of the works of Pothier[12] to the *Groot Placaet Boek*,[13] and from a collection of decided cases[14] to a translation of the *Introduction* of Hugo de Groot.[15] Among the works of Van der Linden are

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5 Roberts 190; Van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1979) ("Van Zyl") 395; De Wet *Die ou skrywers in perspektief* (1988) ("De Wet") 173.

6 De Wet 172, in particular fn 79.

7 De Wet 173.

8 Hahlo and Kahn *The South African legal system and its background* (1968) ("Hahlo and Kahn") 560.

9 45 and 45 fn 1. Cerutti mentions that the books were auctioned in December of that year, but does not reveal the proceeds.

10 Notes (with Lulius) on Merula *Manier van procederen in de provintien van Hollandt, Zeelandt en West-Vrieslandt belangende civile zaken* (vol 1 1781, vol 2 1783); *Korte schets der form van procedeeren voor de hoven van justitie in Holland gebruikelijk* (1781); *Verhandeling over de judicieele practycq of form van procedeeren* (vol 1 1794, vol 2 1798); *De ware pleiter* (1827).

11 Johannes Voet *Commentarii ad Pandectas Tomus tertius ejusdem commentarii continens supplementum auctore Joanne van der Linden sectio prima a libro I usque ad XII Pandectarum* (1793).

12 *Verhandeling van het wisselrecht* (1801); *Het recht omtrent societeiten of compagnie-schappen en andere gemeenschappen* (1802); *Het recht omtrent legaten* (1803); *Verhandeling van contracten en andere verbintenissen* (vol 1 1804, vol 2 1806). See Kunst *Historische ontwikkeling van het recht I* (1967) ("Kunst") 86; Van Zyl 222–227.

13 Part 8 (with Lulius) *Groot Placaet-Boeck vervattende de placaten, ordonnantien ende edicten van de staten generael van de staten van Hollandt en West Vrieslandt en van Zeelant* (1795); part 9 *Groot Placaet-Boeck* (1796); *Repertorium of generaal register over de negen deelen van het Groot Placaet-Boek* (1797).

14 *Verzameling van merkwaardige gewijsden der gerechtshoven in Holland* (1803).

15 Hugonis Grotii *Institutiones Juris Hollandici e Belgico in Latinam sermonem translatae a Joanne van der Linden JUD*. This work was at the printer at the time of Van der Linden's death in 1835 and remained unpublished until 1962. See Hahlo and Kahn 553; Van Zyl 350.

translations of the French Codes,[16] textbooks on the new French law,[17] an introductory textbook for businessmen,[18] and a draft of a Dutch Civil Code.

4 MOVEMENT TOWARDS CODIFICATION

During the 18th century, codification, and its concomitant legal certainty and unity, enjoyed wide appeal. Originally recognised as a powerful tool by rulers attempting to create the modern centralised state, codification in the vernacular was regarded among the enlightened as a human right.[19] Thus the French revolutionaries advocated codification as part of their programme of reform, as did their Dutch counterparts.[20] After the invasion by the French revolutionary armies in 1795, the velvet revolution reconstituted the old decentralised Dutch republic. The new Batavian Constitution of 1798 was meant to create a modern unitary state with a uniform legal system. Section 28 enacted a codification clause,[21] which placed a time limit of two years on the introduction of civil, criminal and procedural codes. The task of choosing members of the codification commission[22] and political developments in the Netherlands[23] hindered serious progress. For example, Professor Cras, an important member of the commission, was an enthusiastic adherent of natural law. He is on record as stating that the codifier does not create law, but teaches and explains natural law to the citizens.[24] In consequence, the draft of this commission was characterised by its philosophical and dogmatic approach.[25]

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16 *Wetboek van koophandel van het Fransche rijk* (1808).

17 *Verhandeling van het regt op de belasting op de successie, volgens de Fransche wetten* (1812); *Verhandeling van het notaris-ambt in Frankrijk* (1810–1811); *Keizerlijke besluiten betreffende de berekening der kosten in rechtzaken: vertaald door J van der Linden* (1811); *Manier van procederen in civiele zaken, voor de geregtshoven en regtbanken in Frankrijk: gevolgd naar het Fransch van den heer Berriat-Saint-Prix* (1812).

18 *Regtsgeleerd practicaal en koopmanshandboek, ten dienste van regters, praktizijns, kooplieden, en allen die een algemeen overzicht van rechtskennis verlangen* (1806), containing the private law, criminal law, civil and criminal procedure as well as mercantile law of the province of Holland.

19 Thomas, Van der Merwe and Stoop *Historical foundations of South African private law* (1998) 56.

20 Cohen Jehoram *Over codificatie* (1970) ("Cohen Jehoram") 6 cites point 4 of the list of political *desiderata* drawn up in 1791 by the Dutch "patriot" Valckenaer during his exile in France.

21 *Staatsregeling voor het Bataafsche volk* (1798) s 28: "Er zal een Wetboek gemaakt worden, zoo wel van Burgerlijke, als van Lijfstraffelijke Wetten, te gelijk met de wijze van Regts-vordering, op gronden, door de Staatsregeling verzekerd, en algemeen voor de gantsche Republiek. Deszelfs invoering zal zijn, uiterlijk binne *twee* jaaren, na de invoering der Staatsregeling."

22 Cerutti 46 mentions the names of Gockinga, Wierdsma, Bondt, Farjon, Cras and Walraven. The best-known member is Cras, professor of law at Amsterdam. His publication *Betoog dat de redekunde en het regt der natuur de eenigste grondslag is van alle wetgeving* (1814) explains his choice of paradigm. See Cohen Jehoram 7ff; Van Zyl 415.

23 As early as 1801, a new constitution, *Staatsregeling des Bataafschen volks*, had replaced the 1798 Constitution. In 1805, another *Staatsregeling des Bataafschen volks* came into force. The Constitution of 1801 had a more federal character, but stipulated the following in s 84: "Het Staats-Bewind zorgt, dat een algemeen Civil en Crimineel Wetboek, na dat op de daar van gemaakte ontwerpen de consideratien van het Nationaal Gerechtshof zullen zyn ingenomen, ten spoedigsten aan het Wetgevend Lichaam ter bekrachtiging worde aangeboden." The codification of the law of procedure, which had been accepted in 1799, was, however, not introduced, and this led the commission to adopt the view that codification had become unnecessary. See Cerutti 47; Cohen Jehoram 7.

24 Cohen Jehoram 7f.

25 Kunst 103ff.

Furthermore, the Constitution of 1798 was replaced as early as 1801, and the 1801 Constitution was viewed as a return to the old provincialism.[26] The political situation underwent a drastic change when the Kingdom of Holland was created in 1806, with a younger brother of the French Emperor as the Dutch king. Legal development was given a new direction and impetus when the new king, Louis Napoleon, made a clean sweep and appeared to display Napoleon's aptitude for choosing the right man for the job. This was Johannes van der Linden, who was given a low-key appointment, directly by the king, to codify Dutch private law, for a consideration of Fl 7 000.[27]

5 VAN DER LINDEN'S CODE

Although Van der Linden had, according to some accounts, been a member of the codification commission of 1798,[28] the lack of progress on the part of the commission can hardly be laid at his door. At the time of Van der Linden's appointment in 1807, the commission had completed only book 1 (*General introduction*) in 1804, and the report on it by the highest court in the Batavian Republic, released in 1806,[29] was hardly encouraging. Van der Linden asked for the unfinished draft and related papers, and artfully combined the preliminary work of the commission, the recent French codification and his own considerable knowledge to produce a practice-orientated draft within one year.[30] A noteworthy inclusion is that of mercantile law and the law of procedure.[31]

A balanced combination of new French law and old Dutch law, this draft never came into force, as a result of Napoleon's instructions. It is, however, generally accepted today that considerable traces of Van der Linden's draft are to be found in the code which came into operation in 1809.[32]

6 HISTORICAL CHANCE

After consolidation of his position as French first consul, Bonaparte concluded the Peace of Amiens with Great Britain in 1802.[33] As a result, the British returned a number of conquered colonies to their original masters. The Cape Colony and the Dutch East Indies were accordingly returned to the Batavian Republic, one of the co-signatories to the treaty.[34] After hostilities between France and Great Britain reopened in 1805, however, the British were quick to reoccupy these territories, and in 1806 the second British occupation of the Cape Colony took place. In 1802 the Dutch had resumed power in the Cape with good intentions of introducing the new ideals, but little had been achieved by 1806.[35] This turned out to be a missed opportunity. In contrast, the then Ile de France (the present isle of Mauritius) was

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26 Kemper *Crimineel wetboek voor het koningrijk Holland* I (1809) cited by Cohen Jehoram 7; Kunst 104.
27 Cerutti 50f.
28 De Wet 174, 176.
29 Cerutti 48; Cohen Jehoram 7.
30 Cerutti 51–58; Cohen Jehoram 8.
31 Kunst 107f.
32 Cerutti 58–71.
33 Larousse *Encyclopedia of modern history from 1500 to the present day* (1968) ("Larousse") 246.
34 Larousse 247; Van Zyl 443.
35 Van Zyl 446–448.

abandoned in 1710 by its Dutch colonisers, whose only contribution to the isle had been the extinction of the Dodo, a unique species of duck. In 1715 the French seized the isle and renamed it Ile de France. French sovereignty survived the revolution and the Napoleonic Anglo-French conflicts until 1810, when the French commander Decaen capitulated to a British invasion force. The *Code civil des Francais* was, however, extended to Reunion and Mauritius in 1805, and was made applicable under the name *Code Napoleon* in 1808. The instrument of capitulation of 1810 expressly safeguarded the laws and customs,[36] the religion and the property of the inhabitants, and its terms were repeated and endorsed by the Treaty of Paris of 1814.[37]

7 THE SECOND LIFE

During the 1830s thousands of Dutch-speaking inhabitants left the Cape Colony and moved north into the interior. The eventual result was the creation of two new states, the Zuid-Afrikaansche Republiek (ZAR) and the Republiek van de Oranje Vrijstaat.[38]

After the recognition of their newly created states by Great Britain in 1852 and 1854 respectively,[39] the Boer Voortrekkers enacted constitutions for their new republics. The Constitution for the ZAR was adopted in 1858. This constitution was silent on the system of law to be applied in the new state, but in 1859 the first annexure to the constitution was promulgated[40] in which the "Code" of Van der Linden was declared to be the code of the state in so far it did not conflict with the Constitution, other statutes or resolutions of the Volksraad.[41] The *communis opinio* in South Africa has always been that Van der Linden's *Koopmanshandboek* was made the official law book of the ZAR, and that where Van der Linden was silent or inadequate, Simon van Leeuwen's *Het Roomsch-Hollandse recht* and the *Inleiding* of Grotius would have binding force as supplementary sources.[42] The author of the first textbook on the law of the Transvaal, Maurits Josson, based his text on these works and regarded them as the statutory law of the Republic.[43]

This may, however, be the occasion to ask with perfect hindsight whether Josson's interpretation is correct. Dutch was the official language of the South African Republic, and the Dutch word "wetboek" (used in the annexure) means

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36 Article 8 of the Capitulation 1810: "The inhabitants shall preserve their Religion, Laws and Customs." See Angelo "Mauritius: The basis of the legal system" 1970 *CILSA* 228 238.

37 Orucu, Attwood and Coyle (eds) *Studies in legal systems: mixed and mixing* (1996) 209ff.

38 Du Bruyn "The Great Trek" and Heydenrych "The Boer Republics 1852–1881" in Cameron *An illustrated history of South Africa* (1986) 127–139 143–160; Oakes (ed) *Illustrated history of South Africa. The real story* (1989) 114–121 144–150.

39 By the Sand River Convention of 1852 (ZAR) and the Bloemfontein Convention of 1854 (OFS).

40 Bylage 1 of 1859-09-19. See Hahlo and Kahn 560; Van Zyl 463.

41 Art 52: "1 Het Wetboek van Van der Linden blijft (voor zoover zulks niet strijdt met de grondwet, andere Wetten of Volksraadsbesluiten), het Wetboek in dezen Staat. 2 Wanneer in genoemd boek over eenige zaak niet genoegzaam duidelijk of in het geheel niet wordt gehandeld, zal het Wetboek van Simon van Leeuwen en de Inleiding van Hugo de Groot verbindend zijn. 3 Bij het gebruik dezer drie wetboeken zal altijd gehandeld worden op de wijze bij art 31 der Drie en Dertig Artikelen bepaald, welk artikel als voigt luidt: In alle gevallen waarin deze wetten te kort mochten komen, zal de Hollandsche wet tot basis verstrekken, doch op eene gematigde stijlvorm en overeenkomstig het costuum van Zuid-Afrika en tot nut en welvaart van de maatschappij." See Josson *Schets van het recht van de Zuid-Afrikaanse Republiek* (1897) ("Josson") 10ff; De Wet 40.

42 Kunst 68; Hahlo and Kahn 560; Van Zyl 463.

43 Josson 10ff.

"code". As stated, Van der Linden did indeed draft a code, which was printed and known by his contemporaries and by subsequent generations.[44] The Constitution of the ZAR was drafted in 1855 by a commission chaired by Jacobus Stuart, a Dutch citizen. Stuart's father, Marthinus Stuart, had been the tutor of Napoleon III, the son of the Dutch king under whose stewardship Van der Linden had drafted his code. Jacobus Stuart had been a senior civil servant in the Department of Finance of the province of North Holland, before entering private enterprise and emigrating to South Africa after losing his estate. In his capacity as chairman of the constitutional commission, Stuart provided the members with a French text of the American Constitution to serve as a guideline.[45] It is therefore more than possible that the drafters of the first annexure to the Constitution were acquainted with Van der Linden's draft and intended to introduce a codification.

8 CONCLUSION

Van der Linden bridged two eras. His *Koopmanshandboek* provided closure to the old legal order of the province of Holland. He and his professor at Leiden, Dionysius van der Keessel, are the last representatives of the Dutch school. His publications testify, however, that Van der Linden had an open mind towards the new movements taking shape in France, and fully realised the importance of the work of Pothier, which decided the shape of legal development for the next hundred years. Van der Linden does not strike me as a creative thinker, and did not become rich from either his practice as an advocate or his numerous publications. He was, however, in touch with his times and possessed the skills of analysis and synthesis, which are essential for law teachers and codifiers. His publications show him to have been a pragmatic jurist and not obsessive in his adherence to a distinct paradigm as was, for example, Cras or Von Savigny. Thus, far from being stubbornly opposed to the new era, Van der Linden was able and willing to produce a civil code for the Dutch Kingdom.

It remains an interesting question whether Van der Linden's draft or his *Koopmanshandboek* was meant to have been the official code of the ZAR. Had Van der Linden received his instructions as a solo codifier in 1798 rather than in 1807, the Batavian Republic would have had a codified legal system via as speedy a process as the French codification process. This code would have returned with the Dutch to the Cape in 1802, and in 1806 the British would again have followed the precedent set in *Campbell v Hall*[46] that in territories acquired from a civilised power, the existing law remains in force unless altered by the new sovereign.

Secondly, if the drafter of the constitutional Annexure had indeed meant Van der Linden's Code and not the *Koopmanshandboek* to be the law of the country, legal development in Southern Africa might well have taken a different turn. We shall never know to what extent the more modern approach of the Code would have found a place in the retrograde society of the Boers.

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44 Cerutti 39, 39 fn 3 and 40 – in particular the reference to Van Hall's publication *Mr Joannes van der Linden en mr Jonas Daniel Meyer als regtsgeleerden herinnerd* (1853).

45 *Suid-Afrikaanse biografiese woordeboek* Deel I (no date) sv Stuart, Jacobus 814–816; Wypkema *De invloed van Nederland op ontstaan en ontwikkeling van de staatsinstellingen der ZA Republiek tot 1881* (1939) 322–327; Ploeger "'n Paar besonderhede in verband met Jacobus Stuart (1803–1878)" (1945) 6,2 *Historiese studies* 68–73; Du Plessis "Jacobus Stuart en die Transvaalse verdeeldheid in 1855–56" (1947) 8,1 *Historiese studies* 33–40.

46 (1774) 1 Cowper 204 209, 98 ER 1045 1047.

The law reports of the ZAR[47] show that the concept of a codified legal system was foreign to the judiciary of the Transvaal. The Supreme Court of the Republic would, in the absence of statute or precedent, turn to Roman-Dutch law and consult a wide variety of authors, among whom Van der Linden was but a face in the crowd.[48]

Moreover, there remains the possibility that we find here an instance of a *Produktives Misverstehen*. The *Koopmanshandboek* covers a broader field of the law than the Code of Van der Linden. Apart from civil law, the *Koopmanshandboek* also treats of commercial law (as one would expect), as well as criminal law and the law of criminal procedure.

> *[D]oes the rule of law suffer if we direct our judges to debate questions of moral and prudential preferability within the outer bounds of linguistic, textual-structural, constitutional-cultural, and situational plausibility, as opposed to debating questions of authors' meaning? It could suffer only if you thought that focusing the inquiry on authors' meaning would lead to more strongly determinate or predictable outcomes in the bulk of the cases, with the beneficial consequences that (1) persons subject to the law could more easily and accurately foresee the law's possible incidence on them as they plot their way through life, and (2) instances of judicial bad faith could more readily be detected . . . Characteristically and on the whole, speaking from American experience, I see no reason to count it more determinate, or less subject to bad faith manipulation, than the alternative sort of bounded moral and prudential inquiry that is now on the table.*
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> *Professor Frank Michelman "Constitutional authorship, 'Solomonic solutions', and the unoriginalist mode of constitutional interpretation"* in "Meaning" in legal interpretation 1998 Acta Juridica 208 224–225.

47 Law reporting in the Transvaal was initiated in 1877 by JG Kotzé, the first professional judge of the supreme court. Cf Zimmermann and Visser *Southern cross: Civil law and common law in South Africa* (1996) 17.

48 The names of Voet, Groenewegen, Noodt, Van der Keessel, De Groot, Van der Linden, Matthaeus, Loenius, Schorer, Wassenaar, Huber, Pothier, Domat, Story, Heumann, MacKeldy, Erskine, Chitty, Taylor and Modderman are often encountered.

Redundancy of the par value concept: A comparative legal study*

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OPSOMMING

Die oorbodigheid van die begrip van pariwaarde: 'n Regsvergelykende studie

Die onderhawige artikel behandel die pariwaarde-begrip en ondersoek die beleidsoorwegings onderliggend aan die regsbeginsels wat op die begrip betrekking het. Daar word aangetoon dat daar nóg in Afrika nóg in die res van die wêreld konsensus bestaan oor die vraag of die begrip in die moderne handelswêreld betekenis het. Die skrywers voer aan dat die pariwaarde-begrip verouderd is en veral in ontwikkelende markte geen noemenswaardige bydrae maak nie. Hulle meen dus dat lande soos Suid-Afrika (en ook Lesotho, Namibië en Zimbabwe) waar dit steeds voorkom, gerieflik daarsonder kan klaarkom.

1 INTRODUCTION

> "Stock (shares) which was issued without a corresponding pay-in of assets valued at an amount equal to par was called 'watered stock' – stock issued not against assets but against water . . . It must be emphasized that concepts of watered stock . . ., and the doctrines that came to surround them, were and are limited in application to the *issue* of stock, that is, sales by the *corporation* of its own stock. The doctrines do not in any way inhibit the *shareholder's* freedom to sell his stock at any price he can get, or to give it away if he wishes. Similarly, a corporation holding shares of another corporation may, like any other shareholder, dispose of them at any price it wishes or can get. The reason why shareholders were held to pay in the par value of their shares is that that was the price exacted by the law for the corporate advantage of limited liability."[1]

* Comments from colleagues who read through the earlier drafts of this paper are gratefully acknowledged. The interpretations and conclusions expressed in the paper are entirely those of the authors.

1 Hamilton *Corporation finance: Cases and materials* (1989) 75. The reason for giving shares a par value is mainly historical. At a time when it was envisaged that the nominal value of shares would be so large that a substantial proportion would be left uncalled, the introduction of the par value concept was a convenient yardstick to measure the extent of the liability of shareholders. For a detailed discussion of this view see eg *Final Report of the Committee of Inquiry into the Working and Administration of the Present Company Law of Ghana* ("Gower's Report") (1961) 53.

The concept of par value of company shares denoted the minimum amount by which the shares could be purchased.[2] However, even if the law exacted a price for the advantage of limited liability to the shareholders, taking into account the net worth of the company, it was not easy to maintain a constant equilibrium between the nominal capitalisation of the company and the value of its assets. The value of the assets, with time, may depreciate or appreciate. Indeed, if this were to happen, the value of the assets of the company could cease to have a corresponding value to the original share-capital employed. To this extent, it could be argued that any monetary pricing introduced as a signal to the market of the value of a share in the equity of a company is almost always a fiction and may be not only meaningless but also misleading.

This contribution examines the policy issues underpinning the legal aspects of par value of company shares. A comparative approach to the law is undertaken. It will be argued that the concept of par value has little relevance in the world of commerce today and that shares of no-par value often reflect the true value of the shares.

2 ALLOTMENT OF SHARES AND THE PAR VALUE CONCEPT IN ENGLAND

Under the Companies Act 1985 of the United Kingdom, a company limited by shares must state in its memorandum of association the division of the share-capital into shares of a fixed amount.[3] The nominal amount of each share is what is known as the *par* value.[4] This Act permits a company to state its nominal capital and the value of its shares in any currency, provided that in the case of a public company the nominal capital with which it is registered must include 50,000 British Pounds Sterling.[5]

3 OTHER JURISDICTIONS

England is not alone in retaining this requirement. Indeed, in Southern Africa some jurisdictions have retained it as well. South Africa's section 74 of the Companies Act 61 of 1973 is a notable example in this regard, as are the Zimbabwean Companies Act[6] and Namibian Companies Act.[7] The last-mentioned, it may be noted, remains a replica of its South African colonial counterpart. These countries' statutes provide that the share capital of a company may be divided into par value shares or be constituted by shares of no par value. Similarly, the concept of par value continues to play a role in Lesotho.[8] By contrast, Zambia,[9] a non Roman-Dutch Law country, and also Botswana[10] and Swaziland from the Roman-Dutch law family, have all done away with it. A common denominator for this development seems to be the recent reforms which these latter countries have undergone for purposes of modernising their company laws.

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2 See *Orregun Gold Mining Co of India v Roper* (1892) AC 125 and also Cilliers *et al, Corporate law* (1992) 216.
3 English Companies Act 1985 s 2(5)(a).
4 See *Orregun Gold Mining Co of India Ltd v Roper supra.*
5 English Companies Act 1985 ss 117 and 118.
6 Ch 24:03; s 8.
7 61 of 1973.
8 See eg the Lesotho Companies Act 25 of 1967. In addition we obtained confirmation of this fact from Professor Umesh Kumar of the National University of Lesotho via E-mail dated 1999-10-19.
9 Companies Act 26 of 1994.
10 Companies Act Ch 42: 01.

While the concept of par value might be relevant to primary issues of securities in both private and public companies (eg at incorporation), that does not necessarily hold good for secondary trading of securities. In the case of secondary trading, par value might be useful only to issues in private companies, but not to issues in public companies. One of the reasons supporting this view is that in many countries shares in a public company are traded on a stock exchange. Since, for the most part of this stock market trade, the public can purchase shares in such companies, it is the market itself that will be expected to set the price of the shares.[11] This indeed appears to be the basis of BonBright's argument that the purpose of the par value concept is not to reflect the market value of the enterprise, which is constantly shifting and which therefore cannot be set by the face value of the share certificate, but to indicate the capital that the shareholders have agreed to contribute.[12] This feature is alluded to by BonBright as being historical and therefore fixed.[13]

Another view supporting the policy basis of having the par value system is that in order for creditors of a company to be confident that the corporation will pay off its debts, when in financial distress, the par value is seen as a basis upon which the share-capital account of the debtor company can be based. Furthermore, the par value prevents arbitrary valuation of shares in excess of their true value. Pennington adds that the nominal value of shares is useful in declaring dividends (usually expressed as a percentage of the nominal value), determining voting rights at meetings of shareholders and, in the case of preference shares which have priority for re-payment of capital, determining the amount which must be paid to the preference shareholder in winding up before the company's remaining assets are shared between the ordinary shareholders.[14]

The question, then, is whether these views are sufficiently pertinent to support a retention of this rather arbitrary division in the value of company shares. In the first place it is important to note that the general rule under the English Companies Act 1985 is that when shares are allotted they have to be paid up in full.[15] Payment must be in money or money's worth, including goodwill and knowhow.[16] Shares are deemed to be paid up in cash if the payment received by the company is in cash or in the form of a cheque received in good faith and the directors have no reason to suspect that it will not be paid.[17] Payment in cash could also involve an undertaking to pay cash to the company at a future date.[18]

Another general rule applying to both private and public companies is that no share can be issued at a discount.[19] Section 100 of the English Companies Act 1985 provides:

> "(1) A company's shares shall not be allotted at a discount.
>
> (2) If shares are allotted in contravention of this section, the allottee is liable to pay the company an amount equal to the amount of the discount, with interest at the appropriate rate."

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11 See for a similar South African view Cilliers *et al Corporate law* (1992) 216.
12 BonBright "The dangers of shares without par value" 1924 *Columbia LR* 449.
13 *Idem* 448–450.
14 Pennington *Pennington's Company law* (1990) 21.
15 S 99(1).
16 *Ibid.*
17 S 738(2).
18 S 738.
19 S 100.

In other words, shares cannot be issued as fully paid up at a consideration below their nominal value. Where shares are paid up at a discount, the allottee will be liable to pay the allotting company an amount equal to the amount of the discount, with interest at an appropriate rate.[20] Where the allottee has already sold the shares, the subsequent holder of the shares will be liable to pay the company an amount equal to the amount of the discount, with interest at an appropriate rate.[21] The subsequent holder is, however, allowed a defence if he can show that he is a *bona fide* purchaser for value and without actual notice.[22] Directors and any officer of the allotting company who are responsible for the allotment will be liable to a fine.[23]

While the injunctions of this provision do not seem to have counterparts in the statutes of Botswana, Lesotho, Namibia, South Africa, Zambia and Zimbabwe, it is useful to remember that, at least in the case of South Africa, Namibia and Zambia, financial assistance by a company in the acquisition of its shares is outlawed.[24] English Law, as is well known, also proscribes the practice.[25] Arguably therefore, a common standard is observed in so far as any dimunition in the price of any individual shares in a company is concerned.

The principle that shares must be paid up in full must be seen as important not only to safeguard efforts to raise company finance, but also to ensure that fair trade in securities takes place. To hold otherwise would amount to condoning "share watering" and would thereby put the existing shareholders and the creditors at a disadvantage. We submit that if a case of collusion between an allottee and the directors of the allotting company were to occur, for purposes of issuing shares at a discount (while the company is a going concern), the remedy must not only be in making the allottee pay an amount equal to the discount. The allottee must also be made to forfeit his right to hold shares – only with regard to those shares acquired under the transaction – since he has shown that he can undermine the company by entering into dubious transactions. This proposal is made in the light of the fact that the law in the United Kingdom is silent on the fate of an allottee who subsequently makes a payment equal to the discount on the share price. We submit further that although the English Companies Act 1985 contains statutory provisions governing the law on payment for shares, the statute does not deal with situations relating to share price discounts on a single share. Section 100 of the English Companies Act 1985 covers only situations relating to the allotment of more than one share: "A company's shares shall not be allotted at a discount . . ."

What happens where only one share is allotted at a discount? It is our view that, since an issued share is part of the share capital, the directors of the company, as persons who manage or who are custodians of assets of the company, unquestionably owe fiduciary duties towards the corporation they direct.[26] On this basis, the directors may be held liable for breach of fiduciary duties if they allot one share at a discount.[27]

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20 S 100 (2).
21 S 112.
22 S 112(1) and (3).
23 S 114.
24 See eg ss 38 and 82 of the South African and Zambian Companies Acts, respectively. See also Mwenda and Ailola "Legal aspects of corporate finance in Zambia: a comparative study of the law on financial assistance" 1998 *CILSA* 187.
25 See the English Companies Act 1985 s 152.
26 See Shepherd *Law of fiduciaries* (1981) 362. See also *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 and cf *Phipps v Boardman* [1966] 3 All ER 721.
27 See generally cases cited *supra* (n 18). See also generally Loose, Yelland and Impey *The company director: Powers and duties* (1993).

4 ARGUMENTS COUNTERING THE PAR VALUE SYSTEM

The concept of par value has received some criticism from a number of scholars.[28] Among these criticisms is the problem associated with issuing shares for a consideration other than cash. What happens where shares are issued in return for services or goods? How do we determine whether services or goods are at par with the nominal value of the shares?

Another difficulty facing the concept of par value is the attitude of the courts towards this concept.[29] In the American case of *Commonwealth v Leigh Av Ry Co*,[30] the court overlooked the applicable par value and adopted an arbitrary value based on the amount paid to the company. In that case, a company was "capitalised" at US$1,000,000 altogether. The charter of the company provided that the company could not issue bonds in excess of 50% of the par value of the shares. A suit was brought to enjoin an issue of US$250,000 of bonds and an injunction was then granted. The court declined to recognise the fifty dollars "par value" established by the charter, and instead held that the five dollars per share received by the company was the real par value while the other figure was merely a "nominal" value.

The courts have also disregarded the par value in instances where recognising par value would prejudice interests of the company. In *Handley v Stutz*,[31] for example, a coal company "capitalised" at US$200,000 and with US$120,000 of the shares unissued, became obliged to raise US$50,000 in order to continue business. The issued shares had depreciated significantly in value and, moreover, no investor could offer "full" value for the unissued shares. Bonds to the amount of the required sum, although not marketable by themselves at their principal value, were therefore sold by giving an equal number of the previously unissued shares at a bonus. The remaining US$30,000 of the shares was then distributed among the old shareholders as a gift. In a creditor's bill to compel payment in cash to the corporation at the par-value of the new shares, the court declared as to the shares delivered with the bonds that

> "an active corporation may, for the purpose of paying its debts and obtaining money for the successful prosecution of its business, issue the stock (shares) and dispose of it for the best price that can be obtained".

In essence, what the above two cases show is that American courts are slowly developing a common law which makes share-watering lawful. The cases also point to a critical weakness in the use of the par value concept as a yardstick to measure limited liability of shareholders. Generally, an investor could be attracted to subscribe for the shares on the basis of the represented value of the shares and it is often this represented value that bolsters the price of the shares above their real value.[32] A great discrepancy between the value of the holdings of a corporation and the nominal value of capitalisation usually lends an opportunity to defraud inexperienced purchasers. A shift inclined towards abandoning the par value system and adopting a non-par value system might therefore be more efficient, since it would place the investor on his guard and thus avoid creating a false sense of investor protection.

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28 Eg BonBright *op cit* 3.
29 See Frederick "The par value of stock" 1906–1907 *Yale LJ* 249.
30 129 Pennsylvania St 405.
31 139 (1891) US 417 11 Sup Ct 530.
32 See Allen "Non par value stock" 1920 *Central LJ* 170.

5 THE NO-PAR VALUE CONCEPT

Generally, the notion of issuing shares at no-par value can be traced to the joint stock companies of the Elizabethan period when shares were used "in the natural sense, namely, as an appreciable part of the whole undertaking not as a multiple of units of the capital".[33] Harmen, however, observes that the concept of no-par value originates from American jurisprudence.[34] He argues that in the US company promoters often found themselves engaged in lawsuits to prove that some of the shares which had been allotted, although treated as fully paid-up, were in fact not fully paid-up. These lawsuits constrained functions of promoters and thus, to avoid such bottlenecks, companies were permitted to issue shares of no-par value.[35]

In the Gedge Report on Shares of No-Par Value the following three instances were identified as typical cases where shares can be issued for no-par value under the American legal system:[36]

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33 See generally Allen *Ibid.* See also generally Morawetz "Shares without nominal or par value" 1913 *Harvard LR* 26 and Goodbar "No par value stock – its nature and use" 1948 *Miami LQ.*

34 Harmen Memorandum to Gedge Committee in the Board of Trade Report of the Committee on Shares of No Par Value Cmd 9112 of 1954 (The Gedge Report).

35 See generally *Ibid.* See also Berle "Problems of non par stock" 1925 *Columbia LR* 25 44 where he observes that the first authorisation for the issuance of shares of no-par value was made under Ch 351 of the Laws of the Sate of New York in 1912. Since then other American states have enacted legislation to permit issuance of no-par value shares.

36 See the Gedge Report 11. In the US, legislative efforts have now been made to do away with the mandatory requirement to have shares of *par* value. As Hamilton *op cit* 157–158, observes: "The financial provisions of the Model Business Corporation Act reflect a modernisation of the concepts underlying the capital structure and limitations on distributions of corporations. This process of modernisation began with amendments in 1980 to the 1960 Model Act that eliminated the concepts of 'par value' and 'stated capital', and further modernisation occurred in connection with the development of the revised Act in 1984. Practitioners and legal scholars have long recognised that the statutory structure embodying 'par value' and 'legal capital' concepts is not only complex and confusing but also fails to serve the original purposes of protecting creditors and senior security holders from payments to junior security holders . . . The Model Act has therefore eliminated these concepts entirely . . . Since shares need not have a par value, under section 6.21 (of the Model Act 1984) there is no minimum price at which specific shares must be issued and therefore there can be no 'watered stock' liability for issuing shares below an arbitrarily fixed price. The price at which shares are issued is primarily a matter of concern to other shareholders whose interests may be diluted if shares are issued at unreasonably low prices or for overvalued property . . . Section 6.21(b) specifically validates contracts for future services (including promoters' services), promissory notes, or 'any tangible or intangible property or benefit to the corporation', as consideration for the present issue of shares. The term benefit should be broadly construed to include, for example, a reduction of a liability, a release of a claim, or benefits obtained by a corporation by contribution of its shares to a charitable organisation or as a prize in a promotion . . . Accounting principles are not specified in the Model Act, and the board of directors is not required by the statute to determine the 'value' of non-cash consideration received by the corporation (as was the case in earlier versions of the Model Act). In many instances, property or benefit received by the corporation will be of uncertain value; if the board of directors determines that the issuance of shares for the property or benefit is an appropriate transaction that protects the shareholders from dilution, that is sufficient under section 6.21. The board of directors does not have to make an explicit 'adequacy' determination by formal resolution; that determination may be inferred from a determination to authorise the issuance of shares for a specified consideration." Other helpful sources of the law on the US position include the following statutory provisions: Model Business Corporation Act 1984, ss 6.20, 6.21, 6.22, 6.31, 6.40, 8.30, 8.31, and 16.21.

(a) where the law requires only that the certificate of incorporation state the number of shares of no-par value to be issued, leaving it to the corporation to determine how much of the proceeds of issue of such shares should be allocated to capital and how much to distributable surplus;

(b) where the law requires that the certificate of incorporation state the amount of the capital of the corporation which must include some minimum amount (eg US$1) in respect of every issued share of no-par value. In such cases, any excess of the proceeds of issue of such shares over the minimum amount may in general be treated as a distributable surplus; and

(c) where the law requires that the amount of capital stated must include the whole consideration received on the issue of shares of no-par value. In such cases there can be no distributable surplus. This system is permissible in New York and certain other states. But in Wisconsin, for example, an amount up to 25% of the proceeds of issue may be allocated to surplus.

The issuing of shares of no-par value is also allowed In New Zealand[37] and Canada.[38] In Ghana, following the Gower Report in that country,[39] the issuing of shares of no-par value is no longer forbidden. The case of Ghana, like that of New Zealand, shows that company legislation now requires that all shares should be issued at no-par value.[40] In Ghana, the Gower Report asked:

> "[Is] the main obstacle in rendering the true nature of a share in a company readily comprehensible to the man-in-the street . . . the fact that the present law insists that a nominal value should be attached to it?"

The report continued:

> "At the commencement of a company's life par-value may be arbitrary and misleading, since shares may be issued at a premium or even (through an issue for a consideration other than cash) at a disguised discount. Thereafter they become totally arbitrary; a so-called $G1 share may if the company has made losses be worth anything from $G1 to infinity. The retention of the misleading $G1 symbol is an endless source of complication and confusion both to the sophisticated and especially, to the unsophisticated investor who is apt to think that he is getting a bargain if he buys a $G1 share for 10 cents. And that he has been cheated if he is able to buy 30 cents. If Ghanaians are to be encouraged to invest in shares everything should be done to make it clear to them that a share is simply a share in the fluctuating value of a business and not a piece of paper worth the value endorsed upon it."[41]

6 ARGUMENTS IN SUPPORT OF THE NO-PAR VALUE SYSTEM

Generally, shares issued without par value afford a more realistic approach to appraisal of profits in relation to the assets employed in a business.[42] Such an approach avoids problems associated with determining profits and dividends by reference to a nominal value.[43] The issue of shares of no-par value also has the

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37 See the New Zealand Companies Act 1990 s 28.

38 See the Canadian Companies Act 1934 s 12(7).

39 See generally Gower's Report (n 1).

40 See Ghana's Companies Code 1963 s 40(1), which provides explicitly that: "All shares created or issued after the commencement of this Code shall be shares of no-par value." See also New Zealand Companies Act 1990 s 28, which provides expressly: "No share shall have a nominal or par value."

41 See Gower's Report (n 1) 53.

42 See Memorandum from the Council of the Chartered Institute of Secretaries of Joint Stock Companies and Other Public Bodies to Gedge Committee 7.

43 See Pennington *op cit* 21.

benefit of flexibility. The issuing company is free from threats pointing to prohibitions on share watering. Indeed, in a troubled economy, such as where there is war, companies may wish to issue shares at lower prices. They should be able to do so without a cloud of juridical disapprobation hanging over them. At the same time, it must be acknowledged that it is in furtherance of good business practice that companies must be permitted to raise finance by selling shares at a fair and true value. If such a view is overlooked, companies may begin to engage in over-leverage to raise finance. Such over-leverage could increase the risks and costs associated with insolvency for both debtor and creditor.

Countering the school of thought that supports the no-par value system, Berle argues that the concept of no-par value could be open to abuses by some company directors.[44] This view tends towards the assumption that no remedial measures will be taken by the company because the legal system is not transparent enough for the shareholders to access the relevant information on the abuses. Indeed, Berle observes that in dealing with corporations having non par-value shares, an investor must ascertain whether shares without a visible dollar mark on the share certificate are in fact true non-par value shares, or whether they are "stated value" non-par value shares – in substance merely a par value share with a different name.[45]

Adding to the criticisms, BonBright argues that the removal of par value is likely to lead to a serious danger in corporate finance, that is, the danger that stated capital will be fixed far below the real capital.[46] Basing his analysis on the Delaware Law of 1917, c133, and the New York Law of 1923, c787 s12, BonBright observes that the law compels the drawing of the conclusion that creditors have been stripped of their long-recognised rights to hold shareholders liable for part-paid shares and to hold directors of the issuing company liable for an impairment of capital.[47] However, this view has its own limitations. Indeed, as was held in the US case of *American Co v Staples*,[48]

> "it has been said that while non par value stock corporations have no nominal value – no dollar mark – stated in the face of their stock certificates, yet the general rules regarding the liability of the subscribers for non-payment of the full amount of their subscription, and the general rules regarding the declaration of dividends, apply as in the case of par-value corporation, the liability of the shareholders depending upon whether he has paid or delivered, the amount in money, or its equivalent for the stock that was sold while the capital stock of a non par-value corporation cannot be lawfully invaded by the declaration of dividends any more than the capital stock of a par value stock corporation".

7 CONCLUSION

In this contribution, the policy issues underpinning the legal aspects of par value of company shares have been examined. It has been observed that whereas English company law still recognises the concept of par value as applicable to the allotment of shares, the concept of par value is now obsolete in the US, New Zealand and Canada. In Africa, while Lesotho, Namibia, South Africa and Zimbabwe still use it, other countries such as Botswana, Ghana, Swaziland and Zambia have done away

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44 See generally Berle *op cit*.
45 *Ibid*.
46 BonBright *op cit* 449.
47 *Idem* 449.
48 1924 Tex Civ App 260 S W 614.

with it. It is argued that the concept of par value has little relevance in the world of commerce today and that shares of no-par value often reflect the true value of the shares.

Indeed, the phenomenon of emerging markets also lends support to the conclusion that the par value concept is an outdated one. In many emerging markets there is an urgent need to overcome constraints such as inadequate liquidity. One of the ways of doing this is by permitting companies to issue shares of no-par value so that small investors can invest in these companies.

At the heart of the ideal of the rule of law, properly understood, is a principle requiring governmental action to be rationally justified in terms of some conception of the common good. The formal equality ensured by the regular and impartial application of rules to all those within their purview is supplemented by a more substantive equality, or notion of equal citizenship. The substantive principle does not prohibit the imposition of special burdens, or grant of special benefits, to particular groups or classes: it requires only that all legislative and administrative classifications should be reasonably related to legitimate, defensible public purposes. . . The rule of law does not, then, embody any particular theory of equal justice; but it does enforce a requirement that government should adhere faithfully to some coherent conception of justice . . .

TRS Allan The rule of law as the rule of reason: consent and constitutionalism 1999 LQR 221 231.

Die historiese grondslae en ontwikkelingsgang van die reg op regsverteenwoordiging in Suid-Afrika – Deel 2[1]

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SUMMARY

It is accepted that until 1806 the position with regard to legal representation in the Cape Colony was the same as that in Holland. After the British took control it initially seemed as if they wished to enforce the Articles of Capitulation. It was, however, inevitable that English law would influence the South African procedural law. This was the beginning of statutory regulation of legal representation and the right to such representation. These statutory provisions provided for both the broad framework of the criminal procedure and the procedural rules to be followed. With the enactment of the first Criminal Procedure Act in 1917, it was already accepted that accused had the right to be represented. It was left to the courts to determine the content and scope of the right. By 1978 is was considered to be desirable for presiding officers to determine whether an accused required legal assistance. Over a number of years the scope and content of the right was extended by the courts. New questions, such as whether the state had to provide legal representation to indigents, arose. There were conflicting decisions on this issue. The polemic was eventually ended by the Constitution and the Bill of Rights. The developmental role of the courts was not terminated, however. It seems as if the legislature and the judiciary played their part in establishing a general right to legal representation. History and evolution also fulfilled its role in establishing the right, but its effective realisation now rests with the executive.

1 INLEIDING

In Deel 1 is die ontwikkelingsgang van regsverteenwoordiging in antieke Griekeland en die Romeinse, Romeins-Hollandse en Engelse reg ondersoek. Daar is bevind dat die reg op regsverteenwoordiging in Suid-Afrika die produk van 'n evolusionêre proses is wat oor ongeveer drieduisend vierhonderd jaar strek. Die kragte wat aktief was in die proses is uiteenlopend van aard, maar daar is tog 'n aaneenlopende skakel tussen die bydraende faktore. In hierdie deel sal die posisie van regsverteenwoordiging sedert 1652 tot en met konstitusionalisering van nader beskou word ten einde

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1 Die artikel is gebaseer op 'n gedeelte van die navorsing wat die outeur vir die LLD-graad aan die Universiteit van Stellenbosch onder promotorskap van prof Steph E van der Merwe voltooi het. Die titel van die tesis is "Regsverteenwoordiging as element van regstoeganklikheid". Die outeur spreek ook graag sy dank uit teenoor die SWO van die RGN en die Navorsingskomitee van PE Technikon vir die finansiële bystand wat hierdie navorsing moontlik gemaak het. Die menings wat in die artikel uitgespreek word, is dié van die outeur en nie dié van enige van bg instansies nie.

die gemeenregtelike en statutêre ontwikkelingsgang te identifiseer, vas te stel watter statutêre regte tot regsverteenwoordiging in die tussentydse Grondwet[2] en die finale Grondwet[3] verleen word en die wyse te bepaal waarop die howe wat met grondwetlike jurisdiksie beklee is die reg op regsverteenwoordiging, en dus die vermoë om die regte af te dwing, vertolk.

2 DIE SUID-AFRIKAANSE REG SEDERT 1652 TOT EN MET UNIFIKASIE

Daar word aangeneem dat die posisie van prokureurs in die Kaapkolonie tot die jaar 1806 dieselfde was as in Holland.[4] 'n Beskuldigde kon eers nadat hy gepleit het die hof versoek om hom toe te laat om verdedig te word.[5] In 1715 is die regering deur die hof versoek om die klagtes wat deur prokureurs en regsagente aanhangig gemaak word te reguleer, maar die eerste prokureurs is eers in 1791 by aflegging van die voorgeskrewe eed toegelaat.[6] In die dae van die Bataafse regering[7] is vereis dat advokate en prokureurs wat deur die hof aangestel is gratis en *pro deo* moes optree vir persone wat dit nie kon bekostig nie.[8]

Met die oorname van die Kaap deur Brittanje het dit aanvanklik geblyk dat die Britse regering die agste artikel van die Artikels van Kapitulasie wou afdwing.[9] So is goewerneur Caledon byvoorbeeld in 1807 daaraan herinner dat die Artikels van toepassing was totdat dit deur 'n bevel van die koning tersyde gestel is.[10] Dit was egter onafwendbaar dat die Engelse reg 'n invloed op die Suid-Afrikaanse prosesreg sou begin uitoefen en die eerste tekens hiervan is na 1820 te bespeur. In Lord Somerset se proklamasies van 1822[11] blyk die invoering van Engelse regsreëls duidelik. In 1823 is 'n kommissie benoem om die Kaapse regstelsel te ondersoek. Een van die aanbevelings wat vervat was in die *Charters of Justice*, wat onderskeidelik in 1828 en 1834 in werking getree het, was dat advokate voortaan uit die geledere van die Britse *Inns of Court* of uit die geledere van gegradueerdes van die universiteite van Oxford, Cambridge en Dublin gewerf sou word. Verdere verengelsing blyk uit die inwerkstelling van 'n strafproseskode in 1818 en 1830.[12]

Tot 1819 kon 'n beskuldigde in 'n strafsaak nie aanspraak maak op 'n reg om deur 'n prokureur of advokaat verdedig te word nie.[13] In 'n proklamasie van 2 September 1819 is oortredings in "crimes" en "misdemeanours" verdeel. Die Romeins-Hollandse reg het in 'n groot mate op minder ernstige misdade van toepassing gebly,[14] maar in die geval van ernstiger misdade het 'n persoon die *reg* gekry om 'n regsverteenwoordiger in diens te neem om hom te verdedig nadat hy eers deur die hof ondervra is.[15] Artikel 65 dui op 'n nuwe benadering tot die reg op

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2 200 van 1993.
3 108 van 1996.
4 Van Zyl "A brief history of the law of attorneys as far as South Africa is concerned" 1912 *SALJ* 265 267 en sien ook Wessels *History of the Roman-Dutch law* (1908) 362.
5 Voet 3 3 15.
6 Botha "Early legal practitioners of the Cape Colony" 1924 *SALJ* 255 257.
7 1803–1806.
8 A 137 van die Provisioneele Instructie voor de Raad van Justitie soos vermeld deur Botha 256.
9 Kaapse Artikels van Kapitulasie van 10 en 18 Januarie 1806.
10 Hosten *et al Inleiding tot die Suid-Afrikaanse reg en regsleer* (1978) 207.
11 Gedateer 1822-07-12 en -05.
12 Ordonnansies 40 van 1818 en 73 van 1830.
13 *S v Wessels* 1966 4 SA 89 (K) 91F.
14 *S v Wessels* 92A.
15 A 65.

regsverteenwoordiging deurdat verteenwoordiging deur 'n advokaat ten opsigte van sowel regsvrae as feitevrae as 'n *reg* toegelaat word. Dit was 'n begrip wat tot 1836 vreemd was aan die Engelse reg. Die onderskeid tussen "crimes" en "misdemeanours" het reeds in die negentiende eeu verval en daarmee saam die laaste beperking op regsverteenwoordiging in strafsake.[16]

Teen 1823 was die verbod op regsverteenwoordiging op die rondgang een van die klagtes teen die regsadministrasie.[17] Dit is volgens Selikowitz[18] die begin van 'n gees van verandering wat in 1828 daartoe gelei het dat regsadviseurs vrye toegang tot aangeklaagdes in die Hooggeregshof verkry het.[19] Hierdie reg het egter nie die reg op bystand by voorlopige ondersoeke ingesluit nie.[20] By voorlopige ondersoeke was die geval dat:

> "(39) A prisoner is not of right entitled to the assistance of a legal adviser while he is under examination."

In 1856 het wetgewing[21] die reg op regsbystand deur advokate, prokureurs en regsagente na landdroshowe uitgebrei,[22] maar verteenwoordiging by voorlopige ondersoeke is steeds uitdruklik verbied. Hierdie verbod is eers is 1874 opgehef.[23]

In Natal het gevangenes die reg van toegang tot regsadviseurs gehad, maar voorsittende beamptes het steeds 'n diskresionêre bevoegdheid gehad om hulle hierdie reg te ontsê waar "the ends of justice will best be served by such an order".[24] In 1892 is daar in *R v Nomcaba*[25] beslis dat hierdie diskresie nog bestaan. In *Ex parte James Malcolm*[26] is beslis dat die hof nie die bevoegdheid het om 'n prokureur aan te wys om 'n hersiening *in forma pauperis* namens 'n gevonnisde beskuldigde waar te neem nie. Die posisie ten opsigte van advokate is egter nie aangespreek nie. In 'n minderheidsuitspraak in *R v Nomcaba*[27] word die eerste keer melding gemaak van 'n absolute reg wat 'n gevangene op die toegang van sy regsadviseurs het. In *Nkehli v Nkehli*[28] is beslis dat die eiser in "quasi criminal"- verrigtinge die reg het om verteenwoordig te word. In 1914 het die Natalse Hooggeregshof in *Hoosen v R*[29] gesê dat dit 'n beginsel is dat "the court will not lightly deprive an accused of the benefit of legal advice and assistance in meeting the charge against him".[30]

In die Zuid-Afrikaanse Republiek was die gebruik dat 'n persoon sy eie saak kon hanteer of iemand kon aanstel. Die Grondwet van 1858[31] het wel net voorsiening gemaak vir *pro Deo*-verskynings in siviele sake, maar daar is aanduidings dat

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16 *S v Wessels* 92E.
17 Hahlo en Kahn *The Union of South Africa – the development of its laws and Constitution* (1960) 205.
18 64.
19 Ordonnansie 40 van 1828 in Selikowitz 65.
20 A 39 van Ordonnansie 40 van 1828.
21 A 45 van die Wet op Landdroshowe 20 van 1856.
22 In *King v Elizabeth* (1904) 18 EDC 221 is beslis dat die weiering om 'n redelike uitstel vir die doel om regsverteenwoordiging te bekom die verrigtinge ongeldig maak. Die hof het ook beslis dat a 45 'n duidelike reg op bystand daarstel.
23 A 13 van Wet 17 van 1874.
24 A 4 van Wet 16 van 1861.
25 *R v Nomcaba* (1892) 13 NLR 247.
26 (1893) 14 NLR 192.
27 *Supra*.
28 (1903) 24 NLR 1.
29 (1914) 35 NLR 41.
30 44.
31 A 156.

verteenwoordigers ook in strafsake toegewys is.[32] Daar was ook strafsake waar die beskuldigdes óf onverteenwoordig was óf deur 'n regsagent verteenwoordig is.[33] Vroeë praktisyns in Transvaal het weinig opleiding gehad[34] en was meestal prokureurs, maar in die landdroshowe is agente ook toegelaat om op te tree.[35] Die Strafprosesordonnansie van 1864[36] het 'n tweeledige effek op regsverteenwoordiging gehad: eerstens het regsadviseurs voor die verhoor slegs toegang tot hul kliënt gehad met die Staatsprokureur se toestemming, maar vrye toegang op aansoek by 'n landdros;[37] en tweedens het behoeftiges die reg verkry op die kostelose hulp van 'n advokaat of agent.[38] Ordonnansie 5 van 1864 was 'n weerspieëling van die trekkers se liberale houding jeens regsverteenwoordiging en het tot 1903 van krag gebly. Hierdie ordonnansie het 'n reg op verteenwoordiging daargestel en toegang tot *pro Deo*-regshulp gewaarborg.

In 1877 is die Transvaal deur Brittanje geannekseer en in dieselfde jaar is 'n Hoë Hof met nuwe hofreëls ingestel.[39] Hierdie proklamasie, wat in 'n groot mate op dié van die Kaap geskoei was,[40] het ook voorsiening gemaak vir die skeiding van die professies. Bestaande praktisyns is egter almal toegelaat om as beide advokaat en prokureur te praktiseer. In 1878 is 'n staande kommissie aangewys om kandidate vir toelating as advokate, prokureurs, notarisse en aktebesorgers te eksamineer. Ten einde as agent in die laer howe te kon optree, moes 'n persoon 'n Derdeklas Sertifikaat in Regte slaag.[41]

Ordonnansie 1 van 1903 het die liberale sienswyse van die 1864 Ordonnansie van Transvaal herroep en in 'n terugwaartse stap het artikel 168 bloot bepaal:

> "Every person charged with an offence is entitled to make his defence at his trial and to have the witnesses examined or cross-examined by his counsel."

In die Vrystaat kon 'n beskuldigde as 'n reg daarop aandring dat hy selfs tydens 'n voorlopige ondersoek deur 'n *pleitbezorger* bygestaan word.[42] In die geval van appèlle was daar 'n plig op die hof van appèl om *pro Deo-pleitbezorgers* aan te stel waar die appellant dit nie kon bekostig nie. Wat regspraktisyns betref is daar tussen advokate, prokureurs en agente onderskei. In *Van der Riet v Peeters*[43] is gesê dat al die werksaamhede van 'n agent by dié van 'n prokureur ingesluit is, maar "Ik ken advocaten die hier gepractiseerd hebben, doch geene niet tegelijker tijd algemeen agentsbezigheden deden". Kort ná die draai van die eeu is daar, soos in die Transvaal, 'n nuwe strafprosesordonnansie[44] uitgevaardig waarin bloot bepaal is dat 'n beskuldigde op regsbystand geregtig was.[45]

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32 Kahn "The history of the administration of justice in the South African Republic" 1958 *SALJ* 298.
33 *ZAR v Wildebeest* en *ZAR v Cassimier Simoes Notule van die Volksraad van die Suid-Afrikaanse Republiek* SA Argiefrekords, Transvaal 453 en 247.
34 Kahn 309.
35 Kotze "The administration of justice in the South African Republic (Transvaal)" 1919 *SALJ* 134.
36 Ordonnansie 5 van 1864.
37 A 91.
38 A 98.
39 Prok van 18 Mei 1877.
40 Kotze 137.
41 Kotze 138.
42 A 46 van die *Wetboek van den OranjevrijStaat.*
43 (1879) OVS 1.
44 Ordonnansie 12 van 1902.
45 A 150.

3 DIE SUID-AFRIKAANSE REG TEN OPSIGTE VAN REGSVERTEENWOORDIGING NA UNIEWORDING

Artikel 135 van die Zuid-Afrika Wet 1909 het voorsiening gemaak vir die voortbestaan van bestaande koloniale reg met die gevolg dat koloniale strafprosedures tot 1917 bly voortbestaan het. Die reg op verteenwoordiging het in artikel 218 van die Wet op Strafproses en Bewysreg 31 van 1917 statutêre erkenning verkry. Hierdie wet en die Wet op Landdroshowe 32 van 1917 het die strafprosedures in die verskillende provinsies gekonsolideer, maar dit was nie juis vernuwend van aard nie[46] en dit was grootliks op die Transvaalse ordonnansie van 1903 gebaseer. Artikel 135 verleen die reg om deur 'n advokaat, prokureur of regsagent ("law agent") verteenwoordig te word. Artikel 97(2) het ook die reg op bystand gedurende die voorlopige ondersoekfase verleen. Die enigste verwysing na regshulp was in artikel 93 wat bepaal het dat *pro Deo*-regsverteenwoordigers wat deur die hof aangestel is op 'n gratis kopie van die rekords van die voorlopige ondersoek geregtig was. Die wet het ook 'n verpligting op die howe geplaas om onverdedigde beskuldigdes tot hulp te wees. So moes die klerk van die hof, waar die beskuldigde behoeftig was, verdedigingsgetuies dagvaar wat as wesenlik en noodsaaklik vir die verdediging beskou is.[47] Daar was ook 'n algemene plig op die hof om die bestaan van sekere regte aan beskuldigdes te verduidelik. Dit het die reg om te swyg en om getuienis aan te voer, ingesluit.[48]

Die Strafproseswet 56 van 1955[49] verleen soos sy voorganger ook die *reg* op bystand en verteenwoordiging deur regsadviseurs, maar dit is nie 'n absolute reg nie.[50] Die Strafproseswet van 1955 het geen verandering aan die posisie van die onverdedigde beskuldigde teweeggebring nie en die beskermende maatreëls van die Wet op Strafproses en Bewysreg 31 van 1917 is bloot bevestig.

Artikel 218 van Wet 31 van 1917 is wel deur artikel 73(2) van die Strafproseswet van 1977[51] uitgebrei. Laasgenoemde maak voorsiening vir die reg op regsverteenwoordiging by "strafregtelike verrigtinge" terwyl eersgenoemde slegs vir verteenwoordiging "by sy verhoor" voorsiening gemaak het. Wet 51 van 1977 verleen dus 'n veel wyer reg as sy voorganger aangesien breedweg gesê kan word dat "strafregtelike verrigtinge" ook verrigtinge soos borgaansoeke en aansoeke om uitstelle insluit.

In siviele aangeleenthede was *pro Deo*-bystand in al vier die voormalige kolonies beskikbaar.[52] Soortgelyke voorsiening vir *pro Deo*-regshulp is ook gemaak in die reëls wat ingevolge die Wet op Landdroshowe 32 van 1917 en 32 van 1944 uitgevaardig is. Die reëls van die onderskeie hooggeregshowe het weer vir *in forma pauperis*-verrigtinge voorsiening gemaak.

Dit is uit die voorafgaande duidelik dat regsverteenwoordiging, en in besonder die reg daarop, by wyse van 'n evolusionêre proses tot stand gekom het. Die reg het bestaan, maar die inhoud van die reg was onseker. Die statutêre reg maak voorsiening vir sowel die breë raamwerk van die strafproses as die besondere prosedurele reëls wat gevolg moet word. Waar spesifieke voorskrifte ontbreek het, kon die howe die gemenereg ontwikkel.[53]

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46 Strauss "The development of law of criminal procedure since Union" 1960 *Acta Juridica* 157 159.
47 A 244(2).
48 A 74(1) en 221(4).
49 A 158.
50 A 73(2).
51 A 73 van die Strafproseswet 51 van 1977.
52 Wet 20 van 1856 van die Kaap, Wet 7 van 1902 van die Oranje-Vrystaat, Wet 22 van 1896 van Natal en Proklamasie 21 van 1902 van Transvaal.
53 Steytler *The undefended accused* (1988) 25.

4 ONTWIKKELING VAN REGSVERTEENWOORDIGING AS INSTELLING DEUR DIE HOWE

Regsverteenwoordiging is 'n produk van die gemenereg[54] wat uiteindelik statutêre erkenning verkry het. Daar is egter alreeds voor die Wet op Strafproses en Bewysreg 31 van 1917 in *Li Kui Yu v Superintendent of Labour*[55] ondubbelsinnig verklaar dat die reg op verteenwoordiging fundamenteel tot die Suid-Afrikaanse regstelsel is. Alhoewel die reg statutêr erken is, is die aard en omvang nie omskryf nie. Die wetgewer het dit aan die howe oorgelaat om die inhoud en omvang van die reg op regsverteenwoordiging te bepaal aangesien die wetgewing en die hofreëls slegs 'n breë raamwerk daargestel het.

4 1 Hofbeslissings ten opsigte van die reg op regsverteenwoordiging: 1917–1955

Met die inwerktreding van die Wet op Strafproses en Bewysreg 31 van 1917 was daar lank nie meer twyfel oor die reg op regsverteenwoordiging nie. So het die appèlafdeling in *Dabner v SA Railways and Harbours*[56] verklaar:

> "That a person who is charged with an offence before any court in judicial proceedings in this country is entitled to appear by a legal adviser is a proposition which no one will dispute."

Deur bogenoemde stelling sonder verwysing na gesag te maak, alhoewel artikel 218 van die Wet op Strafproses en Bewysreg 31 van 1917 alreeds drie jaar in plek was, is 'n aanduiding van hoe algemeen die reg op verteenwoordiging in strafsake alreeds aanvaar was.

Marks v Lugg NO[57] het gehandel oor 'n ondersoek na die vraag of 'n persoon getuienis kan lewer ten opsigte van 'n oortreding ingevolge artikel 96 van Wet 31 van 1917. Die regter het beslis dat dit binne die diskresie van 'n landdros val om te besluit of aan die persoon wat ondervra gaan word, regsverteenwoordiging toegelaat moet word.[58] Daar was egter 'n aantal sake na *Marks v Lugg*[59] waarin regsverteenwoordiging by soortgelyke ondersoeke toegelaat is.[60]

In 1951 het die Transvaalse Hooggeregshof in *Appleson v The Master*[61] verklaar dat 'n getuie nie ingevolge die gemenereg 'n reg het om deur 'n regsadviseur verteenwoordig te word nie. Getuies was egter op gereelde basis toegelaat om van professionele bystand gebruik te maak, selfs al het hulle nie 'n reg daartoe gehad nie.[62]

Daar was geen radikale ontwikkeling ten opsigte van die reg op verteenwoordiging in strafsake in hierdie tydperk nie. Die woord "entitle" in *Dabner v SA Railways and Harbours*[63] is 'n aanduiding dat beskuldigdes 'n reg gehad het om

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54 In *Ndanozonke v Nel NO* 1971 3 SA 217 (OK) 219F is aangevoer dat die reg van 'n beskuldigde op regsverteenwoordiging van wetteregtelike oorsprong is. 'n Ondersoek na die geskiedkundige ontwikkeling en die feit dat die stelling deur die hof nie gemotiveer is nie, bring mee dat daardie standpunt nie ondersteun kan word nie.

55 1906 TS 108.

56 1920 AD 583.

57 1933 WLD 135 141.

58 In *S v Heyman* 1966 4 SA 598 (A) is daar in 'n *obiter dictum* twyfel uitgespreek of die *Marks*-saak korrek beslis is.

59 *Supra.*

60 Sien *R v Heard* 1937 CPD 401 en *Waddell v Eyles NO and Welsh NO* 1939 TPD 198.

61 1951 3 SA 141 (T) 146.

62 *Shamosewitz v Shamosewitz and Schatz's Trustee & Adler NO* 1913 WLD 213.

63 *Supra.*

deur 'n praktisyn bygestaan te word. Die gebruikmaking van regsverteenwoordigers is wel gedurende hierdie tydperk geleidelik uitgebrei van beskuldigdes na getuies. Wat getuies betref, blyk dit nie asof daar 'n reg op bystand bestaan het nie, maar eerder dat dit tot 'n praktyksreël ontwikkel het.

4 2 Hofbeslissings ten opsigte van die reg op regsverteenwoordiging in strafsake: 1955–1994

Teen die tyd wat *R v Mati*[64] beslis is, was dit al gebruiklik dat beskuldigdes in sake waarin die doodstraf opgelê kon word, *pro Deo*-verteenwoordiging geniet het. Die hof beslis dat daar geen regsreël bestaan dat 'n beskuldigde wat die gevaar loop om, indien hy skuldig bevind sou word, ter dood veroordeel te word, deur 'n advokaat verteenwoordig moet word tensy hy daarteen beswaar maak nie.[65] Die hof het egter verder gegaan en verklaar:

> "But it is a well established and most salutary practice that whenever there is a risk that the death sentence may be imposed . . . the State should provide defence by counsel if the accused has not made his own arrangements in that behalf. It is disquieting to think that under our system of procedure . . . it is possible for an accused person to be convicted by a Judge sitting alone and be sentenced to death after a trial in which by reason of his poverty he has had to conduct his own defence."[66]

In *S v Seheri*[67] is beslis dat 'n beskuldigde wat onverteenwoordig is as gevolg van 'n fout van sy prokureur, nie sy reg op regsverteenwoordiging verbeur nie en dat 'n weiering om uitstel te verleen ten einde verteenwoordiging te bekom daarop neerkom dat geregtigheid nie geskied het nie. In hierdie saak is die fundamentele belang van die reg op regsverteenwoordiging onomwonde deur die Appèlhof bevestig:[68]

> "Oor die belangrikheid van die voordeel van regsbystand by die verhoor van persone wat, veral weens ernstige misdaad, aangekla word, kan daar geen twyfel bestaan nie."

S v Wessels[69] was 'n appèl in die Kaapse Provinsiale Afdeling van die Hooggeregshof. Die appellant het in die streekhof geweier om getuienis af te lê en hy is gevolglik skuldig bevind ingevolge artikel 212 van die Strafproseswet 56 van 1955. By die aanhoor van sy beswaar om te getuig, het 'n advokaat versoek om vir hom te verskyn. Die versoek is van die hand gewys en die advokaat is slegs toegelaat om die hof ten opsigte van vonnis toe te spreek. Die hof van appèl het hierdie weiering as 'n growwe onreëlmatigheid beskou[70] en tot die gevolgtrekking gekom dat gesê kan word ". . . that the accused have not been properly tried".[71] Die hof was dan ook die mening toegedaan dat ". . . the accused have not had justice".[72]

Drie maande na *S v Wessels*[73] het die Appèlhof ook die geleentheid gehad om hom oor die reg op regsverteenwoordiging uit te spreek. *S v Heyman*[74] het ook op artikel 212 van die Strafproseswet 56 van 1955 betrekking gehad. In die hof *a quo*

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64 1960 1 SA 304 (A).
65 306H.
66 306H–307A.
67 1964 1 SA 29 (A).
68 33H.
69 *Supra.*
70 97G.
71 98A.
72 97G.
73 *Supra.*
74 1966 4 SA 598 (A).

het die beskuldigde geweier om te getuig tensy hy regsverteenwoordiging gehad het. Die Appèlhof was die mening toegedaan dat 'n weiering, sonder gegronde rede, om so 'n persoon die geleentheid te gee om verteenwoordiging te bekom, in stryd is met die grondbeginsels van die regspleging.[75] Die hof het ook gesê dat die beskuldigde 'n billike geleentheid gegee moes word om regsbystand te kry en dat die versuim om regsbystand toe te laat 'n onreëlmatigheid was.[76]

In *S v Blooms*[77] het die hof gesê dat elke beskuldigde die reg het om deur 'n regspraktisyn verteenwoordig te word. In hierdie saak is die beskuldigde se verhoor sonder sy instemming vervroeg. Dit het tot gevolg gehad dat hy nie die geleentheid gehad het om die dienste van 'n raadsman te bekom nie. Die hof het beslis dat dit 'n growwe afwyking van die prosedure was en dat geregtigheid nie geskied het nie.[78]

In *S v Shabangu*[79] is die saak finaal uitgestel en die beskuldigde is op borgtog vrygelaat. Hy het die dienste van 'n prokureur bekom, maar die prokureur kon nie die verrigtinge op die betrokke dag bywoon nie. Omdat dit moeilik sou wees om die getuies weer by die hof te kry, het die verhoorhof met die saak voortgegaan. Die appellant is skuldig bevind. Die appèlafdeling het bevind dat die appellant se reg op regsverteenwoordiging van groter belang is as die ongerief wat deur 'n uitstel veroorsaak sou word,[80] en dat geregtigheid nie geskied het nie. Gevolglik is die skuldigbevinding en straf tersyde gestel.

In *S v Chaane* [81] is beslis dat 'n versuim om 'n *pro Deo*-advokaat aan te stel wanneer die doodstraf regtens moontlik is, nie die verrigtinge onreëlmatig maak nie. Die hof het artikel 73 van die Strafproseswet 51 van 1977 so vertolk dat die beskuldigde geregtig is op bystand van "sy" regsadviseur en nie dat die staat verplig is om 'n regsadviseur aan te stel nie. Die hof het voorts bevind dat dit praktyk is om *pro Deo*-advokate vir hierdie doel aan te stel en nie 'n regsreël nie. Die praktyk is ook slegs op misdade waarvoor die doodstraf opgelê kan word van toepassing.

Tot in hierdie stadium was daar nie veel ontwikkeling met betrekking tot die reg op regsverteenwoordiging nie. Daar was wel 'n neiging ten gunste van die beskuldigde te bespeur,[82] maar daar is ook ander sake[83] ter illustrasie van die howe se onwilligheid om die aanstelling van verteenwoordigers as voorskriftelik te beskou. *S v Wessels*, *S v Blooms*, en *S v Mkhize*[84] is voorbeelde van sake waar beskuldigdes onreëlmatig van hul reg op regsverteenwoordiging ontneem is. Hierdie sake het almal gehandel oor 'n beskuldigde se reg op verteenwoordiging waar hy dit verlang het. Die posisie waar 'n beskuldigde nie verteenwoordiging versoek het nie en hy of sy ook nie onreëlmatiglik daarvan weerhou is nie, is eers in *S v Baloyi*[85] aangespreek. Daar is beslis dat daar geen beginsel of reël is wat die verrigtinge ongeldig maak nie. Die stelling is egter gekwalifiseer deurdat verklaar is dat die voorsittende beampte 'n plig het om 'n onverdedigde beskuldigde in te lig dat hy of

75 611D.
76 612H.
77 1966 4 SA 417 (K).
78 421B.
79 1976 3 SA 555 (A).
80 558E.
81 1978 2 SA 891 (A) 897A–D.
82 Vgl *S v Seheri, S v Shabangu, S v Mkhize* en *S v Mthetwa supra.*
83 Vgl *S v Mati* en *S v Chaane supra.*
84 *Supra.*
85 1978 3 SA 290 (T) 293F–G.

sy 'n reg op verteenwoordiging het en dat 'n versuim om dit te doen kan meebring dat geregtigheid nie geskied het nie. Volgens die hof is daar sake wat as gevolg van die erns of ingewikkeldheid daarvan in die belang van geregtigheid verteenwoordiging behoef, selfs al kan die beskuldigde dit nie bekostig nie. Indien *pro Deo*-regshulp in sulke gevalle nie bekom kan word nie

> "it would be the duty of the Court to refer the matter to one of the legal aid bodies or to invoke the assistance of one or other of the professional bodies to appoint a legal adviser to act without remuneration".[86]

Dit is in *Volschenk v President, SA Geneeskundige en Tandheelkundige Raad*[87] goedgekeur.

Die positiewe ontwikkeling in *S v Baloyi*[88] is in *S v Hlongwane*[89] voortgesit. *In casu* het 'n landdros versuim om 'n onverdedigde beskuldigde aangaande sy prosedurele regte in te lig. Die hof beslis dat dit 'n plig van 'n voorsittende beampte is en dat beskuldigdes gehelp moet word wanneer dit duidelik is dat hulp benodig word.[90] Die hof sê dat beskuldigdes nie net aangaande hul regte ingelig moet word nie, maar ook oor *hoe* om dit uit te oefen. Die versuim om dit te doen, het volgens die hof daartoe gelei dat geregtigheid nie geskied het nie[91] en die beslissing is gevolglik tersyde gestel.

In *S v Mbonani; S v Radebe*[92] het die hof bevind dat die praktyk om 'n beskuldigde aangaande sy of haar regte in te lig al vir baie jare bestaan het maar dat die plig om beskuldigdes aangaande hul reg op regsverteenwoordiging in te lig nie deel van hierdie praktyk uitgemaak het nie. Gevolglik is beslis dat die plig op regsprekende amptenare om onverteenwoordigde beskuldigdes aangaande hul regte in te lig inligting aangaande die reg op verteenwoordiging insluit.[93] Die hof het verder gegaan en gesê dat 'n beskuldigde nie net aangaande hierdie reg ingelig moet word nie, maar dat hy of sy ook aangemoedig moet word om die reg uit te oefen, dat redelike tyd toegelaat moet word om bystand te bekom en dat hy of sy meegedeel moet word dat by die Regshulpraad om bystand aansoek gedoen kan word. Hierdie plig is egter afhanklik gestel van die ingewikkeldheid van die aanklag of die regsreëls wat daarop van toepassing is en die erns van die aanklag.[94] Daar is aangedui dat die versuim van 'n regsprekende beampte om 'n beskuldigde aangaande sy of haar reg op regsverteenwoordiging in te lig 'n onbillike verhoor en 'n gevolglike gebrek aan geregtigheid tot gevolg *mag* hê, maar die hof het daarteen gewaak om die indruk te wek dat die verrigtinge *per se* onreëlmatig sal wees. Daar is benadruk dat elke saak van sy eie omstandighede en feite afhang.

S v Radebe kan in 'n groot mate as 'n waterskeiding gesien word. Voor hierdie saak was die reg op regsverteenwoordiging bloot 'n vergunnende reg.[95] Daar was geen plig op die voorsittende beampte om 'n onverdedigde beskuldigde aangaande

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86 294A.
87 1985 3 SA 124 (A) 140H–J.
88 *Supra.*
89 1982 4 SA 321 (N).
90 323C.
91 324C.
92 1988 1 SA 191 (T).
93 196F.
94 196G.
95 Malan "Die reg op regsverteenwoordiging in die lig van sekere fundamentele beginsels" 1992 *Obiter* 65.

sy of haar reg op regsverteenwoordiging in te lig nie alhoewel dit soms wenslik geag is.[96] Dit was selfs waar die doodstraf opgelê kon word nie 'n vereiste dat regsverteenwoordiging verskaf moes word nie,[97] maar dit was wel 'n gevestigde praktyksreël dat *pro Deo*-verteenwoordiging verskaf is waar die doodstraf 'n moontlikheid of waarskynlikheid was.[98] Die ontsegging van regsverteenwoordiging waar dit verlang is, is wel as onreëlmatig beskou.[99]

Na die *Radebe*-beslissing het die howe drie benaderings gevolg.[100] Die eerste benadering, wat reeds voor hierdie beslissing bestaan het, was dat die voorsittende beampte geen plig het om 'n beskuldigde aangaande sy reg op regsverteenwoordiging in te lig nie. *S v Mashiyana*[101] was 'n voorbeeld van hierdie benadering. Hier was die beskuldigde 'n onverdedigde swart vrou. In haar aansoek om hersiening voer sy aan dat sy nie daarvan bewus was dat sy 'n prokureur kon aanstel nie, maar dat sy dit sou gedoen het as sy geweet het sy kon. Die hof het beslis dat 'n hof nie verplig is om aan 'n beskuldigde te vra of sy regsverteenwoordiging wil bekom nie en voorts: "[T]he unexpressed desire of an accused to engage a legal representative cannot afford him a cause for complaint after his conviction and sentence."[102] Die hof het gevolglik die aansoek afgewys.

Die tweede benadering, wat ook in *S v Radebe* gevolg is, kom daarop neer dat daar afhangende van die beskuldigde se persoonlike omstandighede en die erns van die saak 'n plig op die voorsittende beampte kan wees om die beskuldigde oor sy reg op regsverteenwoordiging in te lig. In *S v Khanyile*[103] het die landdros in die verhoorhof uit sy pad gegaan om alle moontlike bystand aan die onverdedigde beskuldigdes in die aanbieding van hul verdediging te verleen, maar die Natalse Hooggeregshof het nogtans bevind dat dit geen plaasvervanger vir professionele hulp was nie.[104] Die hof het bevind dat die landdros fouteer het deur die beskuldigdes nie in te lig dat hulle die reg op regsverteenwoordiging het indien hulle dit kon bekom nie. 'n Verdere fout was dat die hof hulle nie die geleentheid gebied het om bystand te bekom nie.[105] Die hof het gesê[106] dat daardie sake geïdentifiseer moet word waar die behoefte aan verteenwoordiging die grootste is en waar die afwesigheid daarvan die grootste gebrek is. Daar is veral drie fasette wat die belangrikste is, naamlik:

- die inherente eenvoud of kompleksiteit van die saak;
- die persoonlike eienskappe van die individu wat verhoor word; en
- die erns van die saak.

Die hof het voortgegaan en 'n werkswyse voorgestel waar die beskuldigde te arm is om verteenwoordiging te bekom en nie waar hy of sy gekies het om nie verteenwoordig te word nie.[107] Die hof moet eerstens al drie die aspekte hierbo genoem

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96 Vgl *S v Mthetwa* en *S v Baloyi supra*.
97 Vgl *S v Mati* en *S v Chaane supra*.
98 Malan 65.
99 Vgl *S v Seheri, S v Wessels, S v Shabangu* en *S v Baloyi supra*.
100 Malan 66.
101 1989 1 SA 592 (K).
102 596D.
103 1988 3 SA 795 (N).
104 798D.
105 799C.
106 815C–E.
107 815I ev.

ondersoek en dan in die lig daarvan vra of die beskuldigde in so 'n mate benadeel sal word deur 'n gebrek aan verteenwoordiging dat die verhoor "palpably and grossly unfair" sal wees. Indien die antwoord positief sou wees, behoort die verhoor gestaak te word en die saak na regshulp of ander liggame wat bystand verleen, verwys word. Indien die antwoord negatief is, moet met die saak voortgegaan word, maar die beskuldigde het nog steeds die reg op appèl of hersiening waar die vraag weer gestel moet word. *S v Khanyile*[108] is oor die boeg van die uitbreiding en ontwikkeling van 'n gevestigde reg, naamlik die reg op 'n billike verhoor en dus die reg om verteenwoordig te word, gegooi. Die hof het gepoog om 'n algemene reël te formuleer, naamlik dat elke beskuldigde die reg het om deur 'n regsverteenwoordiger bygestaan te word ongeag of hy of sy dit kan bekostig of nie. Die uitoefening van daardie reg is gesien as "fundamental and essential to a fair trial" en as die beskuldigde nie bystand kan bekostig nie, moet dit voorsien word. Ontkenning van die reg maak die verhoor *per se* onbillik. Regter Didcott het egter die nie-uitvoerbaarheid van so 'n reël voorsien en hy het gevolglik die werkswyse wat hierbo uiteengesit is as 'n kompromis aanvaar. Die werkswyse is riglyne vir die bepaling van gevalle waar die behoefte aan verteenwoordiging die dringendste is. Regter Didcott het hierdie kompromis toegelig in *S v Davids; S v Dladla*[109] waar hy gesê het dat 'n kompromis gevind moet word tussen die beginsel dat regsverteenwoordiging van beskuldigdes onontbeerlik was vir 'n billike verhoor en die realiteit dat bestaande middele onvoldoende was om in die behoefte aan bystand te voorsien.

In *S v Gwebu*[110] is daar in ooreenstemming met *S v Mbonani; S v Radebe*[111] beslis dat daar 'n verpligting op die howe rus om beskuldigdes aan te moedig om verteenwoordiging te bekom waar die gebrek aan verteenwoordiging nie aan die beskuldigde toegeskryf kan word nie en dat voldoende geleentheid daarvoor toegelaat moet word. Dit is belangriker geag as die ongerief wat deur verdere uitstel veroorsaak sou word. *In casu* het die beskuldigde se verteenwoordiger op die dag van die verhoor onttrek en is hy een uur gegun om 'n alternatiewe raadsman te bekom.

In *S v Davids; S v Dladla*[112] het die hof beslis dat dit absoluut noodsaaklik is dat daar by die aanvang van die verhoor vasgestel moet word of die beskuldigde daarvan bewus is dat hy of sy op regsbystand geregtig is, tensy daar aanduidings is dat die beskuldigde van hierdie reg bewus was. Nadat dit vasgestel is, moet die beskuldigde alle redelike geleentheid gegee word om te reël vir verteenwoordiging.[113] Die hof moet ook van die beskuldigde vasstel of hy of sy van die reg op bystand wil gebruik maak en versuim om dit te doen is 'n onreëlmatigheid. Regter Nienaber kom, in teenstelling met die *Khanyile*-saak, tot die gevolgtrekking dat daar geen plig op die staat is om regsverteenwoordiging, bykomstig tot regshulp, te voorsien nie.[114] Die regter gaan verder en sê dat die teenpool van die reg op regsverteenwoordiging die negatiewe verpligting is om die reg te respekteer en nie die positiewe verpligting om verteenwoordiging te voorsien nie.[115] Dit kom dus daarop neer dat die versuim om bystand te verleen nie op die verbreking van 'n regsreël, praktyk of prosedure neerkom nie.

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108 *Supra.*
109 *Infra* 184G–185A.
110 1988 4 SA 155 (W).
111 *Supra.*
112 1989 4 SA 1172 (N).
113 1941.
114 1971.
115 198B.

In *S v Mabaso*[116] was die vraag voor die volbank van die Appèlafdeling van die Hooggeregshof of 'n landdros se versuim om die appellante tydens verrigtinge ingevolge artikel 119 van die Strafproseswet 51 van 1977 van hul reg op regsverteenwoordiging in te lig die verrigtinge onreëlmatig gemaak het. Die hof beslis dat waar daar 'n algemene plig op 'n regsprekende beampte rus om 'n onverdedigde beskuldigde aangaande sy of haar reg op verteenwoordiging in te lig, 'n versuim om dit te doen nie onvermydelik tot gevolg sal hê dat die verrigtinge onreëlmatig is nie. Of die verrigtinge onreëlmatig is, sal in die lig van elke saak se feite ondersoek moet word.[117] Die hof het ook uitdruklik vermeld dat die omvang van die beskuldigde se kennis van sy regte 'n bepalende faktor sal wees. Die hof het voortgegaan en gesê dat selfs al word veronderstel dat die beskuldigdes onbewus was van hul reg op regsverteenwoordiging en dat die landdros se versuim om hulle aangaande daardie reg in te lig 'n onreëlmatigheid was, gevra moet word wat die effek van die onreëlmatigheid was en of dit tot gevolg gehad het dat geregtigheid nie geskied het nie.[118]

Die derde benadering is dat die beskuldigde in alle gevalle oor sy reg op regsverteenwoordiging ingelig moet word. In *Nakani v Attorney-General, Ciskei*[119] is die *Mashiyana*-saak gekritiseer[120] en die mening is uitgespreek dat alhoewel die versuim om 'n beskuldigde aangaande sy reg op regsverteenwoordiging en die aanbevelenswaardigheid daarvan in te lig nie op 'n uitdruklike en positiewe ontkenning van die reg neerkom nie, die effek daarvan dieselfde is. Die hof het gesê dat voorsittende beamptes beskuldigdes nie net aangaande hul reg op verteenwoordiging moet inlig nie, maar dat hulle ook aan beskuldigdes moet verduidelik hoe om verteenwoordiging te bekom, en as hulle nie oor die vermoë beskik nie, dat instellings wat hulp verleen, genader moet word. Daar moet ook verduidelik word wat die gevolge van 'n gebrek aan verteenwoordiging is indien daar besluit sou word om nie die reg uit te oefen nie.[121] Redelike geleentheid moet dan ook voorts gebied word om bystand te bekom.[122] Die hof het ook verskil van die *Khanyile*-uitspraak en gesê dat die reg om verteenwoordig te word nie afhanklik is van die kompleksiteit van die saak nie, maar dat dit 'n inherente reg is wat nie aan die hof die reg gee om te bevind dat 'n beskuldigde geregtig is op verteenwoordiging, maar dit nie nodig het nie.

In *S v Rudman; S v Mthwana*[123] het die volbank van die appèlafdeling gesê dat die aanname onderliggend aan die kompromis in die *Khanyile*-saak is dat beskuldigdes ten minste in ernstige sake op verteenwoordiging geregtig is, selfs indien hulle nie self die vermoë het om sulke dienste te bekom nie. Die hof is van mening dat die vraag is of daar 'n onreëlmatigheid plaasgevind het[124] en nie of die verhoor onbillik was as gevolg van 'n gebrek aan regsverteenwoordiging nie. Die hof verskil ook van Regter Didcott se standpunt in S v Davids125 dat Khanyile nie 'n nuwe reg daargestel het nie. Met verwysing na verskeie sake kom die hof tot die gevolgtrekking dat *Khanyile* wel 'n nuwe rigting ingeslaan het, maar dat die reël wat aldaar geformuleer is nie

116 1990 3 SA 185 (A).
117 204C–D.
118 204H–I.
119 1989 3 SA 655 (Ck).
120 661B.
121 664B.
122 661D–F.
123 1992 1 SA 343 (A).
124 375A.
125 *Supra.*

legitimiteit kan verkry uit hoofde van die "reg op 'n billike verhoor" nie omdat daardie reg nie die toets vir onreëlmatigheid is nie.[126] Met betrekking tot die vraag of daar enige reël in die Suid-Afrikaanse reg is wat 'n beskuldigde op bystand geregtig maak waar hy dit self nie kan bekostig nie, bevind die hof dat daar voor die *Khanyile*-saak nooit gesuggereer is dat

> "accused persons, who were themselves unable to obtain legal representation, were entitled to be provided with it, or that a criminal trial conducted without such representation was irregular or illegal".[127]

Die hof het ook verwys na *S v Mabaso*[128] waarin verklaar is dat 'n versuim om 'n beskuldigde aangaande sy reg in te lig slegs onreëlmatig sal wees indien bewys kan word dat die beskuldigde nie van die reg bewus was nie en verklaar as volg:[129]

> "I am not sure that this *dictum* is entirely correct. I am inclined to think that the better view is that a failure to inform an accused of his right to representation is an irregularity unless it is apparent to the magistrate, for good reasons, that the accused is aware of his rights . . ."

Die effek van die beslissing is dat die appèlafdeling tot die gevolgtrekking gekom het dat sowel artikel 73 van die Strafproseswet 51 van 1977 as die gemenereg nie 'n positiewe plig op die staat plaas om onder enige omstandighede regsverteenwoordiging te voorsien nie.

4 3 Ontwikkeling van die reg op regsverteenwoordiging in siviele sake

Wat siviele sake betref, was daar nie 'n veelvoud van sake soos in die geval van strafregtelike aangeleenthede nie. Dit beteken egter nie dat die toeganklikheid van die siviele regstelsel nie aandag geniet het nie aangesien daar in die laaste twee dekades twee regterlike kommissies was wat ondersoek na die aangeleentheid ingestel het. Die eerste was die die Galgut-kommissie[130] wat in 1980 verslag gedoen het en die tweede die Hoexter-kommissie[131] wat sy finale verslag in 1983 ingedien het.

Elkeen van hierdie kommissies het voorstelle gedoen en daar is aan die meeste van hierdie voorstelle uitvoering gegee, maar Friedman is van mening dat daar nog steeds nie daarin geslaag is om 'n siviele regstelsel daar te stel wat op doeltreffende wyse toegang tot die geregshowe verleen nie.[132]

Dit is sedert die vroegste tye al aanvaar dat 'n litigant sy eie saak kan hanteer. Dit is ook 'n aanvaarde reël dat natuurlike persone deur behoorlik gemagtigde regsverteenwoordigers verteenwoordig *kan* word[133] terwyl regspersone verteenwoordig

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126 380F.
127 378I.
128 *Supra.*
129 391F ev.
130 RSA *Kommissie van Ondersoek na Siviele Verrigtinge in Die Hooggeregshof van Suid-Afrika* (1980).
131 RSA *Kommissie van Ondersoek na die Struktuur en Funksionering van die Howe: Vyfde en Finale Verslag* (RP 78/1983).
132 Friedman *Address to the Annual General Meeting of the Law Society of the Cape of Good Hope* (1995) ongepubliseerde voordrag gelewer by die algemene jaarvergadering van die Regsvereniging van die Kaap die Goeie Hoop 1995-10-08 5.
133 *Volkskas Motor Bank Ltd v Leo Mining Raise Bone* 1992 2 SA 50 (W).

moet word.[134] Iedere party by 'n siviele geding kan te eniger tyd van die verrigtinge 'n prokureur aanstel om namens hom of haar op te tree.[135]

Goldberg v Union and South West Africa Insurance Co Ltd[136] het gehandel oor die vraag of 'n eiser by 'n aksie om skadevergoeding weens liggaamlike besering geregtig is op regsverteenwoordiging by 'n mediese ondersoek ingevolge reël 36 van die Hofreëls. Die vraag het by twee vroeëre geleenthede ter sprake gekom. In *Mgudlwa v AA Mutual Insurance Association*[137] is dit doelbewus onbeantwoord gelaat en in *Feros and Another v Rondalia Assurance Corporation*[138] is die mening *obiter* uitgespreek dat 'n litigant daarop geregtig is om sy belange deur middel van regsverteenwoordiging te beskerm.[139] In die *Goldberg*-saak het die hof egter onomwonde beslis dat 'n eiser geregtig is op verteenwoordiging by ondersoeke van hierdie aard. Die reg is gesien as 'n voorvereiste vir billikheid en regverdigheid aangesien die moontlikheid van buitegeregtelike ondervraging bestaan en die eiser nie die beskerming van die hof in daardie omstandighede geniet nie.

Hierdie twee sake illustreer dat die reg op regsverteenwoordiging in siviele sake 'n voldonge feit is en dat die omvang van die reg ook sodanig deur die howe uitgebrei is dat dit die reg op buitegeregtelike bystand insluit.

4 4 Evaluering van die ontwikkelingsgang van die reg op regsverteenwoordiging tot voor konstitusionalisering

Die Britse kolonialiseringsproses in Suid-Afrika was ook die begin van die statutêre regulering van regsverteenwoordiging en die reg daarop in Suid-Afrika. Hierdie statutêre regulering is ook in die onafhanklike boererepublieke van die Transvaal en Vrystaat voortgesit en na unifikasie in 1910 is daarop voortgebou. Hierdie statutêre voorskrifte het vir sowel die breë raamwerk van die strafproses as die prosedurele reëls wat gevolg moes word, voorsiening gemaak en die ontwikkeling van spesifieke voorskrifte is aan die howe oorgelaat. Met die inwerkingtreding van die eerste konsoliderende Strafproseswet in 1917 was daar alreeds nie meer twyfel dat beskuldigdes in strafsake die reg het om verteenwoordig te word nie. Die inhoud en omvang van die reg moes egter nog deur die howe bepaal word.

Aanvanklik het die Suid-Afrikaanse howe aanvaar dat Strafproseswet 56 van 1955 en 51 van 1977 nie 'n positiewe verpligting op die staat plaas ten opsigte van regsverteenwoordiging nie en dat dit dus 'n negatiewe reg is waarop nie inbreuk gemaak mag word nie.[140] Met verloop van tyd het die howe van krag tot krag gegaan ten einde aan die reg effek te gee. Teen 1978 was die situasie dat dit wenslik geag is dat voorsittende beamptes voor die aanvang van 'n verhoor vasstel of 'n beskuldigde regsverteenwoordiging verlang.[141] Hierdie ontwikkeling is heelwat verder geneem in *S v Radebe; S v Mbonani*[142] waar beslis is dat die versuim om 'n

134 *Arma Carpet House (Johannesburg) (Pty) Ltd v Domestic & Commercial Carpet Fittings (Pty) Ltd* 1977 3 SA 448 (W).
135 Hooggeregshofreël 16(1).
136 1980 1 SA 160 (OK).
137 1967 4 SA 721 (OK).
138 1970 4 SA 393 (OK).
139 394H.
140 Cowling "Whither *Khanyile*? The remnants of the right to legal representation in criminal cases" 1994 *THRHR* 21.
141 *S v Mthethwa; S v Khanyile* 1978 2 SA 773 (N).
142 1988 1 SA 191 (T).

beskuldigde aangaande sy reg op regsverteenwoordiging in te lig onder sekere omstandighede daarop kan neerkom dat geregtigheid nie geskied het nie. Omstandighede kon ook vereis dat 'n beskuldigde geadviseer moet word dat hy 'n aansoek tot die Regshulpraad kan rig. Hierdie benadering is in *S v Davids; S v Dladla*[143] gekonsolideer waar beslis is dat dit nie bloot aanbevelenswaardig is om by die aanvang van 'n verhoor vas te stel of 'n beskuldigde van die reg op bystand bewus is nie, maar absoluut noodsaaklik.[144] Die effek was dat wat in die *Mthethwa*-saak as wenslik geag is tot die praktyk verhef is.[145] Teen 1990 was die posisie dat dit onreëlmatig was om 'n persoon wat vir regsbystand kan betaal die geleentheid te ontsê en indien 'n verteenwoordiger aangestel is en nie by die hof opdaag nie, was dit onreëlmatig om aan te dring dat die beskuldigde sy of haar eie verdediging teen sy of haar wil waarneem. Dit was ook onreëlmatig om met die verhoor van 'n armlastige te begin sonder om hom of haar aan te sê om om regshulp aansoek te doen, maar dit was nie onreëlmatig om 'n onverdedigde beskuldigde te verhoor waar regshulp geweier is nie.[146] Daar was dus 'n plig op die howe om 'n beskuldigde in te lig aangaande sy of haar reg om om regshulp aansoek te doen en billike geleentheid moes hiervoor gebied word. Waar regshulp geweier is, kon die saak egter aangaan.[147] Dit is dus moontlik om 'n evolusionêre proses waardeur die howe 'n plig op voorsittende beamptes geplaas het om beskuldigdes aangaande die moontlikheid van regsbystand in te lig en dat versperrings nie in die weg van 'n poging daartoe geplaas mag word nie, te identifiseer.[148] So het regter Goldstone in *S v Radebe*[149] na die "evolutionary process of broadening and extending the right to legal representation" verwys. Sedert die beslissing in *R v Mati*[150] in 1959 was daar 'n groeiende bewustheid en simpatie vir die nood van die onverdedigde beskuldigde. Dit het aanvanklik tot die daarstelling van 'n aantal private regshulpburo's wat gedeeltelik deur die staat befonds is, gelei en uiteindelik tot die promulgering van die Wet op Regshulp.[151] Daar kan dus gesê word dat die reg op regsverteenwoordiging, wat statutêr en nou ook grondwetlik[152] beskerm word, gemeenregtelik van oorsprong[153] is en dat die inhoud van die reg deur die howe uitgebou en ontwikkel is.[154] Die gerapporteerde hofsake dui 'n natuurlike neiging in die rigting van 'n uitbreiding van die reg op regsverteenwoordiging ten einde die effek van die gebrek aan bystand te oorkom. Die howe het egter begin besef dat dit geen doel dien om 'n beskuldigde van sy reg op regsverteenwoordiging in te lig as hy of sy in ieder geval nie 'n raadsman kan bekostig nie. Vir hierdie doel is reëls deur die howe geformuleer wat positiewe optrede van regsprekende beamptes ten opsigte van hulp aan onverdedigdes vereis het. So is daar deur sommige howe beslis dat die beskuldigde ook ten opsigte van sy reg op regshulp ingelig behoort te word. Hierdie reëls is almal regterlike skeppings, maar tog is dit geen plaasvervanger vir regsverteenwoordiging nie.[155]

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143 1989 4 SA 172 (N).
144 194G.
145 *S v Mkhize* 1990 1 SACR 620 (N).
146 Chaskalson "The unrepresented accused" October 1990 *Consultus* 100.
147 *S v Rudman; S v Mthwana supra.*
148 Cowling 20.
149 *Supra* 192H.
150 *Supra.*
151 22 van 1969.
152 Vgl a 34 en 35 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996.
153 Geldenhuys en Joubert *Strafproseshandboek* (1994) 62.
154 Daar is uitsonderings wat tydens die ontwikkelingsproses voorgekom het, soos bv *S v Mashiyana supra*, maar oor die algemeen kan 'n progressiewe ontwikkeling bespeur word.
155 *S v Rudman; S v Mthwana supra.*

Verteenwoordiging in "kitsverhore" het ook al die howe se aandag geniet. So is in *S v Yantolo*[156] gesê dat dit aanbevelenswaardig is dat geregtigheid sonder onnodige vertraging moet geskied,[157] maar nie ten koste van die beskuldigde se reg om verteenwoordig te word nie. Die hof het beslis dat 'n beskuldigde in enige saak wat die moontlikheid van gevangenisstraf inhou nie in 'n posisie geplaas moet word waar hy nie die erns van die saak, die aard van die feite en die gevolge van 'n pleit van skuldig kan beoordeel nie. Die hof was van mening dat dit gedoen kan word deur 'n opgevoede, geletterde persoon met die bystand van 'n regsverteenwoordiger en by implikasie dus dat die behoefte van ongeletterdes aan regsverteenwoordiging soveel groter is. In *Van Niekerk v Attorney-General, Transvaal*[158] is die vereiste dat daar by "kitsverhore" noukeurig bepaal moet word of die beskuldigde die verrigtinge en die gevolge daarvan verstaan deur die appèlhof bevestig.

Die strydvraag in die tydperk voor konstitusionalisering was of persone wat nie vir hul eie regsverteenwoordiging kan betaal nie daarop geregtig is om deur die staat daarvan voorsien te word waar dit blyk dat die gebrek aan verteenwoordiging tot ongeregtigheid sal lei. Die appèlafdeling se beslissing in *S v Rudman*[159] het oënskynlik die dispuut wat in die provinsiale afdelings van die Hooggeregshof hoogty gevier het tot 'n einde gebring. Tot die *Khanyile*-beslissing was daar geen Suid-Afrikaanse beslissing tot die effek dat die afwesigheid van regsverteenwoordiging wat deur die finansiële onvermoë van 'n beskuldigde meegebring is die tersydestelling van die verrigtinge geregverdig het op grond daarvan dat die verrigtinge onbillik was nie. Alhoewel hierdie beslissing deur die appèlhof verwerp is, het dit wye debatvoering tot gevolg gehad.[160] Die posisie na die appèlhof se beslissing in *S v Rudman* was dus dat 'n onverdedigde beskuldigde nie die reg het om op staatskoste van regsverteenwoordiging voorsien te word nie. Dit beteken geensins dat die hof onsimpatiek is nie. Die houding van die appèlhof word in 'n nota tot die uitspraak[161] soos volg deur hoofregter Corbett opgesom:

> "The ideal for which Didcott J (and the Judges who agreed with him) strove in the cases of *S v Khanyile and Another* 1988 (3) SA 795 (N) and *S v Davids; S v Dladla* 1989 (4) SA 172 (N), viz the provision of free legal representation to all indigent persons accused of serious crimes who desire such representation, is unquestionably a most worthy one. Indeed it is a *sine qua non* of a complete system of criminal justice; and a system which lacks it is flawed. . . . [I]t is an ideal which under present circumstances in South Africa is not capable of attainment. All the same the ideal should never be lost sight of and should continue to guide and stimulate all who are concerned with the improvement of our criminal justice system. Ultimately . . . it depends on how much the State is able and willing to provide for the funding of public defender, legal aid and such-like schemes for the establishment of the additional infrastructure required. The many clamant demands on the public purse are well known. It becomes a question of deciding on priorities. I trust that those charged with such decisions will not forget the undefended accused."

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156 1977 2 SA 146 (OK).

157 149H.

158 1990 4 SA 806 (A).

159 *Supra.*

160 Sien oa Cowling *supra*, Chaskalson *supra*, Malan *supra*, Cowling "Revisiting the right to legal representation" 1995 *SALJ* 11 en Labuschagne "Eerste wêreldse regsgevoel in 'n derde wêreldse sosio-ekonomiese en -kulturele milieu: opmerking oor die reg op regsverteenwoordiging in die strafproses" 1994 *Suid-Afrikaanse Tydskrif vir Strafregpleging* 36.

161 392F–I.

Die ontwikkelingsgang van verteenwoordiging as regsinstelling kan oorspronklik gesien word as 'n reaksie op 'n behoefte wat ontstaan het as gevolg van veral prosedurele formalisme, opvoeding, taal en die waarde wat aan prosedurele geregtigheid geheg word. Dit is veral hierdie faktore wat tot gevolg het dat persone sonder regsbystand nie effektief aan hofverrigtinge kan deelneem nie en dat die regstelsel ontoeganklik en onverstaanbaar is.[162]

Die effek van die appèlhof se beslissing in *S v Rudman* is dat 'n onverdedigde beskuldigde in strafsake die reg het om verteenwoordig te word, maar nie dat hy of sy die reg het om op staatskoste van regsverteenwoordiging voorsien te word nie. Die posisie is dieselfde in siviele gedinge. Die polemiek rondom regsverteenwoordiging en die vraag of dit deur die staat voorsien moet word, is uiteindelik op beslissende wyse deur die Grondwet van die Republiek van Suid-Afrika[163] beëindig.

5 DIE REG OP REGSVERTEENWOORDIGING SEDERT KONSTITUSIONALISERING

5 1 Inleiding

Die beweging van parlementêre soewereiniteit na konstitusionalisme en 'n gepaardgaande daarstelling van 'n handves van menseregte het 'n aantal fundamentele regte in die Suid-Afrikaanse regstelsel verskans. Dit sluit die reg op regsverteenwoordiging en die reg op toegang tot die howe in. Die waarde van hierdie regte is egter afhanklik van die vermoë om dit effektief af te dwing.

5 2 Die Grondwet van die Republiek van Suid-Afrika, Wet 200 van 1993

Die tussentydse Grondwet van die Republiek van Suid-Afrika[164] het die basis vir die lewering van regsdienste in die toekoms daargestel. Ingevolge artikel 22 het elke persoon die reg om beregbare geskille deur 'n hof of, waar toepaslik, 'n ander onafhanklike en onpartydige forum te laat bereg. Artikel 8 waarborg die reg op gelykheid voor die reg en op gelyke beskerming deur die reg.

Met die inwerkingtreding van hierdie wet het die reg op regsverteenwoordiging vir die eerste keer grondwetlike erkenning verkry. Hiervolgens het elke aangehoudene en gevonnisde gevangene die reg om met 'n regspraktisyn van sy of haar keuse te konsulteer, om van hierdie reg ingelig te word en, waar wesenlike ongeregtigheid sal geskied, om van die dienste van 'n regspraktisyn deur die staat voorsien te word.[165] Hierdie reg word ook aan beskuldigdes verleen en die Grondwet kategoriseer dit as 'n element vir 'n billike verhoor.[166] Artikel 25(3)(e) lui as volg:

> "Elke beskuldigde het die reg op 'n billike verhoor, waarby inbegrepe is die reg:
>
> (e) om deur 'n regspraktisyn van sy of haar keuse verteenwoordig te word of, waar dit andersins tot wesenlike onreg sou lei, op Staatskoste van regsverteenwoordiging voorsien te word, en om van hierdie reg verwittig te word."

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162 Main Committee: HSRC Investigation into Intergroup Relations *The South African Society: Realities and Future Prospects* (1985) 166.
163 108 van 1996.
164 200 van 1993.
165 A 25(1)(c).
166 A 25(3)(e).

Die Grondwet waarborg dat behoorlike regsdienste gelewer sal word. Diegene wat regsverteenwoordiging kan bekostig, het toegang daartoe en diegene wat dit nie kan bekostig nie, moet teen staatskoste van regsbystand voorsien word waar 'n gebrek daaraan tot 'n wesenlike onreg sal lei.

Die effek van artikel 25(3)(e) op bestaande regspraak was dat die benadering in *S v Khanyile*[167] dat die reg om deur 'n regsverteenwoordiger bygestaan te word 'n voorvereiste vir 'n billike verhoor is, statutêr bevestig is. "Wesenlike onreg" is nie omskryf nie en daar is ook onduidelikheid of artikel 25(3)(e) die reg op bystand deur 'n praktisyn van die beskuldigde se keuse teen staatskoste beteken. Die interpretasie van hierdie artikel is aan die howe oorgelaat.

5 3 Hofbeslissings aangaande die reg op regsverteenwoordiging ingevolge die Grondwet van die Republiek van Suid-Afrika, Wet 200 van 1993

In *S v Vermaas*[168] het die beskuldigde aansoek gedoen om van regsverteenwoordiging op staatskoste voorsien te word. Hy het onder andere op artikel 25(3)(e) van die Grondwet gesteun, maar die hof het bevind dat daar nog nooit 'n betekenis aan die woorde "wesenlike onreg" gegee is nie.[169] Die hof het dit egter nie nodig gevind om hom verder hieroor uit te spreek nie en die saak is na die Konstitusionele Hof verwys.

Die woorde "wesenlike onreg" is ook nie in *S v Lombard*[170] omskryf nie aangesien die omstandighede van die saak dit duidelik gemaak het dat 'n gebrek aan regsverteenwoordiging wel 'n wesenlike onreg sou meebring.[171] Die hof het vermeld dat die moontlikheid van gevangenisstraf by skuldigbevinding 'n aanduiding kan verskaf of die afwesigheid van 'n regsverteenwoordiger sou beteken dat 'n wesenlike onreg plaasgevind het. *In casu* was die vraag voor die hof nie slegs ten opsigte van die reg om van regsverteenwoordiging op staatskoste voorsien te word nie, maar ook dat die beskuldigde ingevolge die Grondwet op die dienste van 'n verteenwoordiger van sy keuse op staatskoste kan aanspraak maak. Die regter was van mening dat artikel 25(3)(e) vir twee uitlegwyses vatbaar is. Die eerste is dat 'n beskuldigde die reg het om 'n regsverteenwoordiger van sy keuse op eie koste aan te stel. Die tweede benadering is die reg om onder sekere omstandighede teen staatskoste van regsverteenwoordiging voorsien te word. Die woorde "van sy of haar keuse" ontbreek hier en gevolglik is dit geïnterpreteer as 'n aanduiding dat daar nie 'n ongekwalifiseerde keuse ten opsigte van die verteenwoordiger bestaan nie. Cowling[172] is van mening dat hierdie benadering korrek is.

In *Pennington v The Minister of Justice*[173] was die applikant 'n armlastige *peregrinus*. Die hof was bekommerd dat 'n gebrek aan regsverteenwoordiging die gevolg sou hê dat die verhoor nie billik sou wees nie. Die prokureur-generaal het egter toegegee dat "applicant was in terms of the Constitution (see section 25(3)(e)) entitled as of right to legal aid to enable him to receive a fair trial".[174] Hierdie regshulp moes op staatskoste verskaf word en dit is verleen sowel vir die doeleindes van voorbereiding vir die saak as vir die verdediging daarvan.[175]

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167 1988 3 SA 795 (N).
168 1994 4 BCLR 18 (T).
169 28C.
170 1994 2 SACR 104 (T).
171 108G–H.
172 Cowling "Revisiting the right to legal representation" 1995 *SALJ* 11 13.
173 1995 3 BCLR 270 (K).
174 279D.
175 280D.

In *Cuppan v Cape Display Supply Chain Services*[176] was die vraag of die reg op 'n regspraktisyn van keuse na ander tribunale as geregshowe, soos dissiplinêre verhore, uitgebrei kan word. Die hof het beslis dat artikel 25(3)(e) van die Grondwet nie op die reg op verteenwoordiging by dusdanige verhore betrekking het nie en dat waar 'n regsverhouding by wyse van 'n kontrak gereguleer word, die reg op verteenwoordiging in die kontrak self gesoek moet word.[177]

In *S v Vermaas; S v du Plessis*[178] is twee sake gekonsolideer ten einde gelyktydig bereg te word. Die vraag was of die omstandighede van die sake sodanig was dat dit aan die beskuldigdes 'n reg op regsverteenwoordiging op staatskoste verleen het. Beide sake het voor die inwerkingtreding van die tussentydse Grondwet 'n aanvang geneem en beide beskuldigdes kon nie meer hul eie regsverteenwoordiging bekostig nie. In die *Du Plessis*-saak het die beskuldigde ook nog aangedring op die reg om op staatskoste van 'n regsverteenwoordiger van sy keuse voorsien te word. Die verhoorhof het reeds beslis dat artikel 25(3)(e) nie die afleiding regverdig dat beskuldigdes 'n keuse het ten opsigte van regsverteenwoordigers wat op staatskoste voorsien word nie en die Konstitusionele Hof het gelyk gegee.[179] Die Konstitusionele Hof was huiwerig om hom uit te laat oor die vraag of die beskuldigdes die *reg* gehad het om regsverteenwoordiging op staatskoste te bekom,[180] maar het tog kommer uitgespreek omdat daar oënskynlik niks gedoen is om finansiële en administratiewe strukture daar te stel om uitvoering aan die reg op regsverteenwoordiging te gee nie.[181]

In *S v Gouwe*[182] is beslis dat die woord "shall" in artikel 25(3)(e) 'n aanduiding is dat die wetgewer bedoel het dat die bepaling gebiedend is en dat 'n landdros se versuim om 'n beskuldigde aangaande sy reg op verteenwoordiging in te lig 'n onreëlmatigheid was wat 'n onbillike verhoor tot gevolg gehad het.[183]

In *Msila v Government of the Republic of South Africa*[184] het die Regshulpraad die applikant se aansoek om regshulp geweier omdat hy nie ingevolge die raad se vermoënstoets vir regshulp gekwalifiseer het nie. Die hof het beveel dat die raad aan die applikant regshulp verleen vir die doeleindes van 'n aansoek dat regshulp aan hom toegestaan moet word. Die hof het bevind dat dit onrealisties is om van die applikant te verwag om self aansoek te doen en dat 'n gebrek aan verteenwoordiging in so 'n geval op 'n wesenlike ongeregtigheid sal neerkom.[185]

In *S v Mhlakaza*[186] is beslis dat die Grondwet aan beskuldigdes 'n reg op deurlopende bystand deur 'n regsverteenwoordiger gee, vanaf arrestasie tot die saak afgehandel is, selfs een deur die staat aangestel. Die hof het sy kommer oor die praktiese erkenning en uitvoering van hierdie reg uitgespreek,[187] maar ook gesê dat

176 1995 5 BCLR 598 (D).
177 599I.
178 1995 7 BCLR 851 (KH).
179 859F.
180 859B.
181 859I en 860B.
182 1995 8 BCLR 968 (B).
183 970B–C.
184 1996 3 BCLR 362 (K).
185 367E.
186 1996 6 BCLR 814 (K).
187 833B.

> "'n Mens kan aanvaar dat die Staat verplig sal wees om in die toekoms prakties gesproke vir elke aangehoudene regshulp te verskaf wat so te sê voltyds tot sy beskikking sal moet wees vanaf sy arrestasie totdat die ondersoek (en verhoor en appèl) afgehandel is".[188]

In *S v Mathebula*[189] is beslis dat 'n beskuldigde tydens elke belangrike voorverhoorfase op regsbystand geregtig is. Indien die staat 'n voorverhoorprosedure in werking stel waarin die samewerking van die beskuldigde verlang word, en waar dit neerkom op 'n afstanddoening van 'n grondwetlike reg, moet die beskuldigde aangaande sy regte ingevolge artikel 25 ingelig word. Die hof het beslis dat die versium van die polisiebeampte wat in beheer van 'n uitwysingsparade was om die beskuldigde aangaande sy reg op regsverteenwoordiging in te lig, die getuienis ontoelaatbaar gemaak het. Die beskuldigde is wel voor die parade van die reg ingelig, maar die beslissing was dat 'n beskuldigde voor elke voorverhoorprosedure waar sy samewerking verlang word, aangaande die reg ingelig moet word. Hierdie redenasie is in *S v Shaba*[190] gekritiseer. Die hof het beslis dat die Grondwet 'n verpligting op die staat plaas om 'n gearresteerde so spoedig moontlik van sy reg op regsverteenwoordiging in te lig en hom toe te laat om hierdie reg uit te oefen. Of die plig in 'n besondere geval nagekom is, is 'n feitevraag wat in die lig van die feite van elke geval beoordeel moet word.

In *S v Ngwenya*[191] het die hof dit nodig gevind om te bepaal welke van die twee voorgaande beslissings gevolg moet word. In *S v Mathebula*[192] is sterk op *United States v Wade*[193] gesteun en dit is op sterkte van hierdie saak dat die beslissing gemaak is. Na 'n ontleding van artikel 25(3) kom die hof tot die gevolgtrekking dat die artikel aan beskuldigdes die reg op 'n billike *verhoor* gee en dat hierdie reg nie so wyd is as die Amerikaanse reg op "assistance of counsel for his *defence*" nie. Die hof beslis dat 'n beskuldigde 'n billike verhoor het wanneer geen versperrings in sy weg geplaas word nie en, indien behoeftig, indien hy deur 'n raadsman op staatskoste bygestaan word. Billikheid word verder verseker indien beskuldigdes ondersteun word met die voorlegging van getuienis deur getuies van hul keuse.[194] Die hof het ook bevind dat artikel 25(3) die elemente van 'n billike verhoor duidelik uiteensit en dat, indien dit die artikel ook op voorverhoorprosedures van toepassing wou maak, die wetgewer uitdruklik so kon bepaal het. Getuienis van 'n identifiseringsparade is gevolglik toegelaat alhoewel die staat nie getuienis aangevoer het dat die beskuldigdes voor die parade aangaande hul reg op verteenwoordiging by die parade ingelig is nie. Daar is ook *obiter* opgemerk dat voorsien word dat die dag sal aanbreek dat aangevoer word dat 'n beskuldigde wat *pro Deo*-regsbystand geniet het, weens die onervarendheid van sy verteenwoordiger in teenstelling met die vervolging, nie 'n billike verhoor geniet het nie.[195]

Met die inwerkingtreding van die tussentydse Grondwet het die toets vir die wesenlikheid van die behoefte aan regsverteenwoordiging verskuif van die vraag of die gebrek aan verteenwoordiging 'n onreëlmatigheid daargestel het, na die vraag

188 833C.
189 1997 1 BCLR 123 (W).
190 1998 2 BCLR 220 (T).
191 1999 3 BCLR 308 (W).
192 *Supra.*
193 388 US 218 (1967).
194 315C.
195 313D.

of die afwesigheid van verteenwoordiging 'n wesenlike onreg sou meebring. Dit is egter duidelik dat die trefwydte van die reg op regsverteenwoordiging die onderwerp van teenstrydige beslissings is.

5 4 Die Grondwet van die Republiek van Suid-Afrika, Wet 108 van 1996

Artikel 9(1) van die finale Grondwet verleen die reg op gelykheid voor die reg en die reg op gelyke beskerming en voordeel van die reg. Hierdie gelykheidsbeginsel, wat 'n fundamentele voorvereiste vir 'n billike beslissing is, verseker dat "equality of weapons (*Waffengleicheit*) between the parties prevail throughout all stages of the proceedings".[196] *Waffengleicheit* vereis onder andere ook regsverteenwoordiging.

Ingevolge artikel 34 van die Grondwet het elkeen die reg op toegang tot die howe. Dit is die reg dat 'n geskil wat deur die toepassing van die reg besleg kan word, in 'n billike openbare verhoor beslis word voor 'n hof of, waar dit gepas is, 'n ander onafhanklike en onpartydige tribunaal of forum. Hierdie bepaling oorvleuel met artikel 9(1), wat die reg op gelykheid voor die reg en gelyke beskerming deur die reg waarborg. Dit is egter te verwelkom omrede dit die filosofie van *access-to-justice* in die Suid-Afrikaanse Grondwet invoer.[197] Artikel 34 verleen 'n nuwe dimensie in dié opsig dat dit die aantasbaarheid van reeds bestaande beginsels bolwerk.[198]

Artikel 35(2) verleen aan elkeen wat aangehou word die reg op 'n regspraktisyn van eie keuse en om met daardie regspraktisyn te konsulteer, en om onverwyld van hierdie reg verwittig te word. Elke aangehoudene het ook die reg om deur die staat op staatskoste van 'n regspraktisyn voorsien te word indien dit andersins tot 'n wesenlike onreg sou lei, en om onverwyld van hierdie reg ingelig te word. Hierdie regte word ook in artikel 35(3)(f) en (g) gekategoriseer as 'n voorvereiste vir 'n billike verhoor.

6 SAMEVATTING EN GEVOLGTREKKING

Sekere regte en waarborge het histories te voorskyn gekom as "fundamenteel" of, veral in moderne grondwette, as "grondwetlik" of "internasionaal" verorden, en so word hulle van ander regte en waarborge onderskei.[199] Die geloof dat sekere beginsels "basies" is, is intrinsiek tot die standpunt dat hulle nie bloot 'n absolute minimum is nie, maar ook 'n permanente, onafskeidbare bestanddeel van enige beskaafde regstelsel. Daar was in 'n stadium 'n tendens om hulle as geldig te beskou sonder enige ruimte- of tydbeperkings. Dit is egter 'n droom, want ervaring dui daarop dat geen regsinstelling abstrak kan bestaan nie. Dit is nou verbonde aan die geskiedenis en die gemeenskap. Met die agteruitgang van die idee van natuurreg is hierdie "basiese" beginsels gewoonlik in wette en kodes gepositiveer. Hierdie proses van konstitusionalisering het neergekom op hul inkorporering in 'n nuwe vorm van positiewe reg, 'n hoër reg wat selfs die wetgewer in 'n mate bind.[200]

Ten spyte van die voorskrifte van die Grondwet kan met redelike sekerheid aanvaar word dat daar elke week duisende onverdedigde beskuldigdes en onverteenwoordigde litigante in Suid-Afrikaanse howe verskyn. Die bepalings van die Grondwet kom basies neer op die meedeling van inligting, naamlik: jy het die reg

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196 De Vos "The impact of the new Constitution upon civil procedural law" 1995 *Stell LR* 34 47.
197 De Vos 50.
198 Erasmus "'n Billike siviele verhoor" 1996 *Obiter* 291 293.
199 Cappelletti *The judicial process in comparative perspective* (1989) 215.
200 Cappelletti 216.

op 'n billike openbare verhoor, jy het die reg om jou geskille deur die toepassing van die reg te laat besleg en jy het die reg om met 'n regspraktisyn te konsulteer en om deur so 'n praktisyn verteenwoordig te word. Die meedeling van hierdie inligting is 'n leë gebaar en maak 'n bespotting van die Grondwet indien dit nie gerugsteun word deur meganismes wat voldoende is vir die afdwinging van die regte nie.[201] Grondwette is nie effektief bloot omdat hulle uitstaande grondwetlike dokumente is nie. Daar moet gesien word dat die reg werk en dat dit 'n effektiewe beskermende meganisme is. Slegs dan sal die oortuiging posvat dat die Grondwet effektief is.[202]

Uit die voorgaande blyk dit dat die geskiedkundige ontwikkeling van die reg op regsverteenwoordiging daartoe bygedra het dat twee van die gesagsvorme in die staat, naamlik die wetgewende en regsprekende gesag, hul bydrae tot die vestiging van 'n reg op regsverteenwoordiging gelewer het. Dit kom voor asof die effektiewe verwesenliking van hierdie reg nou op die weg van die uitvoerende gesag lê.

> *In fashioning a declaration of invalidity, a court has to keep in balance two important considerations. One is the obligation to provide the "appropriate relief" under section 38 of the Constitution . . . The other consideration a court must keep in mind, is the principle of separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. . . In essence. . . it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature.*
>
> *Ackermann J* in National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 1 BCLR 39 (CC) 65B 66A–B.

201 *S v Vermaas; S v Du Plessis supra* 860C.
202 Ackerman "The importance of accessibility of legal services" 1988 *De Rebus* 800 802.

The impact of the Public Finance Management Act, 1999, on the South African Tourism Board

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OPSOMMING

Die impak van die Wet op Openbare Finansiële Bestuur, 1999, op die Suid-Afrikaanse Toerismeraad

In hierdie bydrae word die impak van die Wet op Openbare Finansiële Bestuur (WOFB) op die Suid-Afrikaanse Toerismeraad behandel. Die mate waarin bogenoemde wet met die tersaaklike bepalings van die Wet op Toerisme strook, word ondersoek. Dit is van belang omdat die WOFB voorkeur geniet indien die wette sou bots. Uiteraard word daar veral gefokus op die finansiële verpligtinge wat die Raad vir Toerisme opgelê word. Die skrywer kom tot die gevolgtrekking dat die toepassing van die WOFB op die Raad verwelkom sal word deur enigeen wat verantwoordelike, deursigtige en verantwoordbare regering voorstaan.

1 INTRODUCTION

The Public Finance Management Act, 1999,[1] as amended by the Public Finance Management Amendment Act, 1999,[2] came into effect on 1 April 2000.[3] The PFMA, which aims at ensuring that all public revenue, expenditure, assets and liabilities are managed efficiently, effectively and responsibly, applies *inter alia* to the public entities listed in Schedule 3 of the PFMA,[4] among which is the South African Tourism Board.[5]

This contribution details the impact of the PFMA on the South African Tourism Board.[6] The study includes an assessment of the extent to which the PFMA is

1 Act 1 of 1999. Hereinafter referred to as "the PFMA".
2 Act 29 of 1999.
3 S 95. Ch 11 and s 93(4) came into effect on 1999-03-02. Ss 8, 13(2), 18(2)(a), 19, 22(2), 27(3)(e), 27(4), 38(2), 52, 66(3), 66(7)(b) and 70(1)(b), as well as the proviso to s 15(1)(a)(ii), will come into effect at later dates [see *GG* 21053 of 2000-03-31]. The South African Tourism Board is exempted from the application of s 7(1) until 2001-01-01 and s 66(1) until 2001-04-01 [see *GG* 21054 of 2000-04-01].
4 S 3(1)(b).
5 Part A item 42 of the Schedule. This is provided that the Minister of Finance does not exempt the Board from specific provisions of the Act in terms of s 92.
6 Hereinafter referred to as "the Board".

consistent with the relevant provisions of the Tourism Act, 1993,[7] which established the Board[8] and regulates its financial affairs.[9] This is of great import in view of the fact that, in the event of any inconsistency between the PFMA and any other legislation, the PFMA prevails.[10]

2 ACCOUNTING AUTHORITY

In terms of the PFMA, the Board must have an authority which must be accountable for the purposes of the PFMA.[11] When it comes to identifying that authority, the PFMA distinguishes between a public entity which has a board or other controlling body, and one which does not.[12] The PFMA, however, does not define the phrase "controlling body".

If, for the purposes of the PFMA, the Board is seen as its own controlling body, the Board is, in terms of the PFMA, its own accounting authority.[13] On the other hand, if, for the purposes of the PFMA, the Board is not seen as its own controlling body, the PFMA provides that

> "the chief executive officer or the other person in charge of the public entity is the accounting authority for that public entity unless specific legislation applicable to that public entity designates another person as the accounting authority".[14]

Should the first interpretation be correct, it is submitted that the PFMA is inconsistent with section 14(1) of the Tourism Act, which provides that "[t]he chairperson of the board shall be the accounting officer of the board". In such a case, section 49(2)(a) of the PFMA prevails over section 14(1) of the Tourism Act, and the whole Board is its own accounting authority. Conversely, should the second interpretation be correct, it is submitted that section 14(1) continues to apply and that the accounting authority of the Board remains its chairperson.

3 FIDUCIARY DUTIES OF ACCOUNTING AUTHORITY

The Tourism Act is silent with regard to the fiduciary duties of the Board's accounting authority. In contrast, the PFMA provides that the accounting authority of the Board must:

(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the Board;

(b) act with fidelity, honesty, integrity and in the best interests of the Board in managing the financial affairs of the Board;

(c) on request, disclose to the Minister of Environmental Affairs and Tourism or Parliament, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the Minister or Parliament; and

(d) seek, within its sphere of influence, to prevent any prejudice to the financial interests of the state.[15]

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7 Act 72 of 1993.
8 S 2.
9 Ss 14–17A.
10 S 3(3).
11 S 49(1).
12 S 49(2).
13 S 49(2)(a).
14 S 49(2)(b).
15 S 50(1).

Furthermore, the PFMA provides that a member of the Board or, if the accounting authority is not the Board itself, the chairperson of the Board, may not:

(a) act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of the PFMA; or

(b) use the position or privileges of, or confidential information obtained as, accounting authority or a member of the accounting authority, for personal gain or to improperly benefit another person.[16]

4 GENERAL RESPONSIBILITIES OF ACCOUNTING AUTHORITY

The Tourism Act provides cursorily that the Board's accounting officer must:

(a) keep full and correct record of all money received or spent by the Board, and the latter's assets, liabilities and financial transactions; and

(b) draw up annual financial statements showing with appropriate details money received by the Board and expenditure incurred by the Board as well as its assets and liabilities at the end of the financial year concerned.[17]

The PFMA substantially increases those statutory responsibilities by providing that the Board's accounting authority:

(a) must ensure that the Board has and maintains:

  (i) effective, efficient and transparent systems of financial and risk management and internal control;

  (ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of the PFMA;

  (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

  (iv) a system for properly evaluating all major capital projects prior to a final decision on the project;

(b) must take effective and appropriate steps to:

  (i) collect all revenue due to the Board;

  (ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the Board; and

  (iii) manage available working capital efficiently and economically;

(c) is responsible for the management, including the safeguarding, of the assets and for the management of the revenue, expenditure and liabilities of the Board;

(d) must comply with any tax, levy, duty, pension and audit commitments as required by legislation;

(e) must take effective and appropriate disciplinary steps against any employee of the Board who:

  (i) contravenes or fails to comply with a provision of the PFMA;

  (ii) commits an act which undermines the financial management and internal control system of the Board; or

16 S 50(2).
17 S 14(2).

(iii) makes or permits an irregular expenditure or a fruitless and wasteful expenditure;

(f) is responsible for the submission by the Board of all reports, returns, notices and other information to Parliament, the Minister of Environmental Affairs and Tourism or National Treasury, as may be required by the PFMA;

(g) must promptly inform the National Treasury on any new entity which the Board intends to establish or in the establishment of which it takes the initiative, and allow the National Treasury a reasonable time to submit its decision prior to formal establishment; and

(h) must comply, and ensure compliance by the Board, with the provisions of the PFMA and any other legislation applicable to the Board.[18]

Should the Board's accounting authority be unable to comply with any of the abovementioned responsibilities, it must promptly report the inability, together with reasons, to the Minister of Environmental Affairs and Tourism as well as the National Treasury.[19]

5 FINANCIAL PLANNING

The obligations imposed by the PFMA with regard to financial planning depend on whether the Minister of Finance classifies the Board as a Schedule 3 government business enterprise or as a non-business Schedule 3 public entity,[20] something which he has not done yet.

Should the Board be classified as a government business enterprise,[21] its accounting authority would have to submit to the accounting officer for a department designated by the Minister of Environmental Affairs and Tourism, and to the National Treasury, at least one month, or another period agreed with the National Treasury, before the start of its financial year:

(a) a projection of revenue, expenditure and borrowings for that financial year in the prescribed format; and

(b) a corporate plan in the prescribed format covering the affairs of the Board for the following three financial years.[22]

These obligations are not inconsistent with the Tourism Act.[23]

On the other hand, should the Board be classified as a non-business Schedule 3 public entity, its accounting authority would have to submit to the Minister of Environmental Affairs and Tourism at least six months before the start of the

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18 S 51(1) read with s 1.

19 S 51(2).

20 Ss 52–53 read with s 1.

21 In terms of s 1 of the PFMA, the phrase "national government business enterprise" means "an entity which—

(a) is a juristic person under the ownership control of the national executive;

(b) has been assigned financial and operational authority to carry on a business activity;

(c) as its principal business, provides goods or services in accordance with ordinary business principles; and

(d) is financed fully or substantially from sources other than—

(i) the National Revenue Fund; or

(ii) by way of a tax, levy or other statutory money".

22 S 52.

23 See s 16(3).

financial year of the department designated by the Minister, or another period agreed to between the Minister and the Board, a budget of estimated revenue and expenditure for that financial year, for approval by the Minister.[24]

In such a case, the Board's accounting authority would be responsible for ensuring that the expenditure of the Board is in accordance with the approved budget.[25] Furthermore, the Board would not be allowed to budget for a deficit or to accumulate surpluses unless the prior written approval of the National Treasury has been obtained.[26] This appears to conflict with section 16(4) of the Tourism Act, which allows the Board to invest with the Corporation for Public Deposits,[27] or in any other manner determined by the Minister of Environmental Affairs and Tourism with the concurrence of the Minister of Finance, any unexpended portion of its funds.

6 FINANCIAL INFORMATION AND REPORTING

With regard to financial information and reporting, the PFMA provides that the Board's accounting authority must not only "keep full and proper records of the financial affairs of the Board", but also:

- prepare financial statements for each financial year in accordance with generally accepted accounting practice, unless the Accounting Standards Board approves the application of generally recognized accounting practice for the Board;
- submit those financial statements within two months after the end of the financial year to the Auditor-General for auditing as well as to the National Treasury; and
- submit within five months of the end of a financial year to the National Treasury and to the Minister of Environmental Affairs:
  - (i) an annual report on the activities of the Board during that financial year;
  - (ii) the financial statements for that financial year after the statements have been audited; and
  - (iii) the report of the Auditor-General on those statements.[28]

The PFMA requires the annual report and financial statements to:

(a) fairly present the state of affairs of the public entity, its business, its financial results, its performance against predetermined objectives and its financial position as at the end of the financial year concerned; and

(b) include particulars of:
  - (i) any material losses through criminal conduct and any irregular expenditure and fruitless and wasteful expenditure that occurred during the financial year;
  - (ii) any criminal or disciplinary steps taken as a consequence of such losses or irregular expenditure or fruitless and wasteful expenditure;
  - (iii) any losses recovered or written off;
  - (iv) any financial assistance received from the state and commitments made by the state on its behalf; and
  - (v) any other matters that may be prescribed.[29]

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24 S 53(1)–(2).
25 S 53(4).
26 S 53(3).
27 Established by s 2 of the Corporation for Public Deposits Act 46 of 1984.
28 S 55(1) of the PFMA, read with s 58(2) of the PFMA and s 14(3) of the Tourism Act.
29 S 55(2).

The PFMA also provides that the Minister of Environmental Affairs and Tourism must table in the National Assembly the Board's annual report and financial statements as well as the audit report on those statements, within one month after the Board's accounting authority received the audit report.[30]

The PFMA further provides that the Board's accounting authority must submit to the National Treasury or the Auditor-General such information, returns, documents, explanations and motivations as may be prescribed or as the Treasury or the Auditor-General may require.[31]

Finally, in terms of the PFMA, before the Board concludes any of the following transactions, its accounting authority must promptly and in writing inform the National Treasury of the transaction and submit relevant particulars of the transaction to the Minister of Environmental Affairs and Tourism for approval of the transaction, unless the Board was exempted from doing so by the Minister:

(a) establishment or participation in the establishment of a company;

(b) participation in a significant partnership, trust, unincorporated joint venture or similar arrangement;

(c) acquisition or disposal of a significant shareholding in a company;

(d) acquisition or disposal of a significant asset;

(e) commencement or cessation of a significant business activity; and

(f) a significant change in the nature or extent of its interest in a significant partnership, trust, unincorporated joint venture or similar arrangement.[32]

7 ASSIGNMENT OF POWERS AND DUTIES

The Tourism Act does not expressly provide for the assignment by the Board's accounting authority of its powers and duties. In contrast, the PFMA allows the said authority to:

- delegate in writing any of the powers entrusted or delegated to it in terms of the PFMA, to a Board's official; or
- instruct a Board's official to perform any of the duties assigned to it in terms of the PFMA.[33]

Such a delegation or instruction:

(a) is subject to any limitations and conditions the accounting authority may impose;

(b) may either be to a specific individual or to the holder of a specific post in the Board; and

(c) does not divest the accounting authority of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.[34]

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30 S 65(1)(a).
31 S 54(1).
32 S 54(2) and (4). In terms of s 54(3), the Board may assume that approval has been given if it receives no response from the Minister within 30 days or within a longer period as may be agreed to between itself and the Minister.
33 S 56(1).
34 S 56(2).

Furthermore, the accounting authority may confirm, vary or revoke any decision taken by an official as a result of a delegation or instruction, subject to any rights that may have become vested as a consequence of the decision.[35]

8 RESPONSIBILITIES OF OFFICIALS OTHER THAN ACCOUNTING AUTHORITIES

The Tourism Act does not deal with the financial management responsibilities of the Board's officials. This issue is addressed by the PFMA, which provides that all the Board's officials:

(a) must ensure that the system of financial management and internal control established for the Board is carried out within the area of responsibility of those officials;

(b) are responsible for the effective, efficient, economical and transparent use of financial and other resources within their area of responsibility;

(c) must take effective and appropriate steps to prevent, within their area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

(d) must comply with the provisions of the PFMA to the extent applicable to them, including any delegations and instructions in terms of the PFMA; and

(e) are responsible for the management, including the safeguarding, of the assets and the management of the liabilities within their area of responsibility.

9 AUDITING

The Tourism Act provides that the Auditor-General must audit the records and annual financial statements of the Board.[36] This provision is not inconsistent with section 58(2) of the PFMA which provides that a person registered in terms of section 15 of the Public Accountants' and Auditors' Act, 1991,[37] may be appointed only if the audit is not performed by the Auditor-General.

10 LOANS, GUARANTEES AND OTHER FINANCIAL COMMITMENTS

The Tourism Act empowers the Board, with the approval of the Minister of Environmental Affairs and Tourism, granted with the concurrence of the Minister of Finance, to borrow money from a money-lender, in South Africa or elsewhere.[38]

The PFMA, however, forbids the Board to borrow money unless such borrowing is authorised by the PFMA and other legislation not in conflict with the PFMA.[39] In this regard, the PFMA distinguishes between national government business enterprises listed in Schedule 3 and non-business Schedule 3 business entities.[40]

Should the Minister of Finance classify the Board as a national government business enterprise,[41] the Board's accounting authority would be the only person or body allowed to borrow money, subject to any conditions the Minister may

35 S 56(3).
36 S 14(3).
37 Act 80 of 1991.
38 S 13(e).
39 S 66(1)(a).
40 S 66(3).
41 On this issue, see 5 above.

impose.[42] If the Board is its own accounting authority,[43] there would be no inconsistency between the Tourism Act and the PFMA. This would actually be an instance where the requirements set by the Tourism Act are higher than those set by the PFMA. If, on the other hand, the Board is not its own accounting authority, there would be inconsistency between the PFMA and the Tourism Act and, as indicated earlier, the former would prevail.[44]

Should the Minister of Finance classify the Board as a non-business Schedule 3 public entity, the Minister of Finance would be the only person allowed to borrow money for the benefit of the Board.[45] This is inconsistent with the Tourism Act, over which the PFMA would prevail.[46]

The Tourism Act is silent with regard to forms of financial commitment other than loans. As far as the PFMA is concerned, no distinction is made between the various forms of financial commitment should the Board be classified as a national government business enterprise.[47] Should the Board be classified as a non-business Schedule 3 public entity, the Minister of Environmental Affairs and Tourism would be the only person authorised to allow the issue of a guarantee, indemnity or security, with the concurrence of the Minister of Finance.[48]

These are important provisions for financial institutions, because the PFMA provides that if a person lends money to the Board otherwise than in accordance with the PFMA, the state and the Board are not bound by the lending contract.[49]

11 FINANCIAL MISCONDUCT

The Tourism Act does not deal with the consequences of financial misconduct. In contrast, the PFMA provides that the Board's accounting authority commits an act of financial misconduct if it wilfully or negligently fails to comply with a requirement of the PFMA or makes or permits an irregular expenditure or a fruitless and wasteful expenditure.[50] If the Board's accounting authority is the Board itself, every member is individually and severally liable for any financial misconduct of the accounting authority.[51] Furthermore, an official of the Board to whom a power or duty is assigned in terms of the PFMA commits an act of financial misconduct if that official willfully or negligently fails to exercise that power or perform that duty.[52] Finally, the PFMA makes it clear that financial misconduct is a ground for dismissal, or suspension, or other sanction despite any other legislation.[53] A charge of financial

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42 S 66(3)(b).
43 On this issue, see 2 above.
44 S 3(3).
45 S 66(3)(c).
46 S 3(3).
47 S 66(3)(b).
48 S 66(3)(c). S 70(3) of the PFMA provides that the Minister of Environmental Affairs and Tourism who seeks the Minister of Finance's concurrence must provide the Minister with all relevant information that the latter may require. Furthermore, in terms of s 70(4), the Minister of Environmental Affairs and Tourism must at least annually report the circumstances relating to any payments under a guarantee, indemnity or security to the National Assembly for tabling in the National Assembly.
49 S 68.
50 S 83(1).
51 S 83(2).
52 S 83(3).
53 S 83(4).

misconduct against the Board's accounting authority or one of its officials must be investigated, heard and disposed of in terms of the statutory or other conditions of appointment or employment applicable to the accounting authority or official, and any regulations prescribed by the Minister of Finance.[54]

On the other hand, the Board's accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if it willfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55 of the PFMA.[55] Furthermore, any other person who purports to borrow money or to issue a guarantee, indemnity or security for or on behalf of the Board, or who enters into any other contract which purports to bind the Board to any future financial commitment, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.[56]

12 CONCLUSION

It is clear, in view of the above discussion, that the PFMA has a major impact on the financial affairs of the South African Tourism Board. Interestingly, there are only a very limited number of inconsistencies between the PFMA and the Tourism Act. This is actually hardly surprising in view of the very few provisions of the Tourism Act dealing with such matters. In turn, this paucity comes as no surprise when one keeps in mind that the Tourism Act was passed under the pre-1994 constitutional dispensation. For this reason, the application of the PFMA to the Board is to be welcomed by anyone who supports the principles of responsible, transparent and accountable government. Such an application constitutes an important step towards the adaptation of tourism bodies to the needs and requirements of post-apartheid South Africa.

Die prys vir die beste bydrae in Afrikaans is toegeken aan professor DP van der Merwe *vir sy artikel "Die regsimplikasies van elektroniese handeldryf ('E-commerce') met besondere verwysing na die bewysreg".*

54 S 84.
55 S 86(2).
56 S 86(3).

AANTEKENINGE

SEKSTOERISME, DIE KIND SE REG OP WAARDIGHEID EN VRYE PSIGOSEKSUELE ONTPLOOIING EN KULTURELE EN EKONOMIESE MAGSMISBRUIK*

1 Inleiding

In 1987 is Rosario Baluyot, 'n 12-jarige straatkind, in die Fillipyne oorlede. Heinrich Stefan Ritter, 'n Oostenrykse mediese praktisyn, het vroeër, gedurende 'n seksnag wat hy met haar en 'n 14-jarige seun deurgebring het, 'n elektriese vibrator in haar vagina opgedruk. Dit het gebreek en 'n deel daarvan het in haar liggaam vasgesit. Sy het dit in uiterste pyn vir sewe maande verswyg voordat sy op straat neergeval en later as gevolg daarvan gesterf het. Ritter is in 1989 tot lewenslange gevangenisstraf gevonnis, maar sy skuldigbevinding is in 1991 deur die Fillipynse hooggeregshof op grond van onvoldoende getuienis ter syde gestel (sien Healy "Prosecuting child sex tourists at home: Do laws in Sweden, Australia and the United States safeguard the rights of children as mandated by international law?" 1995 *Fordham Int LJ* 1852 met verwysing na Taliercio "International law and legal aspects of child sex tourism in Asia: A contemporary form of slavery?" 3(1993), in 'n lêer gehou by die *Fordham Int LJ*, waarin die feite en beslissing van dié saak opgeneem is). Die omstandighede wat tot Rosario se dood aanleiding gegee het, is die gevolg van waarna eufemisties verwys word as sekstoerisme (Suer *Sexuelle Gewalt gegen Kinder* (1998) 25). Hodgson wys daarop dat toenemende internasionale toeganklikheid en daaruit voortvloeiende georganiseerde toerisme tot die verskynsel van sekstoerisme aanleiding gegee het. Laasgenoemde kan omskryf word as "an industry balancing the supply of, and demand for, sexual services and involving a segment of the local sex industry which is directly linked with the international tourist market". Sekstoerisme behels die sistematiese en doelbewuste eksploitasie van vrouens en kinders wat hulle ter wille van oorlewing tot prostitusie

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* Dank word hiermee uitgespreek teenoor die Alexander von Humboldt-Stiftung en die Universiteit van Pretoria wat 'n deel van dié studie in 1999 aan die Ludwig Maximilians-Universität te München (Duitsland) moontlik gemaak het. Die Universiteit van Pretoria het ook 'n inligtings- en oriënteringsbesoek aan Rusland en Tsjeggië moontlik gemaak. Aangesien 'n groot aantal kinders wat deur persone uit Wes-Europese en ander eerste wêreldse lande seksueel misbruik word uit Oos-Europese lande afkomstig is, was dié besoek besonder insiggewend. Veral die fisieke aantreklikheid, gekultiveerdhied en weerloosheid as gevolg van akute armoede van dié kinders maak hulle besonder kwesbaar vir misbruik. Die finansiële bydrae van die SWO tot navorsing in dié verband hier ter plaatse word ook met dank erken. Die menings in dié bydrae uitgespreek, word nie noodwendig deur genoemde instellings gedeel nie..

(moet) wend (Hodgson "Sex tourism and child prostitution in Asia: Legal responses and strategies" 1994 *Melbourne Univ LR* 512 517). Giordanella onderskei in dié verband kindersekstoerisme wat omskryf word as "the practice of travelling from developed countries to underdeveloped countries to engage in sexual activity with minors" ("Status of section 2423(b): Prosecuting United States nationals for sexually exploiting children in foreign countries" 1998 *Temple Int and Comp LJ* 133 vn 2). Friedrich is van mening dat seksualiteit by uitnemendheid die gebied is waar mag, woede en onderdrukking ontlaai kan word (Friedrich *Tatort Kinderseele. Sexueller Mißbrauch und die Folgen* (1998) 17). Die geestelike weerloosheid van veral (armoedige) kinders maak hulle by uitnemendheid slagoffers vir seksuele misbruik (sien in die algemeen Labuschagne "Seksuele misbruik van kinders en die vraagstuk van verjaring van misdade" 1997 *TRW* 98).

Seksuele en fisiese misbruik van kinders, juis as gevolg van hulle sosio-juridiese ondergeskikte posisie en hulle liggaamlike en geestelik-emosionele weerloosheid, is so oud soos die menslike beskawingsgeskiedenis self (Schultz *The sexual victimology of youth* (1980) 4; Jungjohann *Das Dilemma des mißhandelten Kindes* (1996) 97–98; "Ouderdomsgrense en die bestraffing van pedofilie" 1990 *SAS* 10 13; "Ouerlike geweldaanwending as skending van die kind se reg op biopsigiese outonomie" 1996 *TSAR* 577 578). 'n Voormalige eerste minister van Thailand, Chuan Leekpai, het by geleentheid opgemerk dat kindersekstoerisme nie iets nuuts is nie, dat dit lank gelede begin het, maar dat dit in die verlede nie in 'n ernstige lig beskou is nie (Giordanella 136 vn 26). Hierdie siening verkry duideliker betekenis indien dit binne die breëre sosio-juridiese status wat tradisioneel aan die kind toegeken is, beoordeel word. Sonderling verduidelik in dié verband:

> "Child victimisation, maltreatment and beating are documented as age-old practices that were not cause for great concern. In fact, abuse and violence are generally integral to child rearing and socialisation of children into western civilisation. The current image of the 'child as victim' threatened by society's sexual deviants are recent cultural inventions" ("Power of discourse and discourse of power in making an issue of sexual abuse in South Africa: The rise and fall of social problems" 1993 *Critical Arts* 1 8).

Kinderprostitusie het in 'n enorme bedryf ontwikkel. Beskikbare inligting dui daarop dat ongeveer een miljoen kinders in Asië, een-en-'n-half tot twee miljoen in Indië, 100,000 in die VSA en 'n half-miljoen in Latyns-Amerika in die prostitusiebedryf in diens is. Statistieke dui ook daarop dat 'n kinderprostituut ongeveer 2000 mans per jaar bedien (Robinson "The globalization of female child prostitution: A call for reintegration and recovery measures via article 39 of the United Nations Convention on the Rights of the Child" 1997 *Global Legal Studies J* 239). Die daders is feitlik deurgaans mans en die prostitute (slagoffers) is meesal meisies (Heiliger en Engelfried *Sexuelle Gewalt* (1995) 17).

Die bestemming van ontvoerders van kinders vir doeleindes van prostituering, asook kindersekstoeriste, word al wyer en omvat hedendaags die volgende gebiede: Thailand, Indonesië, Sri Lanka, Taiwan, die Fillipyne, Burma, Laos, Viëtnam, Korea, Hong Kong, Kambodië, China, Bangladesh, Indië, Pakistan, Nepal, Meksiko, Bolivië, Peru, Kenia, Zaïr, die Baltiese lande, Rusland, Pole, Hongarye en Romenië (sien hieroor Healy 1861–1864; Suer 25; Berkman "Responses to the international child sex tourism trade" 1996 *Boston College Int and Comp LR* 397; Labuschagne "Strafregtelike beskerming van kinders teen seksuele misbruik in 'n multikulturele gemeenskap" 1997 *SALJ* 275; Hodgson 513–515). Dit blyk uit beskikbare inligting dat jong seuns en meisies vir seksuele doeleindes vanuit Mosambiek na Suid-Afrika verhandel word (Healy 1864 met beroep op *Sale of Children, Child Prostitution and Child Pornography: Report Submitted by Mr Vitit Muntarbhorn, Special Rapporteur,*

in Accordance with Commission on Human Rights Resolution 1993/82, UN Commission on Human Rights, 50th Sess, Prov Agenda Item 22 38 par 165).

Kinderprostitusie gaan feitlik deurgaans gepaard met een of ander vorm van dwang of bedrog. Dit sou in ieder geval beswaarlik in enige omstandighede as vrywillig aangemerk kon word (sien in die algemeen hieroor O'Reilly "Child prostitution: The next push for human rights" 1993 (summer) *Human Rights* 30; Healy 1854; Hodgson "Combating the organized sexual exploitation of Asian children: Recent developments and prospects" 1995 *Int J of Law and the Family* 23 24; Giordanella 143–144). Robinson wys daarop dat 'n meisie gewoonlik haar weg tot prostitusie vind deur gekoop te word van haar ouers of ander persoon wat beheer oor haar het, deur ontvoering of deur lis (239). Hierdie problematiek verkry ook toenemend 'n internasionale kleur. Aldus verduidelik Berkman:

> "Although the majority of children sold, indentured, or lured into prostitution remain in their home country, movement of children across international borders has become quite common. For example, children from Nepal, Bangladesh, and India have been discovered in Pakistan and the Gulf States: Thai children have been found in Japan. In Thailand, which has the world's largest child sex industry, the supply of young girls is diminishing. Thus, Thai traffickers have made inroads into Burma and China in search of young girls . . . These children are essentially slaves to their procurers" (401–402).

Diegene wat van kindersekstoerisme gebruik maak, sluit sakemanne, professionele persone, militêre personeel, gewone toeriste en pedofiele in. Militêre teenwoordigheid gedurende die Viëtnam-oorlog het vonk gegee aan 'n snelgroeiende kinderprostitusiebedryf in Thailand, die Fillipyne en Taiwan. Hedendaags werf reisagentskappe aktief kliënte vir die kinderseksbedryf. Sekere agentskappe gaan selfs so ver om reisgidse saam te stel oor die toepaslike misdaadomskrywings in spesifieke lande en riglyne te gee oor hoe strafregtelike vervolging vermy kan word (Giordanella 135–136; Healy 1867–1869; Hodgson 1994 *Melbourne Univ LR* 515–516). Sekstoeriste is gewoonlik afkomstig van industriële lande in Europa, Noord-Amerika, Australasië en Asië, veral Japan (Hodgson 1995 *Int J of Law and the Family* 28). By kindersekstoerisme is gewoonlik vier partye betrokke, naamlik die dader, die verkoper ("vendor"), die fasiliteerder en die kind (slagoffer) (Berkman 399).

In die onderhawige bydrae word veral die strafregtelike problematiek rondom die verskynsel van kindersekstoerisme onder die loep geneem. Aangesien dit niks anders as 'n georganiseerde vorm van seksuele misbruik van kinders is nie, moet dié aantekening teen die agtergrond van my voorafgaande publikasies in dié verband, waarna spesifiek verwys word, gelees word. Onnodige duplikasie van inligting, argumente en analise word doelbewus hier vermy.

2 Mag, kultuur, geld en die weerloosheid van kinders

Die *World Federation of Mental Health* (*WFMH*) se komitee rakende die kommersiële seksuele eksploitasie van kinders, verduidelik die proses waarvolgens die wisselwerking van armoede en konsumerisme 'n desensitiseringseffek op die gemeenskap se persepsie van seksuele uitbuiting van kinders het, soos volg:

> "Poverty plays a major role in creating the atmosphere where sexual exploitation occurs. However, poverty has always existed yet in the past cultural taboos and social norms have prevented the widespread use of children for sex. As the world moves to a global economy there is something happening which erodes the cultural taboos . . . This erosion seems to occur when a relatively insulated culture is suddenly exposed to a media image of the availability of an easier life via material possessions. Agents

> enter this culture, lure people with money and goods, then deceive parents into allowing their children to be put to work in the city. In this way child prostitution becomes available on a largescale basis. This then creates the perception that child prostitution is normative within that society" ("Reasons for the explosion of child prostitution: a perspective" (1993-08-27) 4 aangehaal deur Hodgson 1994 *Melbourne Univ LR* 519–520).

In rudimentêre gemeenskappe het die vrou se psigoseksuele integriteit, en gevolglik haar baarvermoë, aan 'n ander behoort (gewoonlik 'n man of 'n groep deur mans beheer). Dit het ook die grondslag gevorm van die universele ondergeskikte posisie van die vrou asook van die vroegste huweliksvorme, naamlik die roof-, ruil- en koophuwelike (sien Labuschagne "Regsakkulturasie, lobolo-funksies en die oorsprong van die huwelik" 1991 *THRHR* 541 en "Geregtigheidsdinamiek van die vroutipiese" 1996 *SAPR/PL* 225 226–229; Labuschagne en De Villiers "Circumcision and female genital mutilation: a human rights and anthropo-legal evaluation" 1998 *SAPR/PL* 277 283–288). In die vroegste menslike gemeenskappe, daarbenewens, het die heilige oervader (*pater*; tropleier) 'n *ius vitae necisque* oor sy ondergeskiktes, dit wil sê sy vroue en kinders, gehad (Labuschagne "Kindermishandeling – 'n juridiese perspektief" 1976 *De Jure* 189 191–195; "Aktiewe eutanasie van 'n swaar gestremde baba: 'n Nederlandse hof herstel die *ius vitae necisque* in 'n medemenslike gewaad" 1996 *SALJ* 216 en "Van instink tot norm. Noodweer en noodtoestand in strafregtelik-evolusionêre perspektief" 1993 *TRW* 133 136–137). Namate gemeenskappe en state in die proses van regstaatlike verfyning vorder, word ouerlike gesagsregte oor hulle kinders minder omvangryk en meer omlyn (Labuschagne "Tugtiging van kinders: 'n strafregtelik-prinsipiële evaluasie" 1991 *De Jure* 23 36–41 en "Ouerlike geweldsaanwending as skending van die kind se reg op biopsigiese outonomie" 1996 *TSAR* 577 581–582). Seksuele misbruik is in die eerste instansie magsmisbruik (Friedrich 13–16): Robinson wys daarop dat die prostituering van jong meisies ook in kulturele praktyke gemanifesteer word. Binne die sosiale en kulturele opset in die meeste ontwikkelende lande is prostitusie 'n aanvaarbare praktyk. Sy verwys vervolgens na die patriargale devaluering van die vrou as 'n vorm van imperialisme en vervolg:

> "Generally, in developing countries, the male establishes and maintains his power through the patriarchal devaluation of the female. The male accomplishes this feat by keeping the female both economically and educationally marginalized. This practice of subjugation is especially prevalent in developing countries through cultural values that allow only the male to attain status in the community. In addition, it is also found in instances where the child starts engaging in prostitution at an early age. The earlier the child starts, the more she is deprived of all forms of cognitive development. In effect, the deprivation of education ensures that the female child will remain both helpless and dependent on the male . . . In many countries, the culture exemplifies the belief that females should be relegated to a societal status beneath that of men. A female is only allowed to acquire status on her sexual prowess, body, and sexuality" (245–246).

Geslagsdiskriminasie in opvoedkundige verband stimuleer ook die prostituering van jong meisies. As gevolg van die kulturele en religieuse status wat aan die vrou as seksobjek en kinderbaarder (nog steeds) in sekere gemeenskappe toegeken word, word hulle minder geleentheid vir onderwys en loopbaanontwikkeling gebied. As gevolg van tradisionele taboes en stigma's kan 'n meisie haar baie moeilik in haar lewe uit prostituering bevry (Healy 1872; Hodgson 1995 *Int J of Law and the Family* 29–30).

Dit blyk uit 'n verslag van die *United Nations Children's Fund* van April 1998 dat meer as 'n miljoen kinders jaarliks die prostitusiebedryf betree en dat op enige gegewe oomblik meer as 'n miljoen kinders in Asië alleen by prostitusie betrokke

is (Giordanella 134 vn 8). Die vereniging *End Child Prostitution in Asian Tourism* (*ECPAT*) skat die waarde van die prostitusiebedryf op ongeveer vyf miljard dollar. Die kindersekstoerismebedryf vorm 'n belangrike bron van inkomste daarvan (Giordanella 134; Healy 1854). Die *Working Group on Contemporary Forms of Slavery* van die VN toon aan dat die winsgewende kinderprostitusiebedryf in stand gehou word deur 'n bemarkingsisteem wat beheer word deur diegene wat reeds in beheer van groot rykdom en mag is. Groot misdaadsindikate in die VSA, Duitsland en Australië, asook die Japanese Yakuza, is betrokke by georganiseerde prostitusie in Suidoos-Asië en is besig om hulle belange na kinderprostitusie uit te brei. Agente besoek gewoonlik dorpe namens die sindikate om toekomstige prostitute vir stedelike bordele te identifiseer. Die ouers stel hulle dogters vir dié doeleindes beskikbaar, gewoonlik in ruil vir 'n geldsom. Die dogter moet dan werk totdat die lening, en rente daarop, terugbetaal is. In werklikheid is volledige terugbetaling dikwels onmoontlik, met die gevolg dat hulle dogter eintlik verslaaf word (Hodgson 1994 *Melbourne Univ LR* 519). Die globalisering van ekonomieë staan op die voorpunt van die prostitusieprobleem. Die ekonomie perpetueer kinderprostitusie omdat dit winsgewend is vir diegene – behalwe natuurlik die kind – wat daarby betrokke is (Robinson 239–240). Armoede is stellig die belangrikste beweegrede vir ouers om hulle kinders oor te lewer aan die seksbedryf of vir kinders om uit "eie beweging" daartoe toe te tree (Robinson 247; Giordanella 134–135; Hodgson 1995 *Int J of Law and the Family* 26). Healy vat die algemene siening in dié verband soos volg saam:

> "Commentators maintain that the grinding poverty and social injustice of the underdeveloped world, especially in rural areas, is primary among the causes of child prostitution. Poverty results in illiteracy, desperate need, and limited employment opportunities, leaving parents easy prey to procurement agents who scour the villages in search of young children. Parents are often not apprised of the nature of the work for which their children are being 'hired'" (1869–1870).

Ek glo nie dat enige diepgaande analise van bogenoemde inligting nodig is om tot die konklusie te kom dat kindersekstoerisme in stand gehou word deur misbruik te maak van die ekonomiese en kulturele (asook religieus-waardematige) weerloosheid van kinders, en in besonder meisies, in veral derdewêreld- en ander ontwikkelende lande nie.

3 Die kind se reg op waardigheid en vrye psigoseksuele ontplooiing

Kinders wat slagoffers van seksuele misbruik is, leef in voortdurende vrees. Hulle leef in vrees vir geweld en sadistiese handelinge deur hulle kliënte, asook in vrees vir gewelddadige optrede deur bendes en koppelaars ("pimps") wat die seksbedryf beheer en vir arrestasie deur die polisie. Hulle ly gewoonlik ook aan depressie en het 'n swak selfbeeld as gevolg van die deurlopende degradering waaraan hulle onderworpe is. Hulle word ook in die reël geteister deur 'n gevoel van wanhoop en hopeloosheid as gevolg van hulle onvermoë om aan hulle omstandighede te verander. Dwelm- en alkoholmisbruik gaan dikwels hand aan hand met prostitusie. Selfdoding is nie 'n seldsame verskynsel in dié omstandighede nie. Afgesien van dié psigiatriese beserings en benadeling is liggaamlike benadeling, soos veneriese siektes en infeksie met die VIGS-virus, aan die orde van die dag. Hierdie kinders ontvang selde behandeling en word slegs medies versorg indien hulle ernstig of terminaal siek is (sien in dié verband Berkman 402; Levesque "Prosecuting sex crimes against children: Time for 'outrages' proposals?" 1995 *Law and Psychology Review* 59; Robinson 249–252; Hodgson 1994 *Melbourne Univ LR* 521). Navorsers wys daarop dat baie sekstoeriste verkeerdelik onder die indruk verkeer dat hoe

jonger die meisie, hoe geringer die kans om met die VIGS-virus infekteer te word (Gerlach "Sex-Tourismus und Strafvervolgung" 1993 *NStZ* 71; Berkman 397; Robinson 247). Met beroep op 'n Thailandse immunoloog, dokter Vicham Vithayasai, wys Hodgson daarop dat aangesien die meisies jonk en nog nie geslagsryp is nie en geslagsomgang met hulle as gevolg daarvan gepaardgaan met die skeur van weefsel wat baie bloeding tot gevolg het, hulle meer vatbaar vir sodanige infeksie is. Die weefsel wat die (manlike) anus omlyn, is ook dun en kan insgelyks maklik skeur, met die gevolg dat die VIGS-virus maklik in die bloedsomloop kan kom (Hodgson 1995 *Int J of Law and the Family* 29. Sien ook Healy 1871–1872; Giordanella 135 vn 16). Sommige (naïewe) daders verkeer ook valslik onder die indruk dat geslagsomgang met 'n maagd veneriese siektes kan genees (Berkman 399).

Inligting dui daarop dat daar 'n verskil is tussen kinderprostituering in ontwikkelde en ontwikkelende lande. In laasgenoemde lande vind dit gewoonlik op 'n vroeë leeftyd plaas en dikwels nie op 'n "vrywillige" basis nie (Robinson 248). Brannigan en Van Brunschot verskaf die volgende interessante inligting oor die tydstip van seksuele aktiefwording en prostituering:

> "However, becoming sexually active is not the same thing as becoming a prostitute. Thus, onset and parental regulation are not the only important intervening factors. Instead, a cluster of conditions and hazards further mediate the link. First, there tends generally to be an age difference between heterosexual couples who date. Males typically date females 1 or 2 years younger than themselves although they often express short-term interest in much younger females . . . In part this age gap results from the fact that male and female adolescents become sexually mature at different ages. In this scenario, the young adolescent females who become sexually active earlier than their peers appear to become active with boys who are not substantially older than themselves . . . The average age difference at first sex between girls who became prostitutes and their mates is 5 years. That means that 12–14-year-old females were sexually active with 17–19-year-old males. Given the large social difference that mark adolescent age transitions, such relationships are not particularly stable and are peculiarly hazardous for the females" ("Youthful prostitution and child sexual trauma" 1997 *Int J of Law and Psychiatry* 337 349–350).

Disfunksionele familie-omstandighede lewer ook 'n belangrike bydrae tot prostituering op 'n vroeë ouderdom (Brannigan en Van Brunschot 343–345). Sodanige prostitute word dan ook dikwels vasgevang in pedofielnetwerke, waaruit hulle moeilik kan ontsnap (vgl Berkman 399–400).

Die internasionale gemeenskap het reeds in 1904 met die *International Agreement on Suppression of White Slave Traffic* 'n poging aangewend om kinders, hoewel selektief, teen seksuele uitbuiting te beskerm. Hierdie ooreenkoms het verskeie wysigings ondergaan. Die 1949-protokol het uitdruklik 'n verbod geplaas op die seksuele gebruik van kinders vir immorele doeleindes – al sou dit konsensueel geskied. Hierdie internasionale ooreenkoms, gepaardgaande met konvensies ter bekamping van slawerny, het bygedra tot beperking van kinderprostituering, hoewel op 'n indirekte wyse.

In 1989 het die VN die *Convention on the Rights of the Child* (*UNCRC*) die lig laat sien. In artikel 1 *UNCRC* word 'n kind omskryf as 'n persoon onder die ouderdom van 18 jaar, tensy meerderjarigheid binne 'n spesifieke regstelsel vroeër bereik word. Artikel 34 *UNCRC* versoek die ondertekenende state om uiterste maatreëls in plek te stel om seksuele uitbuiting en misbruik van kinders te voorkom. Artikels 35 en 36 *UNCRC* vereis van lidlande om die ontvoering en verkoop van, asook handeldryf in, kinders te verbied. Die *UNCRC* het oorweldigende ondersteuning gevind. Australië en Frankryk het met die oog op verskerping van die

maatreëls ter beskerming van kinders teen seksuele uitbuiting die *Draft Optional Protocol to the United Nations Convention on the Rights of the Child Concerning the Elimination of Sexual Exploitation and Trafficking of Children* geïnisieer. Hierdie konsep-protokol het ten doel om groter verpligtinge op hulle ondertekenaars as dié van die *UNCRC* te plaas. Dit is insiggewend dat artikel 1 van dié konsep-protokol seksuele uitbuiting van kinders tot 'n misdaad teen die mensheid verhef. Hierdeur word die seksuele uitbuiting van kinders met oorlogsmisdade en seerowery gelyk gestel. Artikel 2(a) vereis van ondertekenaars om nasionale wetgewing aan te neem wat seksuele uitbuiting van kinders onderworpe aan universele jurisdiksie verbied, dit wil sê enige staat sou daarvolgens sekere misdrywe kon straf al is dit buite hulle jurisdiksiegebied deur 'n burger van 'n ander staat gepleeg. Hierdie konsep-protokol is nog nie aanvaar nie. In 1996 het Swede, *ECPAT* en *UNICEF* in Stockholm die eerste internasionale konferensie oor seksuele uitbuiting van kinders georganiseer. Afgevaardigdes van 126 lande en 50 nie-staatlike organisasies het dit bygewoon. Die doel van dié konferensie was drieledig: (i) om die problematiek in dié verband internasionaal sigbaar te maak; (ii) om besluitnemers van al die relevante hoofdissiplines, soos kinderpsigologie, maatskaplike werk, internasionale reg en strafregspleging, byeen te bring; en (iii) om 'n aksieplan te ontwerp waarvolgens dié vorm van uitbuiting in al die lande van die wêreld uitgeskakel kon word. Hierdie vyf-dag konferensie is afgesluit met 'n eenparige aanvaarding van 'n Deklarasie en 'n Aksie-agenda. Wat vir onderhawige doeleindes van wesenlike belang is, is dat in artikel 3 van die Deklarasie verklaar word dat alle kinders daarop geregtig is om vry van seksuele uitbuiting en misbruik te leef. In artikel 5 word kommersiële seksuele uitbuiting omskryf as "sexual abuse by the adult and remuneration in cash or kind to the child or a third person or persons". Die seksuele uitbuiting van kinders word as 'n vorm van dwangarbeid en slawerny beskou. In die Aksie-agenda word verskeie maatreëls en planne voorgestel om dié probleem oor 'n wye front aan te spreek en te bekamp (sien oor dié internasionale aksies Giordanella 142–147; Berkman 405–408; Robinson 253–256; Hodgson 1995 *Int J of Law and the Family* 32–35; Healy 1872–1884).

Die internasionale voorstelle en pogings hierbo uiteengesit, word onderlê deur 'n begeerte om uiteindelik die waardigheid en vrye psigoseksuele ontplooiing van kinders wêreldwyd in 'n omvattende sin juridies te respekteer. In die 1993 *Vienna World Conference on Human Rights* word onomwonde verklaar dat "all forms of sexual . . . exploitation, including those resulting from . . . international trafficking, are incompatible with the dignity and worth of the human person" (Hodgson 1994 *Melbourne Univ LR* 521). Ten aansien van die psigodinamika onderliggend aan die kind se belewenisse van misbruikende seksuele optrede, in besonder in die vorm van kinderprostitusie, teenoor haar/hom verduidelik O'Grady soos volg:

> "The whole system of child prostitution creates pressure which effectively destroys the child's self-image and result in a total loss of confidence . . . The children are continually told they are no good and will be punished for what they are doing if they try to escape. Customers rarely treat them as real human beings but as objects to be used . . . Whatever self-esteem the young child has is quickly lost in this psychological battering" (*The child and the tourist* (1992) 119 met goedkeuring aangehaal deur Hodgson 1994 *Melbourne Univ LR* 521).

Die vrye menslike persoonlikheid, wat met menswaardigheid toegerus is, stel volgens die Duitse Konstitusionele Hof (*Bundesverfassungsgericht*; *BVerfG*) die hoogste menseregtelike waarde daar (Urt v 5/6/1973, *BVerfGE* 35, 22). Psigoseksuele outonomie en selfbestemming is volgens Duitse regspraak en kommentatore 'n bestanddeel van die vrye menslike persoonlikheid (BGH, Beschl v 23/1/1996,

NJW 1996, 1294; BGH, Urt v 19/11/1996, NStZ-RR 1997, 98; Sick *Sexuelles Selbstbestimmungsrecht und Vergewaltigungsbegriff* (1993) 336; Horn "Anmerkung" 1981 *Juristische Rundschau* 251 253–254). Die menslike sosio-juridiese waardestrukture – ook binne internasionale konteks – moet daarop gerig wees om kinders se waardigheid en hulle vrye psigoseksuele ontplooiing ten alle koste te beskerm. (Vgl Amelung "Über Freiheit und Freiwilligkeit auf der Opferseite der Strafnorm" 1999 *GA* 182 193–195). 'n Mensregtelike kultuur is funksioneel juis daaraan gebonde om die swakkere en weerlose teen misbruik van die sterkere en maghebber te beskerm (sien verder Labuschagne "Die rol van die strafreg in die versekering van die vrye psigoseksuele ontplooiing van kinders" 1996 *SALJ* 585; "Ouderdomsgrense en strafregtelike aanspreeklikheid weens seksuele misbruik van kinders" 1998 *Obiter* 340; "Strafregtelike respektering van jeugdiges se reg op psigoseksuele selfbestemming" 1999 *THRHR* 161; "Klagtemisdade en die strafregtelike respektering van die psigoseksuele outonomie van jeugdiges" 1999 *TRW*).

4 Aanwending van die strafsanksie

Gerlach toon aan dat volgens Thailandse reg geslagsomgang met 'n meisie onder 13 jaar met tot 20 jaar gevangenisstraf strafbaar is. Onsedelike handelinge met kinders onder die ouderdom van 13 jaar is insgelyks met langtermyn gevangenisstrawwe strafbaar. Koppelary word ook strafbaar gestel. Handeldryf in vroue en meisies word deur wetgewing van 1928 strafbaar gestel. Wetgewing van 1960 stel prostitusie in die algemeen onder strafbedreiging. Hierdie strafvoorskrifte is vir alle praktiese doeleindes sonder effek (71). Oneffektiewe strafregspleging het spesifiek in Asiatiese lande 'n stimulerende effek op sekstoerisme. So verduidelik Berkman:

> "Many Asian nations have tourist areas that cater to foreigners seeking sex. Foreigners come primarily from Western Europe, the United States, and Australia seeking boys and girls for sex or pornography. Child welfare activists assert that these travelers, who are able to act with virtually no fear of punishment except deportation, enable the child sex trade to flourish. These excursions are facilitated, in many cases, by actual sex tours visibly marketed in the countries of the consumers, or by advertisements in travel magazines, highlighting the underage sex available in Asia and elsewhere" (403).

In bykans alle lande wat deur sekstoeriste besoek word, bestaan strafvoorskrifte wat hulle optrede verbied (Berkman 403–404; Robinson 243; Hodgson 1995 *Int J of Law and the Family* 27). Hodgson noem verskeie redes vir die nie-aanwending van strafvoorskrifte: (i) in die konteks van ekonomiese moderniseringsinisiatiewe ignoreer regerings en regshandhawingsinstellings, met die doel om toeriste se geld te bekom, sekstoeriste se wederregtelike optrede; (ii) laagbesoldigde polisiebeamptes en ander regshandhawingsamptenare word maklik deur welgestelde toeriste en die goedgeorganiseerde seksbedryf omgekoop; (iii) die polisie self is dikwels by die handeldryf en fasilitering van kinderprostitusie betrokke en het selfs al as wagte by kinderseksinstellings opgetree; (iv) 'n gebrek aan voldoende polisiebeamptes en arbeidsinspekteurs; (v) leemtes en skuiwergate in die betrokke wetgewing; en (vi) die onwilligheid van kinderprostitute om met polisie-ondersoeke saam te werk, as gevolg van 'n vrees dat hulle self vervolg sal word en 'n vrees vir moontlike geweld deur ondergrondse bewegings (1994 *Melbourne Univ LR* 518).

Verskeie lande, insluitende Australië, België, Denemarke, Frankryk, Duitsland, Japan, Noorweë, Swede en die VSA, het wetgewing uitgevaardig wat 'n verbod plaas op seksuele aktiwiteite met kinders in die buiteland (Giordanella 133 vn 3; Berkman 398; Healy 1886–1888). Artikel 5(8) van die Duitse Strafwetboek (*Strafgesetzbuch; StGB*) bepaal dat die Duitse strafreg, onafhanklik van die strafreg van die plek waar die handeling (of late) verrig word, vir handelinge (en lates) wat

in die buiteland verrig is en op skending van die reg op seksuele selfbestemming neerkom, in die volgende omstandighede geld: (a) ten aansien van artikel 174(1) en (3) *StGB*, wat handel oor seksuele uitbuiting van 'n gesag- of afhanklikheidsverhouding, indien sowel die dader as die slagoffer ten tyde van misdaadpleging Duitsers is en hulle lewensbasis ("Lebensgrundlage") in Duitsland het; en (b) in geval van artikels 176–176b en 182 *StGB*, wat handel oor die seksuele misbruik van kinders onder 14 en 16 jaar, indien die dader 'n Duitser is (sien Lackner en Kühl *Strafgesetzbuch mit Erläuterungen* (1999) 44–45; Tröndle en Fischer *Strafgesetzbuch und Nebengesetze* (1999) 49–50). Lackner en Kühl wys daarop dat hierdie uitbreiding van artikel 5 *StGB* ten doel het om 'n bydrae te lewer tot die bekamping van sekstoerisme deur Duitsers tot nadeel van buitelandse kinders en jeugdiges en om moontlike leemtes van die strafregspleging vroegtydig aan te spreek. Dit is egter volkeregtelik moeilik verantwoordbaar om ook Duitsers wie se verblyf in die buiteland nie slegs van verbygaande aard is nie, aan die Duitse strafregspleging onderworpe te stel (47. Sien ook Tröndle en Fischer 52; Dehler *Internationales Strafrecht* (1983) 142–143).

Op 13 September 1994 het president Clinton aan die *Violent Crime Control and Law Enforcement Act of 1994*, beter bekend as die *Crime Bill*, deur ondertekening regskrag verleen. Hierdie wetgewing het die sogenaamde *Mann Act*, wat dit reeds 'n misdaad ("felony") gemaak het om vir immorele doeleindes oor staatsgrense te reis, uitgebrei om jurisdiksie te verkry oor diegene wat na die buiteland reis, of daartoe saamsweer, om betrokke te raak by seksuele aktiwiteite met minderjariges wat volgens die strafreg van die VSA onregmatig is. Die relevante deel van die gewysigde artikel 2423(b) (18 USC par 2423 (1948) gewysig deur die *Violent Crime Control and Law Enforcement Act* (1994), Pub L No 103–322, 108 Sat 1796, Title V1, par 60001–26) lui soos volg:

> "A person who travels in interstate commerce, or conspires to do so, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act (as defined in section 2245) with a person under 18 years of age . . . shall be fined under this title, imprisoned not more than ten years, or both."

Giordanella wys daarop dat federale howe in twee gevalle reeds artikel 2423(b) op persone van toepassing gemaak het wat van een staat na 'n ander in die VSA gereis het (150–151; *United States v Butler* 92 F3d 960 (9th Cir 1996); *United States v Childress* 104 F3d 47 (4th Cir 1996.) Sien ook Healy 1903–1911). Sy wys ook daarop dat dit blyk uit 'n onderhoud wat sy gehad het met Marsha Liss (assistent prokureur-generaal in Washington DC) dat die kantoor van die prokureur-generaal van die VSA tans inligting versamel vir moontlike vervolging van individuele reisigers, asook toerleiers, weens beweerde misdade in die buiteland gepleeg (151–152).

'n Sweedse hof het in 1995 ene Bengt Bolin, 'n 69-jarige pensioenaris, skuldig bevind aan molestering van 'n 13-jarige seun by die Pattaya vakansie-oord in Thailand. Dit was die eerste keer dat Sweedse owerhede in 'n geval van dié aard op die beginsel van ekstraterritorialiteit gesteun het. Volgens hoofstuk 2(2) van die Sweedse Strafkode kan hulle strafreg ekstraterritoriaal aangewend word. Dit lui soos volg:

> "A person who has committed a crime outside the realm shall be tried according to Swedish law and in a Swedish court if the person is:
>
> 1 a Swedish citizen or an alien domiciled in Sweden;
>
> 2 an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish, Finnish, Icelandic, or Norwegian citizen and is present here; or

> 3 some other alien, who is present in the Realm and the crime is punishable according to Swedish law by imprisonment for more than six months" (Engelse vertaling aangehaal deur Berkman 409–410).

Die Sweedse Strafkode laat gevolglik die weg oop om sekstoeriste te straf vir seksuele aktiwiteite met kinders in die buiteland. In die saak van Bolin het Sweedse aanklaers na Thailand gereis om getuienis in te win. Thailandse wetgewing van 1992 magtig die kantoor van hulle prokureur-generaal om behulpsaam te wees met die insameling en versending van inligting na die land waarin die vervolging plaasvind. Alle lande is egter nie so hulpbereid nie (Berkman 410–411; Healy 1890).

Die *Crimes* (*Child Sex Tourism*) *Amendment Act* het in 1994 in Australië van toepassing geword. Hierdeur het die Australiese strafreg in onderhawige verband ekstraterritoriale werking verkry. 'n Verskeidenheid handelinge van 'n seksuele aard met, deur of voor 'n kind onder 16 jaar gepleeg, word spesifiek met langtermyn gevangenisstraf strafbaar gestel (artikels 50BA–C; Berkman 411–412; Giordanella 152–153; Hodgson 1995 *Int J of Law and the Family* 37). Hierdie wetgewing maak ook daarvoor voorsiening dat die hof kan gelas dat 'n getuie by wyse van 'n videoverbinding ("video link") getuienis kan aflê. Artikel 50EA van die wet stipuleer vervolgens die volgende gevalle waar dit moontlik is, naamlik waar:

> "(a) the witness will give the evidence from outside Australia; and (b) the witness is not a defendant in the proceeding; and (c) the facilities required by section 50E are available or can reasonably be made available; and (d) the court is satisfied that attendance of the witness at the court to give the evidence would: (i) cause unreasonable expense or inconvenience; or (ii) cause the witness psychological harm or unreasonable distress; or (iii) cause the witness to become so intimidated or distressed that his or her reliability as a witness would be significantly reduced; and (e) the court is satisfied that it is consistent with the interests of justice that the evidence be taken by video link."

Die lande wat hulle strafjurisdiksie uitbrei om kindersekstoerisme te bekamp en te bestraf, neem klaarblyklik toe (Hodgson 1994 *Melbourne Univ LR* 530).

5 Konklusie

Dit blyk duidelik dat sekstoerisme geanker is in ekonomiese en kulturele magsmisbruik vir seksuele doeleindes. Dit skend die waardigheid en die reg op vrye psigoseksuele ontplooiing van miljoene kinders in veral ontwikkelende lande. (Sien in die algemeen Ing *Die strafrechtliche Schutz der sexuellen Selbstbestimmung des Kindes* (1997) 26 ev; Wilmer *Sexueller Mißbrauch von Kindern. Empirische Grundlagen und kriminalpolitische Überlegungen* (1996) 19 ev.) Georganiseerde sekstoerisme behoort myns insiens deur die internasionale gemeenskap as 'n misdaad teen die mensheid verklaar te word. Alle lande behoort, soos tans in byvoorbeeld Duitsland, die VSA, Swede en Australië, hulle strafjurisdiksie in dié verband uit te brei. (Berkman 421–422). Healy verklaar tereg in dié verband:

> "Child sex tourism is a complex issue of international proportion. It is intimately connected to the financially lucrative business of child prostitution. As such, its elimination necessarily involves the participation of governments, local and international law enforcement agents, tourist agencies, social welfare organizations, NGOs, and international bodies such as the United Nations. National legislation is an important element in the concerted effort to eliminate child sex tourism, and the laws of Sweden, Australia, and the United States each comprise a distinct approach to the realization of that goal. The laws, however, represent only one component in a more comprehensive campaign that must employ multiple long-term and coordinated strategies" (1912. Sien ook Hodgson 1994 *Melbourne Univ LR* 539–540).

Sommige kommentatore stel voor, en dit kan onderskryf word, dat 'n algemene reisverbod na sekere lande geplaas word op persone wat hulle aan seksuele vergrype teenoor kinders skuldig gemaak het en dat die identiteit van sodanige persone in betrokke gemeenskappe versprei behoort te word (Hodgson 1995 *Int J of Law and the Family* 45–46). In die finale instansie is die reg alleen nie by magte om 'n probleem van hierdie aard effektief en standhoudend die hoof te bied nie. Dit vereis 'n internasionale en interdissiplinêre poging van enorme omvang (Hodgson 1995 *Int J of Law and the Family* 42–44; Lamb "The investigation of child sexual abuse: An international interdisciplinary consensus statement" 1994 *Family LQ* 151).

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TRADITIONAL WOMAN-TO-WOMAN MARRIAGES, AND THE RECOGNITION OF CUSTOMARY MARRIAGES ACT

1 Introduction

Traditional woman-marriages, in which a woman marries one or more other women because of her powerful position or because she is childless, occur all over Africa. In South Africa these marriages have been reported in ten groups, and are concluded following all the customary rituals such as payment of bridewealth. While these marriages might not occur often, they are considered far from abnormal in the communities that uphold them. And now that the Recognition of Customary Marriages Act 120 of 1998 recognises customary marriages "concluded in accordance with customary law" (s 1), the question arises whether this also applies to woman-to-woman marriages.

I would like to answer this question in the affirmative. I shall first describe the little-known institution of woman-marriages. Thereafter, I shall examine the Recognition of Customary Marriages Act and its impact on this type of marriage. As the text and spirit of the Act seem to suggest their recognition, this raises the question of the relationship to the discussion about homosexual marriages. In conclusion, I shall offer some possible explanations for the lack of attention given to this phenomenon within customary-law studies.

2 Mrs Matjageng and her wife

My interest in the topic was sparked by a case I encountered while I was conducting field research in the Northern Province during 1999.

On 4 August, two women and their respective families appeared at a meeting of *mosate*, the royal family, in the Sekhukhune area of Mamone. Seated on the ground of the open thatch hut destined for smaller cases, Mrs Matjageng told the men present that she had married a younger woman and had paid the full *magadi* (bridewealth) of two goats. It was a marriage for the *lapa*, the homestead: the old woman was childless and had no brothers. Through this marriage the younger

woman's children would become hers and thus carry on the family name. But the relationship had turned sour. The female husband complained that her wife had insulted her by calling her "barren". The young wife, in turn, lamented that the old lady did not pay the children's school fees.

The men present took a long time to discuss the case, but were unanimous in their judgment. One of the auditors said (in Sepedi):

> "We do not stimulate divorce, we are here to unite people. It often happens that a young woman marries a female husband in the hope of benefiting, and these women would be very disappointed if we started allowing divorces. As long as a goat has been slaughtered and its blood has been spilt we should not allow you to split up."

The female husband (called *mmakgolo* – grandmother) was severely reprimanded:

> "If you marry a wife, you are not a woman any more, but just like a man. These are your children now: take them in and maintain them. If you don't, your wife can take you to the maintenance court."

The men also warned the bride that she should be a good wife and not swear at the husband: "You must have patience in love." Towards the end of the case both women were asked "Do you still love each other?" (*le sa ratana*?), and when they answered in the affirmative, they were told to go back home and make up.

The couple was back in the customary court the following month, however, on 1 September. This time they came to the *kgôrô*, the plenary meeting held under the thorn tree. The old woman complained that the wife refused to fetch water and cook for her: "I married this wife to do these jobs for me but she refuses. What do you men do in such a situation?" Her wife was also still unhappy: "How can we live together like *mosate* says we must? I know they say that good friends can fight and make up, but that doesn't apply here." After intensive questioning by the large group of men present, it turned out that Mrs Matjageng wanted a divorce: "I'm tired of this wife. I don't want her and her children any more." This sparked off a general outcry. But once the mumbling and grumbling had died down, one man said:

> "This woman is just like a man. And if a man is the one who wants to divorce, he must leave the house and take only his jacket with him (*monna o tla tsea baki fela*). This woman is a father to those children so she must keep on maintaining them."

The others agreed: the old woman was to leave the house and her field behind. Even her pension money would be confiscated and given to the wife. Confronted with this harsh verdict summarised by the chief's brother, the old woman changed her mind and told the court that she did want to stay with her wife again. It was decided that she should first go and apologise to the wife's family. Also, she had to pay R100 "to disperse the *kgôrô*".

From interviews following this particular case I learnt that woman-marriages do not occur very frequently amongst the Pedi. Of the 87 cases tried in traditional courts that were reported to the Sekhukhune magistrate – unlike the case described above – in the period 1994–1999, only one concerned a woman-marriage. Nevertheless, informants state that these marriages are considered to be a normal arrangement. The most important reason for such a marriage is that a woman is barren and there is a danger of "the house dying out". The bride is married following the usual rituals, and can come with or without children. If she is without children, a blood relative of the female husband will preferably act as a genitor. This biological father has no rights to the children and they inherit the surname of the female husband. This practice reminds of what Mönnig called Pedi "ghost marriages". He argues, however, that this practice concerns only married barren women, who marry a wife in the name of their unborn son (*The Pedi* (1967) 205).

3 Woman-marriages

The Pedi people are not the only ones to practise this custom. Woman-marriages, or what is called "gynaegamy" in some literature, has been reported for 40 groups in East, West and Southern Africa (O'Brien "Female husbands in southern Bantu societies" in Schlegel *Sexual stratification* (1977); Tietmeyer *Frauen heiraten Frauen: eine vergleichende Studie zur Gynaegamie in Afrika* (1985) ("Tietmeyer (1985)"); Tietmeyer *Gynaegamie im Wandel: die Agikuyu zwischen Tradition und Anpassung* (1991); Pothast-Jutkeit *History of the family: An International Quarterly* (1997) 2 2). The famous anthropologist Herskovitz was one of the first researchers to make mention of the institution of woman-marriages when he wrote about the area presently known as Benin. (Herskovitz "A note on 'woman marriage' in Dahomey" 1937 *Africa* 335). His account was, however, criticised in later years, especially because he imputed sexual overtones to these marriages, a claim that was neither substantiated by him nor supported by any other authors. (See, for instance, Krige "Woman-marriage, with special reference to the Lovedu – its significance for the definition of marriage" 1974 *Africa* 11.) Most authors, by contrast, have emphasised that woman-marriages are not homosexual in nature, but should be seen within the context of African views of marriage as an arrangement between families, aimed at procreation, and a legitimate way in which to "reinvest" wealth.

There are two main motivations underlying woman-marriages. The first is the situation broadly described above, in which a woman in a patriarchal system is past the child-bearing age and – after paying a bridewealth – marries another woman. This bride either already has children or will have them during the marriage, and they will be considered to be the offspring of the female husband (Tietmeyer (1985) 16). A second situation is one in which a woman has independently gained wealth or power, for instance as a political leader or a traditional healer. This has caused some authors writing from a gender perspective to speak of a "third gender" (Aalten and Claus "Twee seksen, drie genders: vrouwenhuwelijken in Afrika" 1999 *Tijdschrift voor Genderstudies* 35–48). O'Brien 122 states that

> "in some societies, if women are expected to symbolise power, they must be conceptualised as male, or at least not take the subordinate status of wife. Women with a high ascribed status are already 'royal', perhaps 'divine', but they may still need a male element to mark their elevated roles".

In South Africa, woman-marriages can be found amongst the Venda, Lovedu, Pedi, Hurutshe, Zulu, Sotho, Phalaborwa, Narene, Koni and Tawana (O'Brien 111). They have been most famously described for the Lovedu. It is relatively well known that the Rain Queen, who was often visited by President Mandela, marries other women (the present Rain Queen has four wives, and her mother was married to eleven women and her grandmother to ten). But the Kriges, in their ethnographies of the Lovedu, have described many other situations in which a woman can marry one or more wives (Krige 1974 *Africa* 17–21; Krige and Krige *The realm of the rain queen: A study of the pattern of Lovedu society* (1943)). Nevertheless, Eileen Krige states that

> "it would appear that the incidence of woman-marriage in Africa as a whole is nowhere high in proportion to other marriages and this is what one would expect. Among the Lovedu, where one cannot remain long in the society without coming across it, I have found its highest incidence outside the royal kraal to be only 5% of the married women in the community".

But then, of course, "woman-marriage is never reflected in any official census" (1974 *Africa* 25).

Woman-marriage is also fairly common among the Venda. The scant references to the institution of woman-marriage in books on customary law usually concern this population group. Bekker, for instance, writes that

> "a Venda wife may, with her own property, furnish lobolo for and marry a woman, who is regarded as her wife, but who is *ngena'd* by a select male consort; this consort is usually her own son or, if she has none of suitable age and status, her brother or other near relative of her father and mother, chosen as far as possible in order of seniority" (Bekker *Seymour's customary law in Southern Africa* (1989) 147).

Van Warmelo describes 23 cases of woman-marriages, mostly concerning women who are independently wealthy, for instance as doctors, and women who have not only a wife but also a husband (Van Warmelo *Venda law* (1948); cf O'Brien 116). Another reason to marry a woman can be to raise an heir (Krige 1974 *Africa* 26). Claus describes an encounter, in 1998, with a female headman, who married a woman because she would otherwise have to move to her husband's village (Aalten and Claus 41).

The Zulu saying *umuzi awuboli kwaZulu* (a Zulu kraal is not allowed to decay) has also resulted in woman-marriages. Among the Zulu, these marriages are allegedly found in two instances: to raise an heir to property, and in cases in which a female diviner has become wealthy and is able to establish a large kraal and following (Krige 1974 *Africa* 26).

4 The Recognition of Customary Marriages Act 120 of 1998

The Recognition of Customary Marriages Act ("the Act") was promulgated in 1998, with the main aim of recognising customary marriages and adumbrating the requirements for their legal validity. The question arises whether this also implies recognition for woman-marriages as described above. In all the discussions preceding the adoption of the Act – organised by the South African Law Commission, in the media, and in Parliament – the issue was overlooked (see eg South African Law Commission Project 90 *The harmonisation of the common law and the indigenous law* Discussion Paper 74 *Customary marriages* (1997) and the Hansard report of the discussion in Parliament on 1998-11-02).

The Act states that a marriage which is valid at customary law is for all purposes recognised as a marriage, whether it already existed at the commencement of the Act or was entered into after that (s 2). Section 3(1) sets out a number of requirements for the validity of the marriage, namely that both the prospective spouses must be older than 18; that they must consent to be married to each other under customary law; and that the marriage must be negotiated and entered into or celebrated in accordance with customary law. The prohibition of a customary marriage between people on account of their relationship by blood or affinity is also determined by customary law (see s 3(6)). One of the most important provisions in the Act is section 6, which declares that a wife in a customary marriage has

> "on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law".

The Act allows for polygamous marriages, and states that if a person is a spouse in more than one customary marriage, all these marriages are recognised (s 2(3) and (4)). It also provides that a customary marriage entered into after the commencement of the Act is in community of property, unless the spouses have agreed otherwise (s 7(2)). The court may grant a decree of divorce on the ground of irretrievable breakdown of the marriage, and may make an order with regard to custody or guardianship of minor children and for the payment of maintenance (s 8).

The Act has therefore strengthened the position of wives in customary marriages. It explicitly states that they are equal to their husbands (in contrast to the previous provision (s 11(3)(b) of the Black Administration Act 38 of 1927), which declared women in customary unions to be perpetual minors). The Act provides that they are married in community of property unless otherwise agreed, and provides for their legal position in the event of a divorce.

Does the Act grant wives who have married female husbands these same rights? The answer depends, of course, on whether the Act also recognises this type of marriage. An answer to this question can be found in the definition of a customary marriage in the Act namely "a marriage concluded in accordance with customary law" (s 1). Customary law is defined as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples" (s 1). As mentioned above, the main requirement for the validity of a customary marriage, apart from adulthood and consent of the spouses, lies in the fact that the marriage must be "negotiated and entered into or celebrated in accordance with customary law" (s 3(1)(b)).

With these definitions, the legislator has explicitly left the "power of definition" – the ability to determine what constitutes a customary marriage – with the people concerned. This plumping for what may be labelled an endogenous definition of culture and customs is not as obvious as may seem. In the past, substantive aspects of customary law were often embodied in legislation (see, for instance, the Black Administration Act 38 of 1927 and the Black Authorities Act 68 of 1951). These Acts contain exogenous definitions in which an actor other than the people concerned (sc the legislator) determined some of the substantive aspects of cultural practices (Oomen and Tempelman "The power of definition" in Donders *et al* (eds) *Sim Special 25: Law and cultural diversity* (1999) 7–26). Whether the definition of what constitutes a customary marriage should be left wholly up to the people concerned was the subject of discussion prior to the adoption of the Act. Many of the stakeholders consulted felt that some essential substantive requirements specific to a customary marriage should be set out, for instance the payment of lobolo (as to which, see SA Law Commission Discussion Paper 74 43–46), or even specifics such as the planting of a spear in the kraal of the prospective wife (workshop with traditional leaders organised by the SA Law Commission, 1998-02-20).

The choice of an endogenous definition of culture seems to entail that woman-marriages are also recognised under the Act. After all, these marriages are negotiated and entered into and celebrated in accordance with customary law. This interpretation is in line with the right to culture enshrined in section 31(1) of the Constitution of the Republic of South Africa, Act 108 of 1996. Although the Recognition of Customary Marriages Act makes no specific statement on the matter, section 3 speaks merely of spouses, not of a husband and a wife. This is in contrast to the Black Administration Act 38 of 1927, which defined a customary union as "the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is party to a subsisting marriage" (s 35).

But, one might wonder, is a marriage between members of the same sex not forbidden on other legal grounds? This is, after all, the position at common law. Hahlo explicitly states that membership of the same sex constitutes a relative incapacity to marry (Hahlo *The South African law of husband and wife* (1985) 64). The *locus classicus* on this issue is *W v W* 1976 2 SA 308 (W), where one partner to a homosexual relationship underwent a sex-change operation, but the court held that a valid marriage could be contracted only by persons of opposite sexes. Then

again, the aim of the Recognition of Customary Marriages Act is to make provision for an alternative to the Western-style monogamous and individualistic marriage envisaged by the common law. In doing so, it (implicitly) moves away from a past in which the dominant legal system moulded and reshaped customary law through restatements and repugnancy clauses. The situation created by an Act such as the Recognition of Customary Marriages Act can best be described as "state law pluralism" (see Griffiths "What is legal pluralism?" 1986 *Journal of Legal Pluralism and Unofficial Law* 24). The legislator explicitly recognises the existence of two legal regimes to regulate the same institution – marriage – for different people. The best illustration of this is the fact that, on the one hand, bigamy is a common-law offence (Hosten *et al Introduction to South African law and legal theory* (1995) 1124) and is considered to be a crime against the community, whereas, on the other hand, the Recognition of Customary Marriages Act explicitly permits the possibility of polygamous marriages (see s 2(3) and 2(4)). The recognition, through this Act, of woman-marriages is an analogous example of state law pluralism.

Another possible obstacle to the recognition of woman-marriages is the repugnancy proviso that is still included in section 1(1) of the Law of Evidence Amendment Act 45 of 1988, which states that indigenous law must not be opposed to principles of public policy and natural justice. A Nigerian court, for instance, held woman-marriages to be "repugnant" in *Egwu v Meribe* (High Court Suit No HU/36/71, Umuahia, 1974-06-03, reported in Akpamgbo "A 'woman to woman' marriage and the repugnancy clause: A case of putting new wine into old bottles" 1977 *African Law Studies* 87–94). In a claim for land, the court held that the custom of woman-to-woman marriages was morally repugnant in terms of section 14(3) of the Nigerian Evidence Act. The Nigerian author reporting the case does not agree with the judgment, and states that Nigerian courts should enforce as law customary rules which are not intrinsically or inherently immoral and whose application will not shock the conscience of the society whose customary law is in question. There is nothing immoral about the custom in the Ibo societies of the Anambra and Imo states of a barren woman marrying another woman for her husband for the purpose of rearing children who will inherit the property of the barren woman or her husband, if either dies intestate (1977 *African Law Studies* 92). Akpamgbo deplores the fact that "indigenous judges, trained abroad, are more readily disposed to strike down customary rules as repugnant to natural justice, equity and good conscience than were the outsiders" (1977 *African Law Studies* 91).

It does not seem likely that a post-1994 South African judge will follow the Nigerian line of reasoning. While the purpose of the South African repugnancy clause might have been to introduce to customary law certain common-law principles (Bennett *Human rights and African customary law* (1995) 114–115), the clause has been rendered more or less redundant by the adoption of the Bill of Rights. After all, the 1996 Bill of Rights introduces its own limitation clause; rights such as that to non-discrimination on the basis of culture (s 9(3)) and the right to culture incorporated in sections 30 and 31

> "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" (s 36(1)).

Nowadays many authors advocate the repeal of the repugnancy proviso, claiming that it is a discriminatory remnant of colonial policies (see eg Currie "Indigenous law" in Chaskalson *et al Constitutional law of South Africa* (1996) 36–19).

5 Parallels with the discussion on homosexual marriages?

Now that it has been established that woman-marriages might well be recognised by the Recognition of Customary Marriages Act, I turn to the parallels and differences between the discussion above and the ongoing debate concerning homosexual marriages. Since the adoption of the Constitution of the Republic of South Africa, Act 200 of 1993, and the 1996 Constitution, in which equality clauses prohibit discrimination on the basis of sexual orientation (s 9(3) of Act 108 of 1996), South Africa has witnessed a vehement debate on the justifiability of the exclusion of homosexuals from marriage (see, for instance, the articles in "Focus on same-sex marriage" 1996 *SAJHR* 533–586).

Obviously, homosexual marriages and traditional woman-marriages are two totally different institutions. The homosexual marriages envisaged have many parallels with the Western-style modern heterosexual marriage, in that they would also be a union of two individuals, who wish to celebrate and consolidate their love for each other, but who happen to be homosexual. The woman-marriages, in contrast, should – as most traditional marriages – be seen as an arrangement between two families, and are more concerned with procreation and redistribution of wealth. Although the women are – according to the literature – not homosexual in orientation, there must be mutual affection in order for the marriage to be a success – as we have seen above, the two women in the customary court in Mamone were asked whether they still loved each other. Indeed, the main similarity between the two institutions is merely that they happen to concern same-sex marriages.

But there is another parallel between the two: the partners would find, in the official recognition of their marriage, a degree of security and of socio-economic benefit for the spouses as well as for their children, which they would not have enjoyed otherwise. As Mosikatsana "The definitional exclusion of gays and lesbians from family status" 1996 *SAJHR* 549 556 states,

> "marriage is the source of socio-economic benefits, such as the right to: inheritance, medical insurance coverage, adopt jointly, bring a wrongful death action, the benefit of spousal privilege, bereavement leave, spousal tax advantages and post-divorce rights such as the award of child custody and access as well as spousal and child support payments".

Although the aim might be the same, it appears that the plea for recognition of the two institutions must be based on different legal rationales. Authors who argue that homosexual marriages should be recognised do so by invoking section 9(3) of the Constitution (in particular, the prohibition against discrimination on the basis of sexual orientation), and the right to privacy entrenched in section 14 of the Constitution. These rights, they argue, are not limited by section 36 of the Constitution and should therefore be respected. A constitutional defence of the recognition of customary marriages would rest on the fact that woman-marriages are a cultural practice. Section 9(3) also prohibits discrimination on the basis of culture. In addition, section 31 provides that people belonging to a cultural community may not be denied the right, with other members of that community, to enjoy their culture. Here the limitation is included in section 31(2): this right may not be exercised in a manner inconsistent with any provision of the Bill of Rights. In addition, section 211(3) of the Constitution states that the courts must apply customary law where that law is applicable. This provides another constitutional basis for the recognition of woman-marriages.

6 Conclusion

In 1974 Eileen Krige concluded an article on woman-marriages by saying:

> "What comes out clearly from this study is that woman-marriage is no aberrant, quaint custom. Nor has it any sexual connotation for the two women concerned. It forms an essential part of, and is closely integrated with, the whole social system in which it is found. It can serve a great diversity of purposes, has shown itself to be flexible in the modern situation and bears testimony to a conception of marriage among the people who practise it that is far wider, more comprehensive, less bound up with the sexual needs of the individual partners than in Western society" ("Woman-marriage, with special reference to the Lovedu – Its significance for the definition of marriage" 1974 *Africa* 11 34–35).

Just like a quarter of a century ago, woman-marriages are not an "aberrant, quaint custom" today. This raises the question why – in spite of the extensive stakeholder consultation by the Law Commission and the reasonable amount of literature on the subject – the topic was not explicitly dealt with in or even discussed before the adoption of the Recognition of Customary Marriages Act.

An important reason lies in the way in which customary law is established. While the ideals behind the recognition of customary law in post-apartheid South Africa may be light years away from before (sc attaining equality between cultures instead of emphasising their differences), the method of determining what practices are cultural is still very much the same. Judges and legal researchers rely strongly on textbooks about customary law, which in turn are often largely written on the basis of case law. But the case law reflects only certain aspects of customary law as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples" (s 1 of Act 120 of 1998). And, as Holleman has taught, in the study of customary law one should consider problem-free cases as well as problematical ones (Holleman "Troublecases and trouble-less cases in the study of customary law and the legal system" 1973 *Law and Society Review* 585–609). In addition, much case law dates from a time when customary practices were squeezed into the legal straitjacket of the common-law system, and institutions which were alien to that dominant system – such as woman-marriages – were either disposed of on the basis of the repugnancy clause or never reached the courts at all.

Of course, many textbooks do not merely piece together an "outwardly coherent" survey of customary law on the basis of case law only. They also rely on anthropological works such as ethnographic monographs. Here another problem arises: what Hammond-Tooke calls the "great tradition" of the ethnographic monograph, from Monica Wilson to the Kriges, no longer exists (Hammond-Tooke *Imperfect interpreters: South Africa's anthropologists 1920–1990* (1997)). Hammond-Tooke (119–139), moreover, points out that many monographs on different peoples and their legal systems published in the 1950s and 1960s have become delegitimised by their *volkekundige* approach and the way in which they were used in order to underpin apartheid. And it appears as if post-apartheid anthropology is plagued by a general crisis sparked by an ideological fear of underlining difference and of describing others, a lack of researchers with in-depth local knowledge (whether through birth or through training), and – more trivial but as important – an academic culture in which there is less and less time for thorough long-term field research. Furthermore, good anthropological research has moved away from the structural-functionalist and holistic approach of the past to a far more post-modern method. Microstudies, characterised by fear of generalisation, have replaced the all-encompassing

ethnographies. This approach, for all its merits, makes it even more difficult for legal scholars to deduce legal rules from anthropological texts.

Nevertheless, with legislation on customary succession, traditional courts and traditional leaders in the pipeline, one must hope that the legislator will be able to base itself on the contemporary situation as much as possible. Here, stakeholders as well as academics have a duty to report to the Law Commission "what is happening on the ground".

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IS AN ATTORNEY LIABLE AS A MATTER OF LAW FOR THE FEES OF AN ADVOCATE BRIEFED BY HIM?

1 Introduction

Answering this question with a quick "yes" or "no" could provide a good example of the old adage that "fools rush in where angels fear to tread". Oversimplified, the answer is almost that: "Well, it depends on whose side you are on!" Advocates: "Yes"; attorneys: "No". The comments of Southwood J in *Bertelsmann v Per* 1996 2 SA 375 (T) 380B–C are very much in point:

> "I know from my own experience at the Bar (some 22 years) that attorneys have invariably paid my fees and I always accepted that that was the practice, if not the law. As a member of the Council of the Society of Advocates of the Transvaal, Transvaal Provincial Division, and of the General Council of the Bar I became aware of the fact that some attorneys disputed that they were liable for counsel's fees and took the view that they acted as the agent of their clients when instructing counsel – precisely the point raised by the respondent in his conditional plea. I am also aware that the point has not been *pertinently* dealt with in any Court" (my italics).

One should consider the final sentence of the above citation with care. Although not dealt with *pertinently*, this matter has indeed been commented on judicially (probably *obiter*, since the cases dealt with matters such as admission to practice as an advocate or removal from the roll of practising advocates) and even explained in their heads of argument by senior counsel (see 2 below). It has also been touched upon in some academic publications (see 3 below).

2 Extracts from the cases

2 1 General

Many of the cases in which this question was raised, dealt with the clear distinction between the two professions, namely that of attorney and advocate. An eminent exposition of this distinction, from Roman law to present-day practice, including an excursus into English law, is that by Thirion J in *Society of Advocates of Natal v De Freitas (Natal Law Society Intervening)* 1997 4 SA 1134 (N) (also quoted with approval by eg Swart J in *General Council of the Bar of South Africa v Van der Spuy*

1999 1 SA 577 (T)). In some cases (the list is, of course, not exhaustive) the attorney's liability for counsel's fees was apparently accepted, or at least not denied. However, strong arguments and comments to the contrary are also to be found.

2 2 Attorney's liability apparently accepted

Although the *Friedman* case dealt mainly with the question whether or not an advocate may appear for someone without having been instructed to do so by an attorney, Thirion J quoted (1168H) the following *dictum* by Corbett CJ in *In re Rome* 1991 3 SA 291 (A) 306B–D, which apparently accepted the attorney's liability for counsel's fees:

> "The advocate is, broadly speaking, the specialist in forensic skills and in giving expert advice on legal matters, whereas the attorney has more general skills and is often, in addition, qualified in conveyancing and notarial practice. The attorney has direct links (often of a permanent or long-standing nature) with the lay client seeking legal assistance or advice and, where necessary or expedient, the attorney briefs an advocate on behalf of his client. The advocate has no direct links or long-standing relationship with the lay client: he only acts for the client on brief in a particular matter and is normally precluded by Bar rules from accepting professional work direct from the client. *The attorney is responsible to the advocate for the payment of professional fees due to the latter by the client* and for the recovery of these and his own fees and disbursements from the client: the advocate has no direct financial dealings with the client" (my italics).

Thirion J then remarked (1169A–B):

> "In those cases where an advocate acts for a client on instructions from an attorney, the advocate *in the first instance looks to the attorney for the payment of his fees*. It is the *duty* of the attorney to *make arrangements with the client for* the payment of his fees and disbursements and *the advocate's fees*. This the attorney usually does by taking a deposit from the client in advance of the work done" (my italics).

In *Minister of Finance v Law Society, Transvaal* 1991 4 SA 544 (A), counsel for the appellant, MC Maritz SC, said *inter alia* (548C–D):

> "[A]ll the moneys in issue accrued to or are received by the attorney as principal for the services rendered by him – which services *include the engagement of and assumption of liability towards counsel* and others" (my italics)

and (548G–I):

> "The matter can be put thus: Does the attorney render 'any professional or other service'? The answer must be 'Yes'. The professional or other service rendered consists of engaging counsel and others and *assuming personal liability towards them, alternatively paying them their fees*. Does the attorney recover this amount from his client? The answer is a clear 'Yes'. The fact that the attorney renders an account to his client where such payments are reflected as 'disbursements' does not detract from the conclusion. Does the attorney receive payment of such moneys from his client in respect of or for any professional or other service rendered by him? Again the answer must be a clear 'Yes'. *In engaging counsel or instructing the other third parties the attorney assumes a personal liability towards them.* This is part of the professional service rendered by the attorney. Equally, when the attorney pays counsel or the other third parties, *he discharges also his personal obligation towards them.* This also constitutes part of the attorney's professional service" (my italics).

Further, in *Minister of Finance* (556*fin*–557A) Goldstone JA said:

> "The fact that because of a professional practice or a contract the attorney, notary or conveyancer may be personally liable to pay for the service performed by the third party in no way has as a consequence that the attorney, notary or conveyancer himself performs that service" (my italics).

2 3 Attorney not liable

In *Minister of Finance* (552D–553D) RS Welsh QC argued the legal position of both advocate and attorney and the attorney's liability for counsel's fees as follows:

> "The appellants sought to mount a case that attorneys engage advocates as principals. The advocate is, in other words, engaged as subcontractor to the attorney; as between the attorney and his client, the advocacy service is one rendered by the attorney to his client through his subcontractor, the advocate. This contention is erroneous on the facts and in law. The advocate only has one client and that is the litigant for whom he acts. That fact should not be obscured by the machinery created for the payment of his fee: (1) In Roman-Dutch law, counsel was entitled to sue his client for his fee . . . *The practice increasingly became for counsel to look to his instructing attorney for his fee. That practice has by now probably hardened into law, which would mean that the advocate is today entitled to sue either his client or his instructing attorney for his fee once the necessary permission has been obtained from his professional body.* Van Zyl 'Can an advocate sue for his fees?' 1896 *CLJ* 169 at 174–5 and 181; Joubert (ed) Law of South Africa vol 14 at 213 para 230, and at 248–50 para 257. (4) *The practice that has developed whereby the attorney impliedly agrees to stand good for payment of the fee owed by the client to counsel does not mean that the attorney has replaced the client as contracting party vis-à-vis counsel. There is no reason to infer that the contractual relationship between counsel and client recognised in Roman-Dutch law has changed in any way. It remains open to counsel to sue his client. The only change has been that the attorney has interposed to stand good for the client's debt owed to counsel.* The appellants would have it that the attorney acts only as principal and not also as his client's agent when instructing counsel. *On that construction, the attorney contracts with his client to provide the services rendered by counsel, and then subcontracts those services to counsel. That construction is untenable. It would constitute an unwarranted departure from Roman-Dutch law. It would mean that the attorney is an independent middleman between the client and counsel. He would be liable to his client in contract for the advocacy service rendered by counsel. He would in his charge to his client be entitled to add his own mark-up or profit margin to counsel's fees, something which attorneys have hitherto not been entitled to do. He would no longer be obliged to retain in trust payments received from his client on account of counsel's fees, but would be entitled to deal with the money so received once the services had been rendered, whether or not counsel has been paid . . . There would no longer be privity of contract between counsel and client. That would have implications for both of them. The client would not have a claim in contract against counsel for breach of his duties. Counsel would no longer be entitled to sue the client for his fee. All these implications are so foreign to the relationship between client, attorney and counsel as we understand it today that the construction from which they flow contended for by the appellants, cannot be correct*" (my italics).

Southwood J in *Bertelsmann* 381D–E agreed with the above exposition by "eminent counsel" Welsh and said:

> "The comments relating to the liability of the attorney for counsel's fees coincide with my own understanding of the position. It is also significant that no reference was made in the very comprehensive heads of argument to any rule of law, common or statutory, or to any judgment of any Court stating that an attorney is as a matter of law liable for advocates' fees."

3 Academic publications

Van Dijkhorst and Mellet "Legal practitioners" in Joubert (ed) 14 *LAWSA* par 285 state:

> "Nowadays the attorney is liable for the payment of the fees of the advocate briefed by him even though he has briefed the advocate on behalf of a client. This rule is an old one that has arisen through long-standing practice . . . This does not mean, however, that the client can no longer be sued by counsel for his fees."

However in the first re-issue of 14 *LAWSA*, Van Dijkhorst in the title "Advocates" has added a proviso to the above "old" rule (par 257 fn 20, referring to *Bertelsmann* and *Minister of Finance* above), by stating that *it is not a hardened rule of law and that it must be proved* (my italics).

Daniels *Morris Technique in litigation* (1993) 34 explains the position thus:

> "According to the law of England counsel may not sue for his fees; nor may he do so in South Africa without the leave of the Bar Council. *The attorney is liable to counsel directly for payment of counsel's fees*, and the question of the client's liability will arise usually when the attorney claims a refund of counsel's fees as a disbursement made. In the majority of cases there will be little doubt that the client has been made aware of the attorney's action in briefing counsel and there usually will have been an express or a tacit ratification" (my italics).

Midgley *Lawyer's professional liability* (1992) 17 says that "[i]n the majority of instances the client will be the mandator, *with the attorney acting as surety in respect of counsel's fees*" (my italics).

It is significant to note that counsel for the appellant in *Bertelsmann* "readily conceded that none of these authorities is based on a common law or statutory rule or judgment of any Court" (per Southwood J 380A–B; note that the first re-issue of *LAWSA* referred to above was not before the court).

4 (In)conclusion

All of the above quotations lead to the finding that *quot homines tot sententiae*. One finds, for example, that an attorney is *liable to counsel directly* or is *responsible for* or *under a duty* to pay or *assumes responsibility for* or that he acts as *surety* in respect of advocate's fees; and that the latter *primarily* or *in the first instance looks to* the attorney for his fees. *Hardened into law*, an attorney stands good for such fees; and the exact opposite: *not hardened into law – it must be proved*. Then again, one learns that such a position (of a hardened rule of law) is untenable. Common sense therefore dictates a return to the basics: to establish what exactly the legal relationships between client, attorney and advocate are. Only then can a sound legal basis for the attorney's liability (if any) be proposed.

5 Legal relationships between client, attorney and advocate

A number of reported decisions deal with this matter to some extent, the most comprehensive perhaps being that in *De Freitas*, which traces the development of the legal profession from Roman law times until the present day and deals with developments in both the common law and English law.

For fear of stating the obvious after consulting the authorities in this regard, one might say that the attorney is the mandatary (agent) of the client charged with overseeing the overall conduct of a case, including the appointment of counsel as part of his services. Therefore, it seems to be correct to say that he briefs counsel in his capacity as the client's agent (that being part of his professional services), bringing about a privity of contract between client and counsel. This is borne out by the statement by Corbett CJ in *In re Rome*, that "the attorney briefs an advocate on behalf of his client. The advocate has no direct links or long-standing relationship with the lay client: he only acts for the client on brief in a particular matter . . ." (306C; Thirion J in *De Freitas* 1167*fin* remarked that "[t]hese observations accord with what the old authorities have to say on the subject of the distinction between the two branches of the profession").

In view of the foregoing and in accordance with the general rules of the law of agency, the attorney would disappear from the picture, since he is not a party to the contract between client (principal) and advocate (agent). Midgley 17 states in this regard:

> "Thus, although the advocate-client relationship does have some extraordinary facets, mandate and agency principles can be applied without much difficulty to advocates . . . The advocate will thus be a co-mandatary [with the attorney] . . . If appointed to represent a client in court, counsel acts as an agent of the client, but he has greater discretion than other agents normally have, because counsel has additional duties to ensure the proper administration of justice."

Surely this means that the advocate (agent) should look directly to the client (principal) for compensation? On what legal grounds, therefore, can one reverse this legal position and hold the *attorney* liable for the advocate's fees?

6 Legal grounds for attorney's liability

6 1 General

One possibility would be to regard the advocate as a sub-mandatary of or sub-contractor to the attorney. In such a case the attorney, as principal, would then brief the advocate as his agent. In my opinion this possibility was ably disposed of in the argument of Welsh QC quoted earlier (see above 2 2).

Two other possibilities were mooted in *Bertelmann*'s case. (One should bear in mind that this decision centred around an appeal against a magistrate's court's dismissal of an exception because of a lack of evidence.) One is that a *trade usage* has come about in terms of which the attorney accepts liability for payment of counsel's fees. The other is that it is an *implied term* in the contract between attorney and counsel that the former would be liable to pay the latter. Both possibilities seemed viable. However, both failed in *Bertelsmann*, Southwood J almost treating the two possibilities as one:

6 2 Trade usage and implied term

As regards the decision in *Minister of Finance* (2 1 above) Southwood J treated the possibility of an implied term as follows in *Bertelsmann* (381H–382E):

> "It would seem that the Appellate Division regarded the arrangement that an attorney is liable for the fees charged by the advocate he has briefed as something arising from contract or as a professional practice. Counsel for the appellant argued that the practice that exists between attorneys and advocates has evolved to such an extent that it has become a hardened rule of law and accordingly that attorneys are liable for counsel's fees. Reference was made to the following passage from the article by Van Zyl referred to in the argument quoted (from 174): 'On the other hand suppose he (ie the advocate) receives his instructions from an attorney, with a fee marked on a brief duly accepted, can he sue the attorney? Or should he sue the client? Or can he sue neither? These questions have never been decided; but there seems no doubt that he can sue the attorney, by virtue of the implied contract, for the fee marked by the latter on the brief, and that he can sue the client, not necessarily for the amount marked on the brief by the attorney, but for what may be allowed on taxation, unless he (the advocate) can prove that the client sanctioned the fee marked by the attorney on the brief. Having regard to the practice which has been in force for so many years in this Colony, and which has been adopted and observed for the convenience of the attorney as well as that of the advocate, viz that instead of paying counsel's fees on delivery of the brief the attorney should pay them at the end of the term, it is too late now for an attorney to say that he is only the agent of his client, and that, as such, counsel cannot

sue him, but should sue his client. The practice must be taken to have hardened into law, through being established as the uniform custom, owing to the arrangement above-mentioned.' *Counsel for the appellant contended that this passage was written about one hundred years ago and that the practice must now be accepted law and accordingly that the Court can take judicial notice of this practice. He submitted that it is implied by law that the respondent would be personally liable for the defendant's fees. The argument cannot be sustained. First, Van Zyl was writing about the practice of the marked brief and the implied term which flows therefrom and not the modern practice of delivering the brief to counsel without any fee marked on it. Second, the term to be implied would not be a term implied by law but a term implied by trade usage. The relationship between attorney and advocate has not been static for the last hundred years. The fact that briefs are no longer, or hardly ever, marked by attorneys before they are delivered to counsel is testimony to that fact*" (my italics).

The possibility of a *trade usage* in this regard elicited the following from Southwood J (383B–F):

"I am not satisfied that the term contended for must be implied in the contract as a matter of law. It depends upon the existence of a professional practice or trade usage which would have to be established by evidence. As the learned author of Christie *The Law of Contract in South Africa* 2nd ed succinctly puts it at 187: 'If the trade usage is known to both parties their knowledge will be one of the surrounding circumstances indicating that the trade usage ought to be incorporated in their contract as a term implied from the facts. The implication will not be made by law but from the presumed common intention of the parties to include a term customarily included to the knowledge of both of them (even if one party may later deny his knowledge or intention). But if one party cannot prove that the other knew of the trade usage it will nonetheless be incorporated as an implied term in the contract if, in addition to other requirements, it is so universal and notorious that the party's knowledge and intention to be bound by it can be presumed.' In *Crook v Pedersen Ltd* 1927 WLD 62 at 71 Krause J summed up the circumstances in which a trade usage of which one party has no knowledge will be implied in a contract: '(1) The implication must be a necessary and not merely a reasonable one. (2) Where the implied term relied on is based upon a usage or custom, the evidence must be clear and consistent. (3) The custom or usage must be long-established, reasonable, have been uniformly observed and certain. (4) Generally speaking no one is bound by a term in a contract of which he had or could have had no knowledge. (5) Where, however, a custom is universal and notorious a person may be presumed in certain circumstances or cases to have had knowledge of such custom and to have intended to include such custom in his contract. (6) Circumstances which might lead to such a presumption are, where a principal deals or employs a person to deal on his behalf with other persons, in a particular market, or where the transaction is peculiar to a particular locality, or where the persons engaged in such transactions belong to a particular class, who, for the better conduct of their business, are subject to certain customs and rules, or where the transaction itself is of a special or peculiar nature.' (See also *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd* 1973 (2) SA 642 (C) at 645G.) In all these circumstances it is clear that the trial magistrate in the court a quo was correct in finding that the exception could not be decided without hearing evidence. The exception was therefore correctly dismissed and the costs order correctly made."

7 My answer

The decision in *Bertelsmann* notwithstanding, I think that both possibilities canvassed there should be seriously considered. A technicality (lack of evidence) sank them in the appeal. Should the correct procedure be followed (not by way of exception, evidence led, etc: see 14 *LAWSA* (first re-issue) par 257 fn 20), I cannot see why either an implied term or a trade usage in this respect cannot be established in order to found the attorney's liability to pay counsel's fees. This indeed happened,

for instance, with the recognition of a duty of care on the part of the collecting bank which was originally appealed from at the exception stage to the recognition of such duty by the Supreme Court of Appeal (see *Indac Electronics (Pty) Ltd v Volkskas Bank Limited* 1992 1 SA 783 (A)) and many subsequent cases entertaining full evidence in respect of such duty (see eg *KwaMashu Bakery Ltd v The Standard Bank of South Africa Ltd* 1995 1 SA 377 (D)).

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EQUALITY COURTS: INTRODUCING THE POSSIBILITY OF LISTENING TO DIFFERENT VOICES IN SOUTH AFRICA?

1 Introduction

There has been much heated debate in South Africa (during the first few years of our newly created democratic society) surrounding the inherent conflict which arises between the right to culture and the right to equality (See eg Els "Customary law and equality: *Mthembu v Letsela* 1998 (2) SA 675 (T)" 1998 *Responsa Meridiana* 88; Kerr "Inheritance in customary law under the Interim Constitution and under the present Constitution" 1998 *SALJ* 262; Van Heerden "Die intestate erfopvolgingsreg van 'n swart vrou in 'n gebruiklike huwelik: *Mthembu v Letsela* 1997 2 SA 936 (T)" 1998 *THRHR* 522 and Maithufi "The constitutionality of the rule of primogeniture in customary law of succession: *Mthembu v Letsela* 1997 2 SA 936 (T)" 1998 *THRHR* 142). The right to equality is entrenched in section 9(4) of the final Constitution (Act 108 of 1996) and the Constitution itself commits South Africa and its people to the values of unity, human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism. (The right to equality was previously entrenched in s 8 of the Interim Constitution, Act 200 of 1993.) Both the right to equality and the right to culture are protected in the final Constitution. The latter is entrenched in section 211(3), which enjoins all courts to apply indigenous law in so far as it is applicable, subject to the Constitution and existing legislation.

In this note a submission is made that the equality courts (see ch 4 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, hereinafter referred to as the Act) could, when dealing with customary law gender discrimination cases in particular, serve as a forum for hearing the different voices of marginalised people affected by customary law practices. The preamble of the Act states:

> "This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom."

The details of the administration of these courts will not be dealt with here, but a tentative proposal is made for a narrative approach to be adopted by such courts in deciding hard cases which reflect the conflict between the right to equality and the

right to culture. According to Chanock ("Law, state and culture: Thinking about 'customary law' after apartheid" 1991 *Acta Juridica* 52 63) debates about customary law "tend to begin with cultural celebration of its special characteristics and develop into scepticism about its equity" .

2 A brief overview of the creation of equality courts

The enforcement of the proposed legislation by means of equality courts is dealt with in chapter 4 of the Act. In terms of section 16, every magistrate's court and high court is an equality court for the area of its jurisdiction. However, initially, and in terms of section 31, no proceedings may be instituted in such a court unless a presiding officer has been designated by the Minister by reason of his or her training, experience, expertise and commitment to the values of equality and human rights. These training courses should assist in establishing uniform norms, standards and procedures to be observed by presiding officers and clerks in the performance of their functions and duties and in the exercise of their powers (s 31(4)(a)); and the building of a dedicated and experienced pool of trained and specialised presiding officers and clerks (s 31(4)(b)). The appointment or designation of equality court clerks is provided for in section 17.

The rules and court proceedings for these equality courts are contained in section 19, which provides that the provisions of the Magistrates' Courts Act 32 of 1944 and the Supreme Court Act 59 of 1959 and of the rules made in terms of these statutes, as well as the rules made under the Rules Board for Courts of Law Act 107 of 1985 apply to the equality courts with the necessary changes required by the *context* of these courts. These include

(a) the appointment and functions of officers;

(b) the issue and service of summons;

(c) the execution of judgments or orders;

(d) the imposition of penalties for non-compliance with orders of court, for obstruction of execution of judgments or orders, and for contempt of court;

(e) jurisdiction, subject to subsection (3).

For the purposes of this note, the ability of a presiding officer to refer the proceedings before him or her to "another appropriate institution, body, court, tribunal or other forum (hereafter referred to as an alternative forum) which, in the presiding officer's opinion, can deal more appropriately with the matter" (s 20(3)(a)) is of particular interest. Here seems to be at least a partial recognition that this type of proceeding needs to be dealt with in a more inquisitorial manner. More about this later. Section 21(1) provides:

> "The equality court before which proceedings are instituted in terms of or under this Act must hold an enquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged."

The provisions relating to the administration of equality courts will not be dealt with in detail, as indicated above. The methodology used will be to welcome the concept of introducing equality courts in South Africa and to propose the manner in which these special courts could adjudicate cases in which no quick and easy solution presents itself. In other words, it is the nature of the enquiry by the court which will be of interest in future customary law gender discrimination cases. It is submitted that the courts should be structured in such a way that they provide a forum for individuals to tell their stories.

3 The tradition of legalism in South African courts

Traditionally the South African courts have, because of their legalistic culture, adopted legalism as the dominant approach to customary law disputes. It is appropriate to explain what is meant by legalism in this context. The legalistic perspective is described by Shklar (*Legalism* (1986) 10) as

> "the structuring of all possible human relations into the form of claims and counter-claims under established rules, and the belief that the rules are 'there' – these combine to make up legalism as a social outlook. When it becomes self-conscious, when it challenges other views it is a full-blown ideology".

This legalistic approach (as encountered in eg *Mthembu v Letsela* 1997 2 SA 936 (T); 1998 2 SA 675 (T)) emphasises the objective, rational and neutral application of the law. The judge must distance herself from any involvement in the particular stories of the characters before her. She must analyse the facts, identify the rules, and apply the rules to the facts. This process does not accommodate perceptions of the particular as expressed through sympathy, imagination, storytelling or emotion. As Van Niekerk ("Indigenous law and narrative; rethinking methodology" 1999 *CILSA* 208, hereafter Van Niekerk 1999) puts it, "one must bear in mind the wisdom of Socrates when he said that the truth and a just decision were more important than the use of formal procedures and technical skills" (221). Diamentides ("Ethics in law: Death marks on a still life: a vision of judgement as vegetating" 1995 *Law and Critique* 209) describes legalism as follows:

> "'Law' has a *life of its own* and . . . it arrives at a judgement by means of an almost mechanical process. It claims the closure of legal meaning which it purports to be contained in the stillness of the letter of the law that is universally applicable."

It is suggested that lawyers find an alternative to traditional legal theory as the precepts of determinacy, objectivity and neutrality have failed us and, in the light of this failure, we should imagine new ways to live together (Singer "The player and the cards: Nihilism and legal theory" 1984 *Yale LJ* 19). Singer (66) states that "[w]e cannot answer our question of how to live together by applying a non-controversial rational method. We will have to take responsibility for making up our minds".

So what method of decision-making should our courts apply to ensure that the "letter of the law" does not blind us to the fact that those that seek justice are individuals whose stories should be heard?

4 A proposal to move away from legalism and to embrace a narrative methodology

It is submitted that these new equality courts should create a space in which to make empathetic judgments based on the circumstances of the individuals who convey their suffering to the court. It is further submitted that the storytelling or narrative approach to legal-decision-making is preferable to the legalistic methodology advocated in the past.

The imaginative or narrative perspective would assist us in recognising the debates about customary law and the particularities and variation in human stories and relationships. The revival of this storytelling or narrative approach may be interpreted as an attempt to break away from the legalistic paradigm that has dominated the West for the past three hundred years. A wise judge, according to this mindset, would listen to the stories of the characters involved and make a judgment which takes into consideration the histories and complexities of that particular case and those particular characters.

As Massaro ("Empathy, legal story telling and the rule-of-law" 1989 *Michigan LR* 2099 2116) correctly states, the call for more empathy in legal decision-making often includes the call for more *individualised* justice:

> "Judges should focus more on the context – the results in *this* case to *these* parties – and less on formal rationality – squaring this with results in other cases. This means that the law must be more open-ended . . . "

(For a discussion of the storytelling approach to the law of access of fathers to children born out of wedlock, see Bohler and Le Roux "Using (our) imagination: The relationship between storytelling, parenthood and the law" *Language in court* (1996).)

A current proponent of the storytelling approach, which is slowly winning ground in South Africa, is Woolman ("Out of order? out of balance? The limitation clause of the final Constitution" 1997 *SAJHR* 102), who tentatively recommends that a storytelling approach to limitation analysis should be considered by the courts. He submits that

> "the only way to come to grips with what the comparison of incommensurable goods requires of us is to present stories, detailed stories, about the kind of worlds to which we commit ourselves when we choose certain values and goods over others" (103).

In other words, instead of a sterile head-to-head balancing of rights against rights and values against values, we should adopt a narrative approach because "human beings value a vast array of goods. And we value each good in our own and its own particular way" (114) and, as with other goods such as friendship, intimacy, work, beauty, nature and money, the relationship between constitutional rights is complex. The storytelling approach therefore offers us a new way of attempting to compare incommensurate goods, such as the right to equality and the right to culture, and would be a suitable approach to adopt in an equality court in order to ensure that western liberal values do not overshadow the values recognised by a living system of customary law. The danger, therefore, of merely continuing to apply legalistic methodologies in these proposed equality courts should be guarded against, and the training of presiding officers should include creating an awareness of alternative methods such a storytelling or narrative approach to legal decision-making.

Using the storytelling approach to hear women's voices

There are writers and activists (see Karganas and Murray "Law and women's rights in South Africa: An overview" *Gender and the new South African legal order* (1994)) who criticise the "masculine" qualities of the law and who identify more with the "feminine" values which would lead to the development of an alternative, more altruistic society. Such a society, it is thought, can be achieved provided the law is imbued with an "ethic of care" in place of the masculine "ethic of rights" (see Bacchi *Same difference: Feminism and sexual difference* (1990)). It is submitted that a characteristic of a more "feminine" approach to justice is the achievement of a more compassionate justice via the narrative or storytelling approach to the law. The needs and aspirations of many South African women have yet to be articulated, and it is argued that the articulation of these needs and aspirations need to be an integral process of law reform.

It is contended that the novel as a form of articulation lends itself to the requirements of legal storytelling and constitutional politics "because it recognises a plurality of different ways of looking at, understanding and being in the world" (see 1997 *SAJHR* 121). It is further submitted here that the short story serves the same function as that ascribed to the novel, that is, to place things in their social context. As Woolman (131) puts it:

> "[W]hen I suggest that a picture or a story of what society *ought* to look like is necessary for the resolution of particular cases, I am not suggesting that a judge must supply a picture – or a theory – of everything. I am simply suggesting that in particular cases where basic constitutional goods conflict and no second-order rules exist for the resolution of the conflict, then judges have an obligation to give us a clear, if complicated, picture of why one right should be privileged over another" (my emphasis).

Currie ("The future of customary law: lessons from the lobolo debate" in *African customary law* (1991) 146) proposes that South African courts adopt an approach of "considering culture" (152) and, in doing so, consider the lives of those individuals affected by customary law. Perhaps the proposed equality courts could do just that – consider culture – and it is contended that the only way of doing this would be to listen to the stories of those individuals who live that culture.

In *The torn veil: Women's short stories from the Continent of Africa* (Van Niekerk ed (1998), hereafter Van Niekerk 1998) the stories written by African women portray the struggle between competing visions of the world. Van Niekerk notes that, in the past, women on the continent were ignored and their art of narration overlooked. The Nigerian writer, Emecheta, explains that many African societies are not yet ready to accept women as writers, and quotes an incident from her own life: "The first book I wrote, my husband burnt, and then I found that I couldn't write with him around" (Van Niekerk 1998 *xii*). The need to be heard and the need for social and legal change is reflected in the short story "A Woman's Life" penned by the Tanzanian author Mbilinya (*The torn veil* 65). In her narrative Mbilinya deals with the subject of violent spousal abuse and the entrapment of a wife in an abusive relationship because to leave her husband would mean to lose her children since "you are *his* children according to the law" (73). The mother, however, hopes for better life for her daughter: "Thecla, maybe for you it can be different . . . but you have to *make* it different. For me . . . I don't know how" (*ibid*). Stories such as this about women's suffering and lack of choice are numerous and these narratives need to be listened to. The theme of the overlapping of traditional and western ways in Africa is an exploration of how both systems confine women in similar and different ways. The Indian author Reddy (*The spirit of two worlds*) demonstrates how an Indian family is traumatised by the clashes between traditional and modern lifestyles, between Christian and Moslem beliefs, and how in the end, "the spirit of two worlds had emerged in a new beginning" (*xviii*).

Van Niekerk (1999 208) illustrates the importance of deviating from formal, inflexible court proceedings by referring to the decision in *Mthembu v Letsela* (above). She asks whether the court would have come to the same conclusion if it had heard the *story* of Tembi and her mother and whether the real stories would have put the written material into proper perspective. In this case the real issues were swamped by legal technicalities unfamiliar to indigenous law (1999 220). *Reconciliation* or the *restoration of harmony* is at the heart of African adjudication, which is an informal and relaxed process, which has as its aim the restoration of an equilibrium within the community (Allott "African law" in Derritt (ed) *Introduction to legal systems* (1986) 145). Van Niekerk therefore questions the use of application proceedings where indigenous law is at issue. In application proceedings the court must rely on written documents without affording an opportunity to the parties to tell their stories. The possibility of hearing counter-stories, which may challenge the stock stories, is reduced to a minimum. The courts should rather encourage the recounting of personal stories and in in this way would find it easier to apply or reform indigenous law. White *The content of form, narrative discourse and historical representation* (1987) 1 further submits that in order to understand

another culture, one needs to listen to the stories of individuals who live by those customs and traditions. *The values underlying indigenous law* should be taken into consideration when reforming the law to bring it into line with constitutional norms. The problem, according to Van Niekerk (1999 208), is that traditional law is an oral, living law which has been reduced to writing and thus been distorted. The literature on customary law reflects a western perception of the law, and in the process stock stories about indigenous law do not correctly reflect the living law practised within communities.

Van Niekerk submits that one of the ways in which to change these existing stock stories in order to reflect reality is simply to listen to the untold stories of the women and children who have been marginalised in indigenous law. In this manner the telling of counter-stories challenges the present understanding and application of indigenous law. Sarmas ("Storytelling and the law: a case study of *Louth v Diprose*" 1994 *Melbourne Univ LR* 701) submits that "the telling of counter-stories is seen as a means of challenging dominant legal stories . . . thereby transforming the legal system so that it is more inclusive, and responsive to the needs of *outsider groups*" (703, my emphasis). Culture consists of narratives and myths, according to Vargas ("Deconstructing Homo(geneous) Americanus: The white ethnic immigrant narrative and its exclusionary effect" 1998 *Tulane LR* 1493), and therefore the only access we have to these narratives and myths is through a recounting of the experiences of these "outsider groups".

To return to the case of *Mthembu v Letsela*: Van Niekerk agrees with the court that the indigenous law of succession should not be interfered with by applying western norms to indigenous law, but she also submits that the development of customary law rules should lie in the hands of the courts and not in the hands of the legislature. Each case should be judged on its own, taking into account the specific circumstances of the case. General reform by the legislature cannot cater for individual needs and specific circumstances. (See Van Niekerk 1999 226 where she criticises the Amendment of Customary Law of Succession Bill B109–98 which provides that if a person in a customary law marriage dies intestate, succession takes place in accordance with the general (Western) rules which regulate intestate succession. The Intestate Succession Act 81 of 1987 is made applicable with some minor adaptations. This legislative amendment would, in her opinion, have far-reaching consequences for millions of people in South Africa.) This view is sound and it is preferable that the equality courts be given a wide discretion to deal with cases before them.

5 Conclusion

In the light of the above exposition, it is therefore submitted that the creation of equality courts is a sound proposal. These courts could serve as forums for considering hard cases which may be solved in a just way only by employing a narrative perspective to legal decision-making. The provisions for specially trained presiding officers and options of mediation appear to point in the direction of a new era in our law. Future equality courts should be given the opportunity to develop a new methodology as outlined above and it is hoped that this could spill over to our mainstream courts in time. Perhaps this is what Langa J was thinking of when he stated in *S v Makwanyane* 1995 3 SA 391 (C); 1995 6 BCLR 665 (CC); 1995 2 SACR 1 (CC) par 221 that "[f]or all of us . . . a framework has been created in which a new culture must take root and develop".

In particular, the voices of marginalised groups such as the women and children living in rural areas under the system of customary law need to be heard and their counter-stories considered. If this is done, the needs of the individual will be taken into account without allowing legal technicalities to cloud human issues. After all, is it not the wish of all South Africans, men, women and children, to live happily ever after?

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[L]aw is very like an iceberg: only one-tenth of its substance appears above the social surface in the explicit form of documents, institutions, and professions, while the nine-tenths of its substance that supports its visible fragment leads a subaquatic existence, living in the habits, attitudes, emotions, and aspirations of men. In a sense we all know this.

Iredell Jenkins Social order and the limits of law: a theoretical essay (1980) xi.

Dealing in words is dangerous business . . . Dealing in long, vague, fuzzy-meaning words is even more dangerous and most of the words The Law deals in are long, vague and fuzzy.

Fed Rodell Woe unto you, lawyers (1980)

VONNISSE

BEWARING- EN TOESIGBEVELE VAN MINDERJARIGE KINDERS BY EGSKEIDING: FAKTORE

Ex Parte Critchfield 1999 3 SA 132 (W)

1 Feites

Die feite wat aanleiding tot die wysiging van hierdie bewaring- en toesigbevel gelei het, is uitsonderlik. By ontbinding van die huwelik van die eerste en tweede applikante by wyse van 'n egskeidingsbevel, het die egskeidingshof by monde van regter Wunsh 'n gesamentlike bewarings- en toesigbevel gemaak. Wat hierdie gesamentlike bewaring- en toesigbevel so uitsonderlik maak, is dat die bevel teen die aanbeveling van twee raadgewers van die gesinsadvokaat se kantoor gedoen is en voorsiening gemaak het vir die fisiese gesamentlike bewaring van die twee minderjarige kinders vir periodes van vier maande by die eerste en tweede applikante alternatiewelik. Regter Wunsh het hierdie bevel gemaak op sterkte van die ooreenkoms wat die applikante bereik het en onderhewig aan die volgende voorwaarde (134H):

> " 'It is ordered:
>
> (1) . . .
>
> (2) . . .
>
> (3) That the Family Advocate is ordered to investigate the progress of this custody and to furnish a written report to Wunsh J in Chambers at the end of September 1997.' "

Aan die einde van September 1997 het die kantoor van die Gesinsadvokaat, weer eens soos tydens die egskeidingsgeding, aanbeveel dat die bewaring en toesig aan die eerste applikant toegeken moet word, maar dat die tweede applikante ruim toegangsgeleentheid moet verkry.

In reaksie hierop het regter Wunsh 'n skrywe aan die regsverteenwoordigers van beide applikante gerig waarin hy die *prima facie* standpunt gehuldig het dat die bevel dienooreenkomstig gewysig moes word en dat as interim-maatreël tot die aanhoor van die aangeleentheid en getuienis, die bewaring en toesig aan die eerste applikant gegee moes word. Daar is bepaal dat voorbereidings vir die aanhoor van die interim-aansoek op 12 Januarie 1998 'n aanvang sou neem. Op 12 Januarie het die tweede applikante 'n aansoek gebring vir die onttrekking van regter Wunsh omdat hy op grond van sy uitgesproke *prima facie* standpunt nie 'n billike en onafhanklike oordeel oor die aangeleentheid sou kon maak nie. Regter Wunsh het hom op 20 Januarie 1998 van die saak onttrek.

In hierdie stadium was die tweede applikante ook ooreenkomstig die bestaande bevel geregtig op die fisiese bewaring en toesig van die twee minderjarige kinders. Eerste applikant het egter geweier om die kinders aan tweede applikante te oorhandig aangesien hy van mening was dat die bestaande bevel in elk geval gewysig sou word om aan hom die bewaring toe te ken. Tweede applikante het op sterkte hiervan 'n dringende aansoek op 13 Januarie 1998 gebring waarin die hof versoek is om eerste applikant te dwing om die kinders aan haar te oorhandig. Hierdie aansoek is deur regter Nugent op 20 Januarie 1998 aangehoor. Hy het as 'n interim-maatreël hangende die huidige aansoek beveel dat die kinders aan tweede applikant oorhandig word.

Na aanleiding van hierdie gebeure en die bevel van regter Nugent kom die partye beide as applikante en versoek hulle 'n wysiging van die bestaande bewaring- en toesigbevel van regter Wunsh en eis elkeen van die applikante die bewaring en toesig van die twee minderjarige kinders. (Die twee minderjarige kinders is onderskeidelik 'n dogter van sewe jaar en 'n seun van drie jaar.) Die aansoek is aanvanklik voor regter Joffe ter rolle geplaas. As gevolg van die verwagte lengte van die hofverrigtinge moes regter Joffe hom voor die aanvang van die verrigtinge onttrek omdat hy ook ander verpligtinge gehad het. Die saak is toe ter rolle geplaas voor waarnemende regter Willis. Die aansoek het volgens die hofverslag 21 dae geduur en dit het die eerste applikant alleen meer as R150 000 in litigasiekoste beloop wat hy by sy werkgewer moes leen. Eerste applikant (die vader van die twee minderjariges) was suksesvol in sy aansoek en die twee kinders se bewaring en toesig is aan hom toegeken. Die gesamentlike bevel is dus gewysig. Daar is aan die moeder (die tweede applikante) ruim voorsiening vir toegang tot die kinders gemaak. In die uitspraak van waarnemende regter Willis is daar vyf aangeleenthede waarop ek kommentaar wil lewer. Hulle word vervolgens afsonderlik bespreek.

2 "Children's 'instrumental needs' "

Waarnemende regter Willis verwys hierna in die volgende woorde (138H–I):

> "All the experts were agreed, . . . , that when it comes to what psychologists call the children's 'instrumental needs' – tucking the children up in bed at night, feeding them, clothing them, reading them stories, making sure they receive medical attention, etc – there was nothing much to choose between the first and second applicants. The same applies with regard to the kind of home which they provide . . ."

In *McCall v McCall* 1994 3 SA 201 (K) 205C word hierna as die "creature comforts" verwys, wat insluit kos, kleding, huisvesting en ander materiële behoeftes van die kind.

3 Homoseksuele en owerspelige gedrag

Die hof verwys ook by monde van waarnemende regter Willis na die homoseksuele en owerspelige gedrag van die applikante onderskeidelik. Daar is in die getuienis aangetoon dat die eerste applikant by geleentheid homoseksuele ontmoetings gehad het, maar in dieselfde asem verwys die regter dan ook na die owerspelige verhoudings van die tweede applikante wat by monde van die hof ". . . exceeded those of the first applicant in number, duration and extent" (139C). Verwysende na beide hierdie optredes van die applikante sê die hof (139B–F):

> "Certainly, in a society such as ours which proscribes discrimination on the basis of sexual orientation, these encounters [verwysende na die homoseksuele ontmoetings] can be viewed in no more serious a light than conventional adultery ... For decades now, adultery *per se* has never been a factor of any real importance in South African custody cases. (See *Fletcher v Fletcher* 1948 (1) SA 130 (A).) ... In my view, a Court should not be particularly concerned with the sexual predilections of litigants when it comes to custody matters ... It is an entirely different matter where such predilections pose an actual or potential threat to the welfare, psychological or physical, of young children ... In this case, it would seem that there is, in any event, no risk of the so-called 'confusing signals' referred to by Flemming J, as he then was, in *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W) at 328D."

Hierdie aanhaling verwys na twee verskillende menseregte. Aan die een kant is daar die verwysing na die bepaling van artikel 9(3) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 wat die staat verbied om regstreeks of onregstreeks onbillik teen iemand te diskrimineer op grond van onder andere seksuele georiënteerdheid. Aan die ander kant is daar die verwysing na die bepalings van artikel 28(1)(c) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 wat onder andere aan elke kind die reg verleen om teen mishandeling, verwaarlosing, misbruik of vernedering beskerm te word en artikel 28(2) wat uitdruklik verklaar dat die beste belang van 'n kind van deurslaggewende belang is in elke aangeleentheid wat die kind raak.

Die interpretasie wat waarnemende regter Willis aan beide hierdie twee menseregte gee, is myns insiens te verwelkom. Twee aangeleenthede moet hier van mekaar onderskei word. Eerstens sê waarnemende regter Willis dat, gesien in die lig van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 se bepalings (waarna verwys is), homoseksuele ontmoetings nie in 'n meer ernstige lig as owerspelige flirtasies beskou kan word nie. 'n Hof behoort nie in aangeleenthede rakende bewaring en toesig van minderjarige kinders té begaan te wees oor die seksuele voorkeure en bedrywighede van die gedingvoerende partye nie. Tweedens verander die prentjie indien hierdie seksuele voorkeure 'n daadwerklike of potensiële bedreiging vir die beste belang van die minderjarige inhou. In so 'n geval moet die verbod op diskriminasie op grond van onder andere seksuele oriëntasie die knie buig voor die beste belang van die minderjarige. Hierdie interpretasie van die hof maak ook nie die saak van *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) ongrondwetlik nie, maar plaas dit myns insiens in die regte grondwetlike perspektief. (Sien egter Visser en Potgieter *Inleiding tot die familiereg* (1998) 171 vn 108 wat oa die volgende kommentaar op die *Van Rooyen*-saak lewer: "En vir solank as wat die gemeenskap in die algemeen nie homoseksualiteit en lesbianisme as normaal beskou nie, sal dit enige poging teenstaan om homoseksuele of lesbiese ouers as 'normaal' te behandel vir sover dit toegang tot jong kinders betref. Boonop vereis die Grondwet nie dat homoseksualiteit aktief bevorder moet word nie." Hierdie beskouing is myns insiens te eng en strydig met die beskouing van waarnemende regter Willis tans onder bespreking.)

4 Die "maternal preference rule"

Me Rosenberg wat namens die tweede applikante in hierdie saak opgetree het, het sterk op die sogenaamde "maternal preference rule" gesteun. Me Schneid-Lieberman wat namens die eerste applikant opgetree het, het weer swaar gesteun op artikel 9 van die Grondwet wat onbillike diskriminasie onder andere op grond van geslagtelikheid en geslag verbied. Waarnemende regter Willis het regsvergelykend gaan kyk hoe hierdie reël in ander demokratiese lande toepassing vind.

Daar is na nie minder nie as vier westerse demokrasieë se regspraak op hierdie punt verwys. Ek sal poog om dit kortliks te beskryf.

(a) Waarnemende regter Willis som met goedkeuring van beide regsverteenwoordigers, die reg van die state van die Verenigde State van Amerika wat nog 'n diskresie op hierdie aspek aan die howe verleen, in die volgende woorde op (141B):

> "[W]here the Courts retain a discretion, they have tended to award custody of young children to mothers unless they are found to be unfit."

(b) Die posisie in Kanada word opsommenderwys deur waarnemende regter Willis só beskryf na aanleiding van 'n artikel van Boyd ("Potentiality and perils of the primary caregiver presumption" *Canadian Family LQ* – ongelukkig word die jaartal nie vermeld nie) (141C):

> "[I]n Canada the approach is to attempt to avoid gender discrimination by giving a preference to the so-called 'primary caregiver' unless that person is found to be unfit."

(c) Die posisie in Engeland word deur Bromley (*Family law* 386–387) beskryf na aanleiding van twee ongepubliseerde uitsprake van Butler-Sloss LJ in die volgende woorde (141C–E):

> " 'I would just add that it is natural for young children to be with mothers, but where it is in dispute, it is a consideration not a presumption.'
>
> And
>
> 'In short, maternal preference remains an important consideration particularly where she has continuously looked after the child in question. However, as with each of the statutory considerations it has to be weighed in the balance with all the others.' "

(d) Die saak van *The Marriage of Raby* 12 ALR 669 (Family Court of Australia) word aangehaal (141G) as verteenwoordigend van die regsposisie in Australië waar regters Watson Fogarty and Lindenmayer op 682 die volgende sê:

> " 'We are of the opinion that the suggested "preferred" role of the mother is not a principle, a presumption, a preference or even a norm. It is a fact to be taken into consideration where relevant . . . ' "

Nadat die hof na bogenoemde regstelsels verwys het, word die regsposisie in Suid-Afrika kortliks voorgehou en maak waarnemende regter Willis die volgende stelling (142B):

> "For decades, the law in South Africa with regard to the award of custody is that the best interest of the child must prevail."

Hierdie beginsel word deur artikel 28(2) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 bevestig. (Sien ook hierbo 3.) In die loop van die uitspraak (143A) wys waarnemende regter Willis op 'n stelling wat deur adjunkpresident Mahomed, soos hy toe nog was, in *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (KH) 274B gemaak is:

> " '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 the father.' "

Die regter lewer die volgende kommentaar op bogenoemde stelling (143A–D):

> "In my view, given the fact of pregnancy or, more particularly, the facts of the dynamics of pregnancy, it would not amount to unfair discrimination (ie it would not be unconstitutional) for a court to have regard to maternity as a fact in making a determination as to the custody of young children. On the other hand, it would amount to unfair discrimination (and, correspondingly, be unconstitutional) if a

> court were to place undue (and unfair) weight upon this factor when balancing it against other relevant factors. Put simply, it seems to me that the only significant consequence of the Constitution when it comes to custody disputes is that the Court must be astute to remind itself that maternity can never be, willy-nilly, the only consideration of any importance in determining the custody of young children. This, as I have indicated above, has for a long time been the position in our common law. It is really a question of emphasis (or *Drittwirkung*)."

Die Suid-Afrikaanse regspraak toon wat hierdie faktor betref, soos waarnemende regter Willis aandui (141F), groot ooreenstemming met die Engelse en Australiese reg.

Die "maternal preference rule" kom ook vandag al hoe meer onder verdenking. Regter Hattingh stel dit so in *Van der Linde v Van der Linde* 1996 3 SA 509 (O) 515F:

> "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 die 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."

Die hof erken in *Van der Linde v Van der Linde* 1996 3 SA 509 (O) op meer as een plek dat bemoedering ook deel van die man se wese is (515B; 515D; 515F). Die begrip bemoedering is aanduidend van 'n funksie (of 'n ouerlike rol) eerder as 'n *persona* (515B); of anders gestel: bemoedering is nie deel van net die vroulike geslag nie. Bemoedering 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" (515B–C). Hierdie ouerlike rol of funksie kan deur enige ouer wat hierdie behoefte kan bevredig, vervul word".

5 Ander faktore

Die hof wys ook op ander faktore wat vir die feite van hierdie saak belangrik is om in ag te neem alvorens besluit word aan wie die bewaring en toesig van die kinders moet gaan.

Eerstens word die vlugtige humeur van tweede applikante in 'n negatiewe lig beskou (144H). Die hof wys ook op gesag wat stabiliteit van 'n persoon se karakter as 'n relevante faktor aanvaar en toepas (144I). Die stabiliteit van eerste applikant se karakter verdien in hierdie saak 'n hoë prioriteit. Aansluitend hierby wys die hof ook op die vasberadenheid en verbondenheid waarmee eerste applikant sy taak as ouer en opvoeder van die kinders waarneem (144I–J). Genoemde deugde en die deugde van bestendigheid en standvastigheid van eerste applikant oortuig die hof dat die bewaring en toesig van die twee minderjarige kindertjies aan eerste applikant toegeken moet word. Die hof is daarvan oortuig dat eerste applikant beter toegerus is om die kinders te lei om hulle beste potensiaal te bereik (145B).

6 Ruim toegang

Die hof is ook van oordeel dat die tweede applikante ruim toegang tot die kinders moet verkry. Die bevel maak ook voorsiening vir toegangsregte aan die grootmoeder aan moederskant. Hieruit blyk dit myns insiens dat toegangsregte

nie alleen daar is om die (uitgebreide) familiebetrekkinge te handhaaf nie, maar ook om dit te koester (145E).

Die toegang van tweede applikante word op aandrang van die partye self in uitgebreide formaat deur die hof omskryf (146F). Wat my egter opval van die gedetailleerde omskrywing van die bevel, is dat die hof (par 32 150A) aan die partye die bevoegdheid verleen om by wyse van 'n skriftelike ooreenkoms onderling die toegang tot en die onderhoud van die kinders te verander, maar dat hierby nie ingesluit is die bewaring en toesig van die kinders nie. Hierdie aspek is myns insiens van groot praktiese betekenis. Ek wil dit kortliks verduidelik.

Die gemeenregtelike reël is dat 'n hofbevel net deur die hof wat die bevel gegee het, gewysig of opgehef of opgeskort kan word. Op hierdie algemene reël is daar twee uitsonderings. Die eerste uitsondering bestaan waar wetgewing daarvoor voorsiening maak. (Sien in hierdie verband bv a 5(1)(b)(i) en (iii) saamgelees met a 1 van die Wet op Onderhoud 23 van 1963 wat daarvoor voorsiening maak dat 'n onderhoudshof die bevoegdheid besit om 'n onderhoudsbevel van enige ander hof te wysig of op te hef. Vgl *Jerrard v Jerrard* 1992 1 SA 426 (T) en *Rubenstein v Rubenstein* 1992 2 SA 709 (T) vir die debat wat hieroor in die regspraak ontstaan het asook a 8(2) van die Wet op Egskeiding 70 van 1979.) Die tweede uitsondering maak daarvoor voorsiening dat 'n hof met appèl- of hersieningsbevoeghdheid ook die bevoegdheid het om die hofbevel te wysig of op te hef. (Vgl in hierdie verband oa *Steyn v Steyn* 1990 2 SA 272 (W) 273H–274G; *Rabie v Rabie* 1992 2 SA 306 (W).)

In die saak onder bespreking verleen die hof egter aan die partye self die bevoegdheid om onderling die bepalings van die bevel te verander. In die lig van die bespreking hierbo, is ek onseker of die hof oor die bevoegdheid beskik om genoemde wysigingsbevoegdheid aan die partye te kan verleen. Die punt waarby ek wil uitkom, is dit: Indien geen bewaring- en toesigbevel aan die een kant en geen toegangsbevel aan die ander kant gemaak is nie, beskik die partye self oor die bevoegdheid om sake rakende hierdie aangeleentheid onderling te reël. Artikel 6(3) van die Wet op Egskeiding 70 van 1979 bepaal onder andere dat 'n hof wat 'n egskeidingsbevel verleen, "kan" ten opsigte van die bewaring van of toegang tot 'n minderjarige kind uit die huwelik, enige bevel gee wat die hof goedvind. Hoewel die woord "kan" gebruik word, is dit praktyk in Suid-Afrika om by elke egskeiding waarby minderjarige kinders betrokke is bewaring- en toesigbevele en toegangsbevele te maak. Indien geen bevel egter hieroor by egskeiding gemaak sou word nie, beskik die partye onderling self oor die bevoegdheid om hierdie aangeleenthede sonder inmenging van die hof te reël en te verander. Om dit self te reël, is myns insiens ook nie 'n oortreding van artikel 6(1) van die Wet op Egskeiding 70 van 1979 nie. Artikel 6(1) maak onder andere daarvoor voorsiening dat 'n egskeidingsbevel nie verleen word nie, alvorens die hof oortuig is dat die voorsiening wat vir die welsyn van 'n minderjarige of afhanklike kind uit die huwelik gemaak is, bevredigend is of die beste is wat in die omstandighede bewerkstellig kan word. Hierdie bepaling van die Wet op Egskeiding 70 van 1979 word myns insiens nagekom indien die partye die hof oor die ooreengekome reëlings inlig sonder om die ooreenkoms deel van die hofbevel te maak. Indien die partye egter self by wyse van ooreenkoms 'n bevel van die hof oor die bewaring en toesig of oor die toegang sou verander, is dit my mening dat die verandering sonder enige regsgevolge is en dat die oorspronklike bevel bly voortbestaan en die party wat in stryd daarmee optree minagtend teenoor die bevel van die hof handel. (Die moontlikheid bestaan ook dat die ouer wat in stryd met die bevel handel, hom- of haarself aan oa abduksie van sy eie

kind skuldig kan maak – vgl Labuschagne "Vryheidsberowing, kinderdiefstal en abduksie van jou eie kind" 1998 *TSAR* 260 ev.) Indien partye so 'n hofbevel sou wou wysig, is hulle myns insiens dus genoodsaak om 'n aansoek voor die hof te bring.

Dit is insiggewend om hier na die Engelse reg te verwys. In Engeland bepaal artikel 1(5) van die Children Act 1989 (1989 c 41):

> "Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all."

Die beginsel wat bogenoemde bepaling ten grondslag lê, word die "non-intervention policy/principle" genoem (sien in hierdie verband Cretney en Masson *Principles of family law* (1990) 563–566 veral 562 en 564; Bromley en Lowe *Family law* (1992) 366; Montgomery en Sax (red) *Butterworths Family Law Service* (1997) Binder 2 par E[23]–E[25]). Regter Thorpe in *Re A (Minor) (Parental Responsibility)* [1996] 1 FCR 562 564 stel dit so:

> "The family justice system is not a system that parents are obliged to invoke. It should be seen always as the system of last resort. On the face of it, if young parents, whether formally married or not, can co-operate to arrange the future of their lives and the future of their child without lawyers and courts, that is best for the child. If parents are seen to enter the system unnecessarily or under misapprehension, it is right that they should be sent away empty-handed."

Die filosofie wat die basis van die "non-intervention policy/principle" vorm, is onder andere om hofinmenging te beperk of eerder heeltemal uit te skakel aangesien konflik sodoende tussen ouers verminder en ouerlike samewerking bevorder word (sien Montgomery en Sax par E[24]). Daar is 'n sterk regsgevoel in Engeland wat die mening huldig dat die belange van kinders die beste beskerm word indien die ouers vry van staatsinmenging (inmenging deur die howe) is (sien Cretney en Masson 566. Vgl egter ook Cretney en Masson 563 tov die probleme wat met die "non-intervention policy/principle" ondervind kan word). Hierdie stand van die reg maak dit vir die ouers moontlik om self reëlings wat die kinders raak, te tref en indien nodig om dit ook self te wysig indien hulle so sou ooreenkom. Die inmenging van die howe is net nodig indien die hof ingevolge artikel 1(5) van die Children Act 1989 (1989 c 41) dit in belang van die kind beter vind om 'n bevel te maak as om geen bevel te maak nie.

Die posisie soos dit in Engeland bestaan, is myns insiens 'n posisie met merkbare voordele. Dit behoort ook in Suid-Afrika se egskeidingspraktyk waar kinders betrokke is, met omsigtigheid gevolg te word. Dit is myns insiens ook nie nodig om die heersende statutêre posisie (a 6 van die Wet op Egskeiding 70 van 1979) te wysig om hiervoor voorsiening te maak nie.

Soos reeds deur Cretney en Masson 563 vermeld, is hierdie benadering nie sonder probleme nie. Dit moet egter in dieselfde asem ook gesê word dat hierdie benadering nie beteken dat die hooggeregshof sy posisie as oppervoog van minderjarige kinders abdikeer nie. Die hof kan altyd genader word indien omstandighede na egskeiding daarop dui dat 'n hofbevel noodsaaklik geword het.

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THE EXTENSION OF THE DEPENDANT'S ACTION FOR LOSS OF SUPPORT AND THE RECOGNITION OF MUSLIM MARRIAGES: THE SAGA CONTINUES

Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening) 1999 4 SA 119 (SCA)

1 Introduction

A contentious issue for many years has been the legal status of Islamic marriages which are polygamous in nature and have for that reason not been recognised by the law (*Seedat's Executors v The Master (Natal)* 1917 AD 302; *Ismail v Ismail* 1983 1 SA 1006 (A)).

The development of the dependant's action for loss of support also has a long history. The action has, over the centuries, been adapted to changing circumstances (see Davel *Skadevergoeding aan afhanklikes* (1987)), but it has been denied to spouses who have entered into religious marriages – whether Muslim, Jewish or Hindu – not recognised at civil law (see *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 12 BCLR 1716 (D)). In the case of African customary marriages, however, the action was recognised if both parties to the action were blacks (*Sipongomana v Nkuku* 1901 NHC 26) but denied if not (*Mokwena v Laub* 1943 WLD 63; *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 2 SA 467 (A)). The legislator corrected this position by introducing section 31 of the Black Laws Amendment Act 76 of 1963. In terms of this provision, a widow married according to customary law is able to institute an action for loss of support as a result of the death of her husband. Polygamy is, for the purposes of this action, "recognised". The position regarding spouses in religious marriages was, however, never addressed.

Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening) 1999 4 SA 1319 (SCA) can be seen as a landmark case regarding the rights of Muslims in South Africa. For the first time, a South African court was prepared to recognise an action for loss of support by a surviving Muslim spouse married in terms of Islamic law. In this note the decisions of the court *a quo*, the Constitutional Court and the Supreme Court of Appeal will be discussed. Reference will also be made to the historical development of the dependant's action and to the nature of an Islamic marriage. A possible interpretation of section 39(2) read with section 8(2) and (3) of the Constitution of the Republic of South Africa, Act 108 of 1996, will also be proposed.

2 The decision of the Durban High Court

Amod's case was first heard by the Durban High Court. (For a discussion of the decision of that court, see Freedman "Islamic marriages, the duty of support and the application of the Bill of Rights" 1998 *THRHR* 532.) The facts of the case were as follows: H and W (the plaintiff in the Durban High Court, appellant in the Supreme Court of Appeal) entered into a Muslim marriage in 1987. Their marriage did not comply with the requirements of the Marriage Act 25 of 1961, and was therefore not regarded as a valid civil marriage. H was killed in a motor collision in 1993 and W lodged a claim against the Multilateral Motor Vehicle Accidents Fund (MMF) for compensation for loss of support arising out of H's

death. The MMF denied liability on the ground that the marriage was a void Muslim marriage. W contended that H was under a contractual obligation in terms of Muslim marriage law to support her. The question before the court was accordingly whether the MMF was legally liable to compensate W for the loss of support suffered by her. In terms of South African common law, liability would exist if H were, during his lifetime, under a common-law duty to support W. On the basis of the *Ismail* case, in which it was held that Muslim marriages were *contra bonos mores*, however, counsel for the MMF argued that such a duty did not exist if the parties were married in terms of Islamic law. Counsel for W argued, first, that there has been a change in public policy regarding the conclusion of Muslim marriages, which has altered the traditional position. Meskin J found, however, that the onus of proving such a change rested on W, and that she had not proved that there had been a change of policy since the decision in *Ismail* (1997 12 BCLR 1720C–D). Secondly, counsel for W argued that the court should develop the common law so as to recognise a duty of support arising out of a Muslim marriage. This, it was said, should be done in terms of section 39(2) read with section 8(2) and (3) of the 1996 Constitution. Meskin J held, however, that although the dispute had arisen prior to the commencement of the 1996 Constitution, it was in the interests of justice to apply the 1996 Constitution to the matter (1722E–F). He considered sections 39(2), 8(2) and 8(3) of the 1996 Constitution and came to the conclusion that section 39(2) does not confer a general power on the courts to develop the common law to "promote the spirit, purport and objects of the Bill of Rights". The court held that if section 39(2) is read with section 8(2) and (3), it is clear that the development of the common law the legislature had in mind was development "in order to give effect to a right in the Bill . . . to the extent that legislation does not give effect to that right". It was not intended that the court should have a general power to develop the common law to "promote the spirit, purport and objects of the Bill of Rights" independently of giving effect, when applying a provision of the Bill of Rights to a natural or juristic person, to "a right in the Bill . . . to the extent that legislation does not give effect to that right" (1722H–J). W's counsel argued that the right to equality (s 9), which includes the right not to be unfairly discriminated against on the ground of marital status or religion, and the right to dignity (s 10) were relevant to the facts of the case. Meskin J agreed that "a refusal to recognise the contractual duty of support upon which [W] relies as being sufficient to ground the liability which she seeks to enforce constitutes, indeed, a violation" of those rights (1723B). The judge agreed that such a refusal resulted in people being treated unequally before the law – since the law would discriminate between women who were lawfully married in terms of the civil law to a deceased breadwinner and those married to a deceased breadwinner in terms of unrecognised Muslim law. Although the refusal to recognise Muslim marriages resulted in unequal treatment before the law, the question was whether the court had the power to develop the common law by eliminating a principle which already formed part of it (1723C–E). With reference to *Du Plessis v De Klerk* 1996 3 SA 850 (CC), 1996 5 BCLR 658 (CC) para [60], Meskin J said:

> "As I read s 8(3)(*a*), the intention is that if there is silence in the common law with regard to the giving effect to a right in the Bill, and legislation does not give effect to such right, the court must amplify the common law to eliminate such silence. This is not an intention that the court must, in order to give effect to a particular right, eliminate or alter an existing principle of the common law which affects the operation of such right, irrespective of the manner in which this occurs. The intention is that such alteration or elimination is to remain the function of the legislature" (1723H–J).

The court accordingly came to the conclusion that it may not alter the existing law governing a claim for loss of support so as to include a duty of support in terms of a contractual relationship resulting from a Muslim marriage, and W's claim was dismissed. The court distinguished the issues in this case from those in *Ryland v Edros* 1997 2 SA 690 (C), and (with respect, correctly) held that the court in *Ryland* did not hold that a Muslim marriage is a lawful marriage or that it generated a legal duty to support a wife (1726E–F).

It is clear from the judgment that the court interpreted its power to develop the common law restrictively, in order not to eliminate principles which already form part of the law. This attitude creates the impression that the courts, which are supposed to be the protectors of fundamental rights, may be powerless to enforce or protect the provisions of the Bill of Rights (see also s 7).

Another disappointing aspect of the decision of the Durban High Court was Meskin J's approach to an individual's constitutional right to equality. Section 9(1), 9(4) and 9(5) of the 1996 Constitution reads as follows:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> . . .
>
> (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."

It is clear from the wording of these provisions that the right to equality is very wide. An individual is not only entitled to be treated equally before the law, but also has the right to "equal protection and benefit of the law". Furthermore, section 9(4) prohibits discrimination in the private sphere, which places the question of equality clearly outside the scope of the current debate about the horizontal or vertical operation of the Bill of Rights. It may be argued that the unequal treatment of Muslim and other married couples cannot be shown to be fair in terms of section 9(5).

3 The decision of the Constitutional Court

W then applied for leave to appeal directly to the Constitutional Court. The Constitutional Court in *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 4 SA 753 (CC) found that the crucial question before the court was whether the common law should be developed to allow W to claim damages for loss of support. Since the Constitutional Court took the view that this question fell primarily within the jurisdiction of the Supreme Court of Appeal, the application for leave to appeal was dismissed. Although it cannot be said that the Constitutional Court misdirected itself in its reasoning, the decision illustrates the reluctance (or caution) on the part of the courts to apply the Bill of Rights directly to private relationships. The reluctance displayed by some courts to deal with matters such as the adaptation of the common law to the new constitutional order, and the failure by courts to take up the challenge to bring about legal renewal, may frustrate claimants and give rise to unnecessary costs to the individual.

4 The decision of the Supreme Court of Appeal

4 1 Background

Five judges heard the appeal to the Supreme Court of Appeal. The unanimous judgment of the court was delivered by Mahomed CJ.

4 2 Arguments of the parties

It was common cause between the parties that the deceased had died owing to the negligent driving of one Biyela (for which the MMF was in law responsible), that the appellant and her husband had been married according to Islamic law, and that in terms of the Islamic marriage, which was regarded as a contract, the deceased as husband was obliged to maintain and support the appellant. The marriage was not registered in terms of the Marriage Act 25 of 1961. The claim of the children for loss of support was not disputed, only that of the appellant (para [1]).

Before the appeal was heard, the Commission for Gender Equality, established in terms of sections 181(1)(d) and 187 of the 1996 Constitution, was admitted as *amicus curiae* (para [4]). On behalf of the appellant and the Commission for Gender Equality, it was argued that the common-law rules make provision for a claim for loss of support of a Muslim widow. In the alternative, it was argued that, if the rules of the common law do not make such provision, the common law should be so developed in terms of section 35(3) of the Constitution of the Republic of South Africa, Act 200 of 1993 (which was in operation when the action commenced in the court *a quo* (see para [5])).

The MMF alleged that an Islamic marriage does not enjoy the same status as a civil-law marriage, that the duty of support was "a contractual consequence of the union between them and not an *ex lege* consequence of the marriage *per se*", and that the action for loss of support should not be extended to include claims for loss of support pursuant to a contractual duty to furnish support. The action for loss of support, it was argued, should be restricted to cases in which the duty of support is one of the common-law consequences of a valid marriage (para [16]). Although the MMF conceded that the common law discriminated against the appellant by not recognising religious marriages, the MMF still argued that the marriage was not valid, since it was not solemnised in terms of the Marriage Act 25 of 1961 (para [16]).

4 3 Finding of the court

The court found that the appellant had a good cause of action (para [30]), based on the facts that (a) the deceased had a legally enforceable duty to support the appellant, (b) the duty arose from a solemn marriage in accordance with the tenets of a recognised and accepted faith, and (c) it was a duty which deserved recognition and protection for the purposes of the dependant's action (para [26]). The question was not whether the marriage was lawful at common law, but whether the deceased had a duty to support the appellant during the subsistence of the marriage (para [19]). The court based its finding on an "important shift in the identifiable *boni mores* of the community" that "must also manifest itself in a corresponding evolution in the relevant parameters of application in this area" (para [23]), and on the test laid down in *Santam Bpk v Henery* 1999 3 SA 421 (SCA) 427H–J, 429C–D, 430D–I (para [12]). The court stated the following with regard to the non-recognition of an action for loss of support in the case of a monogamous Islamic marriage:

> "It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993" (para [20]).
>
> "The inequality, arbitrariness, intolerance and inequity inherent in such a conclusion would be inconsistent with the new ethos which prevailed on 25 July 1993 when the cause of action in the present matter commenced" (para [23]).

The court did not find it necessary to discuss the application of section 35(3) of the 1993 Constitution or section 39(2) of the 1996 Constitution, as it was able to reach its conclusion without reliance on those provisions (para [30]).

4 4 Historical development of the action for loss of support

The court correctly indicated that the action for the loss of support was unknown to the Roman law and that its sources are the Germanic *soengeld* and the philosophy of natural law, which was developed especially by Soto (a sixteenth century moral theologian) and De Groot (the seventeenth-century Dutch writer) (see para [6]; cf Davel 46). Some authors and courts mentioned only that the action originated from Germanic customary law (see eg *Victor v Constantia Insurance Co Ltd* 1985 1 SA 118 (C); Neethling, Potgieter and Visser *Law of delict* (1999) (Neethling, Potgieter and Visser) 10, 283). The action was later regarded as an *actio utilis* developed from the *actio legis Aquiliae* by the Roman-Dutch writers (Neethling, Potgieter and Visser 283).

The question arises who could institute the action. The answer is not clear from the old authorities (see para [7]). The court in this regard referred to De Groot (*De iure belli ac pacis* 2 17 13) and Voet (*Commentarius ad Pandectas* 9 2 11). From these texts the court inferred that the law recognises a claim for loss of support by members of the deceased's family (para [8]). The court also correctly pointed out that law is not static, and that it can be developed and adapted to changing times. The court must, however, determine the rationale for the remedy, namely whether there is a legal duty to support the particular type of dependant who claims compensation for loss of support (para [10]). Considerations of equity and decency must be taken into account. (In this regard, the court referred to *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T) 316E–F.) As examples of how the action for loss of support was adapted, the court referred to the cases of *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 (a claim by a husband for loss of support arising out of the death of his wife), *Abbott v Bergman* 1922 AD 53 (a claim by a husband for loss of support arising from an injury to his wife), *Zimnat Insurance Co Ltd v Chawanda* 1991 2 SA 825 (ZS) (a claim for support by a customary-law wife) and *Santam Bpk v Henery* 1999 3 SA 421 (SCA) (a claim by a divorcee who had received maintenance from her former husband prior to his death) (paras [9]–[12]).

A characteristic of the application of Roman law through the ages, as the court pointed out, is its adaptability to new and changing circumstances (see also Du Plessis "Aequitas Equity-Billigkeit en die usus hodiernus Pandectarum" 1989 *TRW* 16 20–24; Du Plessis "Regsvinding en geregtigheid in 'n ontwikkelende land" 1991 *TSAR* 701 (Du Plessis 1991 *TSAR*) 704). In *Zimnat Insurance* the role of the courts in developing countries was described as follows:

> "Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change. The Judiciary can and must operate the law so as to fulfil the necessary role of effecting such development" (1991 2 SA 832G–H).

The courts must ensure that the law does not stagnate because economic and social change are ignored, or injustice will result (see 1991 2 SA 832B–G). Justice and equity demand of the courts that they adapt the law (cf 832I–833B). This was echoed by Mahomed CJ in *Amod*:

> "I have no doubt that it would be perfectly proper for the Legislature to enact such legislation if it considered it necessary, but it does not follow that the Courts should not interpret and develop the common law to accommodate this need if it was consistent with the relevant common-law principles which regulate the objectives and the proper ambit of the dependant's action in Roman-Dutch law" (para [28]).

The South African courts have been reluctant to extend the action to spouses, especially in relation to marriages that might be polygamous. Although it was done in *Fondo v Santam Insurance Co Ltd* 1959 4 SA 391 (W), the decision was reversed by the Appellate Division in *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 2 SA 467 (A) (see the discussion in *Amod* paras [17]–[18]), and the position had to be rectified by legislation (see sv "Introduction", above).

In *Nkabinde v SA Motor & General Insurance Co Ltd* 1961 1 SA 302 (D) it was argued that the duty of support was based on a contractual agreement, but the court was not prepared to extend the action to claims of this type. Maintenance awarded on the basis of a contract was, however, not unknown to Roman-Dutch law. Voet 25 3 4 refers to maintenance under contract or legacy and states that "[i]f it is due under contract, we should look mainly to see what has been arranged between the contracting parties" (Gane's translation; see also Voet 25 3 18–19 and Davel 44). The granting of an action for loss of support furnished in terms of a contract would accordingly not be in conflict with the common law.

It was argued in *Amod* "that the recognition of a dependant's claim which is premised on a contractual duty might unacceptably widen the scope of the dependant's action in the common law" (para [26]). The court in *Amod* did not elaborate on this except to state *obiter* that if the loss of support resulted from a contractually enforceable duty alone, the MMF's argument might have some validity. Mahomed CJ stated, however, that the test set out by the court in *Henery* should be applied to the facts of *Amod*'s case. All three requirements must be complied with (see para [26]). The court added that the recognition of the action for loss of support in the case of Muslim marriages does not necessarily mean that Muslim marriages are recognised for any other purpose (para [27]). The MMF had argued that recognition will "also lead to a recognition of possibly other incidents of such a marriage which have neither been articulated or properly analysed in the present appeal" (para [27]). The courts will eventually have to decide on the legal consequences of contractual obligations to provide support. There may be circumstances in which this will have to be regulated, as in the case of cohabitation (see Schwellnus *The legal implications of cohabitation in South Africa – a comparative approach* LLD thesis Leyden (1994) 222–231). In this instance, the arguments of the MMF and the decision in *Nkabinde* will most probably have to be rejected.

The court left open the question of claims by dependants who are parties to polygamous marriages. Mahomed CJ said that this did not mean that such dependants "would necessarily fail in a dependant's action based on any duty which the deceased might have towards such dependants" (para [24]). The court, however, expressed its disagreement with the decision in *Ismail* (para [29]). The *Ismail* case, it was held, was distinguishable from the facts in *Amod* and was decided "long before the consolidation of the new ethos" to which Mahomed CJ referred earlier in his judgment (para [29]).

The court's willingness to adapt the common law by making use of the *boni mores* is laudable. Since judges have a measure of freedom in the interpretation of the law, the courts are able to achieve the aims of social and economic change fairly rapidly. Judges are not only interpreters of the law, but also make law (*Zimnat Insurance* 1991 2 SA 832H–I; see also Du Plessis "*Regsvinding: die Duitse en Nederlandse ervaring*" 1990 *Koers* 565 and 1991 *TSAR* 703). As occurred in *Amod*, the court should first decide whether it is possible to adapt the common law by making use of the inherent dynamic of the common law. If the court then decides to change a common-law rule, it is necessary to establish whether the new rule is in conflict with the Constitution. South Africa, with its new democratic dispensation and process of development of a new legal system, needs activist judges who are prepared to make decisions based on changing *mores*. The courts have an important role to play in the process of harmonisation of different legal systems and the adaptation of legal norms. The application of justice, equity and equality to meet the social needs of a developing community should influence judges in their decisions, as happened in *Amod* (see Du Plessis 1991 *TSAR* 705).

5 Nature of Islamic marriages

Marriage is encouraged in the Muslim community, as the family forms the nucleus of the community (Hodkinson *Muslim family law* (1984) 89; Pearl *A textbook on Muslim personal law* (1987) ("Pearl") 58; Coulson *A history of Islamic law* (1991) 189–190; Schacht *An introduction to Islamic law* (1991) 22). The courts usually regard an Islamic marriage as a civil contract with legal and social consequences. However, in a Karachi case, *Muhd Yasin v Khushnuma Khatoon* 2 Kar WLR 29 (1960) Justice Qadir al-Din Ahmad regarded an Islamic marriage not purely as a civil contract, but as a religious institution with a religious purpose (*nikah*). Hodkinson 90–91 states that an Islamic marriage differs from a civil contract in the following sense: marriage is an institution with rules set out in the *Shari'ah*, whereas a contract is interpreted in terms of the law of contract. Any person may be a party to a civil contract, whereas only Muslims (or Muslim males and non-Muslim females) may conclude a marriage contract, depending on the legal prohibitions. The rights and responsibilities of a contract are interpreted in accordance with the law of the land, whereas the responsibilities of an Islamic marriage are interpreted in terms of the *Shari'ah*. These rights and responsibilities may, under Islamic law, be amended or adjusted as long as they are not in conflict with the essence of the *Shari'ah*. Any party may terminate a contract, subject to the liability to pay compensation, but there are some checks and balances in the case of termination of a marriage. According to the Sunni School, witnesses are important at a marriage and the Maliki is also in favour of openness, which is not always necessary in the case of a contract. Both parties must agree to the marriage, as in the case of ordinary contracts. The content of the *nikah* is permanent although divorce is allowed, whereas the purpose of a contract is not necessarily to achieve a permanent state of affairs.

One of the consequences of an Islamic marriage is that a man has to maintain his wife. Even if his wife has her own income, the man is still responsible for seeing to her wellbeing. The wife does not have to contribute to household expenses. (See Doi *Shari'ah: The Islamic law* (1984) 117; Pearl 68–70.)

The court in *Amod* held that the marriage between the appellant and the deceased had been

> "contracted according to the tenets of a major religion; and that it involved 'a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable'" (para [20], with reference to *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) para [21]).

The court correctly found that the marriage resulted in a legal duty to support the dependant, and that the relationship does indeed deserve recognition and protection at common law (para [25]). It can therefore be said that the obligation to maintain is based not only on the contractual nature of the marriage but also in its religious foundation.

6 Constitutional values

The court in *Amod* referred in para [22] with apparent approval to *Ryland v Edros* 1997 2 SA 690 (C) 707E–H, where Farlam J said:

> "I agree with Mr *Trengove's* submission that it is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it."

Although Mahomed CJ did not refer to the Constitution as such to found its arguments, he stated that if the common law is trapped within the limitations of its past, it will lose its legitimacy and effectiveness "in the pursuit of justice among the citizens of a democratic society" (para [23]). The court also referred to the values of equality and religious freedom articulated in the Constitution. This was mentioned with regard to the possible recognition of *de facto* polygamous religious marriages (para [24]). The issue of constitutional values was not discussed further.

The recognition of systems of religious, personal or family law (s 15(3)) and of African customary law (s 211) are subject to the provisions of the 1996 Constitution. It may be argued that these legal systems will also be subject to the values set out in sections 1 and 7 of the 1996 Constitution. Section 1 refers, *inter alia*, to the values of human dignity, achievement of equality, the advancement of human rights and freedoms, non-racialism, non-sexism, supremacy of the Constitution and the rule of law, while section 7 refers to the democratic values of human dignity, equality and freedom.

It was not necessary for the court in *Amod* to base its decision on these values. It may, however, be asked whether the court would have reached a different decision had they been taken into account. The non-recognition of Islamic marriages definitely infringes against the values of human dignity and equality. Until now recognition was afforded only to certain aspects of Muslim marriages when it suited the state. For example, section 21(13) of the Insolvency Act 24 of 1936 defines the word "spouse" to include a wife or a husband married "according to any law or custom". In terms of section 31 of the Special Pensions Act 69 of 1996, a "dependant" includes the spouse of a deceased "under any Asian religion". A similar provision appears in section 1 of the Demobilisation Act 99 of 1996, which defines a "dependant" to include any surviving spouse to whom the deceased was married "in accordance with the tenets of a religion". Section 1(2)(a) of the Births and Deaths Registration Act 51 of 1992 includes in the term "marriage" all marriages concluded in accordance with the "tenets of any religion". (See also Moosa "Muslim personal law – to be or not to be?" 1995 *Stell LR* 417.)

The question can be formulated differently: if all the rules of Islamic law are made subject to the values of the 1996 Constitution, will they stand the test of time? An outsider might regard some of the rules applicable to women as infringing against the principle of equality, while women who live according to Muslim rules might not agree. If the constitutional values and human rights are applied to customary law, will that not again be a case of outside values being imposed on a different cultural or religious group, as occurred with the non-recognition of Muslim marriages? Only the Muslim community itself can answer this question (see eg Moosa "The interim and final constitutions and Muslim personal law: implications for South African Muslim women" 1998 *Stell LR* 196 ("Moosa 1998 *Stell LR*")).

7 Interpretation of sections 8(1)–(3) and 39(2) of the 1996 Constitution

Counsel for the appellant in *Amod* argued in the alternative that the common law should be developed in terms of section 35(3) of the 1993 Constitution in order to provide for a claim for loss of support on the part of the appellant (para [5]). The 1993 Constitution was in operation when the action commenced in the court *a quo*. Section 35(3) was subsequently replaced by section 39(2) of the 1996 Constitution. The court developed the common law to provide the appellant with a claim for loss of support without relying on either section 35(3) of the 1993 Constitution or section 39(2) of the 1996 Constitution. The question may, however, be asked whether the courts have the power in terms of these provisions to develop the common law to extend the action for loss of support to Muslim widows.

Section 39(2) of the 1996 Constitution reads as follows:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Section 39(2) must be read with section 8(2) and (3) of the 1996 Constitution. Section 8(3)(a) reads as follows:

> "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
>
> (a) 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. . . ."

The court *a quo* interpreted the developmental function of the courts in terms of sections 8(2), 8(3) and 39(2) restrictively (see part 2 of this note, above). The 1996 Constitution gives the courts the opportunity to adapt the common law to confer recognition upon Muslim marriages. The power of the courts to develop the common law should be interpreted, not in a restrictive manner (ie in such a way as not to allow the elimination of principles of the common law), but to adapt it to new circumstances. One of the distinctive characteristics of the common law has always been its ability to change down the ages (see part 4 4 of this note, above). If, however, it is not borne in mind that the change will not be always acceptable to the community, the law as developed will be mere paper law. This may be one of the reasons why the courts are reluctant to interfere with *de facto* situations and why they leave it to the legislature to effect changes. The courts may not, however, ignore their duty as protectors of an individual's fundamental rights in terms of the Constitution by leaving it up to the legislature to bring about change. Thus Woolman "Application" in Chaskalson *et al* (eds) *Constitutional law of South Africa* (1996) 10–60 writes:

> "[W]here no express rule of common law exists to cover a private or public relationship, one 'must' be formulated if necessary to give effect to the Bill of Rights . . ."

Such a viewpoint promotes and recognises the importance of judicial activism, which is essential in a new constitutional dispensation. Even before the commencement of the 1996 Constitution, Corbett "Aspects of the role of policy in the evolution of our common law" 1987 *SALJ* 52 54 pointed out that the courts have a policymaking function to "perform in the process of developing the common law and adjusting it to the ever-changing needs of society". Chaskalson P confirmed that the high courts of South Africa have always had the inherent jurisdiction "to develop the common law to meet the needs of a changing society" (*Amod v Multilateral Motor Vehicle Accidents Fund* 1998 4 SA 753 (CC) para [22]). In the light of this, it is recommended that a wide interpretation of the developmental function of the courts, as envisaged in sections 8(2), 8(3) and 39(2) of the 1996 Constitution, be adopted. Such a viewpoint is in accordance with the "spirit, purport and objects" of the Constitution and the recent change in social policy regarding the recognition of religions.

A further question that comes to mind is whether section 39(2), read with section 8(2) and (3), empowers the courts to develop Islamic law in order to "promote the spirit, purport and objects of the Bill of Rights". The answer to this question depends to a large extent on the meaning of the expression "law" used in section 8(1), and the meaning of "common law" and "customary law" in sections 8(3) and 39(2) of the 1996 Constitution.

Section 7(2) of the 1993 Constitution made provision for the application of the Bill of Rights to "all law in force". The Constitutional Court in *Du Plessis v De Klerk* (1996 3 SA 850 (CC), 1996 5 BCLR 658 (CC) para [44]) held that the phrase "all law in force" referred to both common law and statute law. Since Muslim personal law is not recognised in terms of South African common law or statute law, it may be argued that Muslim law is not comprehended by the term "all law in force", and that it was accordingly not subject to the provisions of the Bill of Rights contained in the 1993 Constitution. It must be borne in mind, however, that the *Du Plessis* case did not deal with the application of the Bill of Rights to systems of personal law such as Muslim personal law.

The 1993 Constitution was repealed by the 1996 Constitution, which came into operation on 4 February 1997. The expression "all law in force" contained in section 7(2) of the 1993 Constitution was omitted from the 1996 Constitution. Section 8(1) of the 1996 Constitution refers only to "all law" and reads:

> "The Bill of Rights applies to *all law*, and binds the legislature, the executive, the judiciary and all organs of state" (our emphasis).

The first question that comes to mind is whether the omission of the words "in force" alters the applicability of the Bill of Rights to unrecognised Muslim personal law. On the face of it, the answer appears to be no. Writers such as Burns (*Administrative law under the 1996 Constitution* (1998) 15) and De Waal, Currie and Erasmus (*The Bill of Rights handbook* (1999) 50) argue that the Bill of Rights applies to legislation, common law and customary law (see also Rautenbach and Malherbe *Staatsreg* (1996) 306). If this view is followed, Muslim personal law is excluded from the reach of the Bill of Rights. The same argument applies to the meaning of "law" referred to in item 2(1) of Schedule 6 to the 1996 Constitution, which reads:

> "All law that was in force when the new Constitution took effect, continues in force, subject to –
>
> (a) any amendment or repeal; and
>
> (b) consistency with the new Constitution."

It is not necessarily correct to say that Muslim personal law falls beyond the ambit of the Bill of Rights. Indeed, it is surely inconceivable that there may be areas of "law" which are not subject to the scrutiny of the Bill of Rights. The proposition that such areas of law exist makes a mockery of the supremacy of the Constitution which is emphasised in section 2 of the 1996 Constitution. Section 2 lays down that "law or conduct" which is inconsistent with the 1996 Constitution is invalid, and that the obligations imposed by the Constitution must be fulfilled. It is therefore submitted that unrecognised Muslim personal law is in truth included within the ambit of the expression "all law" contained in section 8(1) of the 1996 Constitution.

This inference is supported, *inter alia*, by the text of the 1996 Constitution. First, the use of the phrase "all law" in the 1996 Constitution, in contrast to the use of the expression "all law in force" in the 1993 Constitution, indicates that the constitutional draftsmen (possibly) envisaged that there could be law in South Africa which cannot be classified as "law in force", but which nevertheless needs to be scrutinised in the light of the Bill of Rights. Muslim personal law would be a legal system which was not "in force" (because it is not directly recognised in terms of South African law), but which needs to be examined against the Bill of Rights.

Secondly, section 2 of the 1996 Constitution recognises the supremacy of the Constitution and invalidates "law or conduct" inconsistent with the Constitution. It may, therefore, be argued that unrecognised Muslim personal law is "conduct" which is subject to the Constitution. The Bill of Rights forms part of the Constitution as a whole, and it can therefore be argued that the Bill of Rights will apply also to conduct which is not law in terms of section 8.

Thirdly, section 15(3) of the 1996 Constitution refers to "systems" of "religious, personal or family law". The use of the word "law" is a clear indication that the writers of the Constitution saw these systems as systems of "law", and it may therefore be argued that the phrase "all law" in section 8(1) of the 1996 Constitution subjects these legal systems to the Bill of Rights.

Fourthly, sections 30 and 31 of the 1996 Constitution, which recognise the religious and cultural diversity of the South African population, emphasise that religious and cultural rights must be exercised in a manner which is not inconsistent with any provision of the Bill of Rights. It does not make sense to say that Muslims have the right to enjoy their religion (which includes the *Shari'ah*), but that the enjoyment of such a right which may lead to inequality before the law is not subject to the Bill of Rights because the precepts of the religion are not included in the expression "all law".

A further argument that may be advanced for the inclusion of Muslim personal law in the phrase "all law" is to be found in Van Zyl and Van der Vyver *Inleiding tot die regswetenskap* (1982) chs 7–9, regarding the meaning of "law". Van Zyl and Van der Vyver argue that "law" consists of both positive state law ("staatlike positiewe reg") and positive non-state law ("nie-staatlike positiewe reg"). Positive state law includes legislation, custom and case law. On the other hand, positive non-state law includes, for example, the rules of a sports club or an organisation, or the rules of a family head laid down for the members of the

family (273). If their argument were to be followed, it would mean that the rules of a religious group, such as Muslims, can be regarded as positive non-state law, which is "law" in terms of the South African Constitution.

In addition, several Acts of Parliament recognise certain aspects of Muslim marriages (see part 6 of this note, above). Although it may be argued that this legislation recognises Muslim marriages for practical reasons, it is indicative of the plurality of South African society. It is difficult to understand why Muslim marriages are recognised for some purposes but not when the parties to a Muslim marriage turn to the courts for the recognition of their union.

In spite of these arguments in favour of the inclusion of unrecognised Muslim personal law in the expression "all law", it is open to doubt whether the courts will agree with this view. It is, therefore, recommended that statutory recognition be given to Islamic personal law, or at least to Muslim marriages, as valid in South Africa.

Statutory recognition would solve another problem with which the courts will be faced. Sections 8(3) and 39(2) of the Constitution confirm the developmental function of the courts regarding the common law and customary law. If Islamic personal law is not regarded as "law", "common law" or "customary law", it may be argued that the courts have no power to develop Islamic personal law to "promote the spirit, purport and objects of the Bill of Rights", or to give effect to rights contained in the Bill of Rights. On the other hand, if statutory recognition is given to Islamic personal law or to Muslim marriages, the legislation in question will be subject to the scrutiny of the Bill of Rights. Moosa 1998 *Stell LR* 196 points out that women are discriminated against under Islamic law. Therefore, if Islamic personal law is recognised in terms of section 15(3)(a) of the 1996 Constitution, the discriminatory rules of Islamic personal law can be brought into conformity with the Bill of Rights (see also the arguments discussed in Van der Vyver "Constitutional perspective of church-state relations in South Africa" 1999 *Brigham Young Univ LR* 659ff).

8 Conclusion

Although *Amod* may be seen as a landmark case regarding the rights of Muslims in South Africa, its effect is limited in two ways. First, no recognition has been given to Muslim marriages. It is only the claim of a surviving spouse (married in terms of a valid civil marriage) for loss of support that has been extended to spouses married in terms of unrecognised Muslim law. Secondly, the court did not deal with polygamous Muslim marriages, and it is uncertain whether the court would have followed the same route if the appellant's marriage had been polygamous.

By protecting cultural and religious rights the 1996 Constitution recognises the cultural diversity of South Africa. A change in public policy regarding the recognition of cultural diversity in South Africa should be reflected in the decisions of the courts. The courts may not ignore their new-found duty as protectors of the individual's fundamental rights by leaving it to the legislature to effect change. Undoubtedly, the courts are placed in a difficult position. If they develop the common law to recognise Muslim marriages as valid marriages, this may lead to discrimination against women. On the other hand, if they do not recognise Muslim marriages as valid marriages, they do not afford equal protection to Muslims before the law.

The 1996 Constitution makes provision for the recognition of traditional and religious marriages, and of traditional and religious systems of personal law, by means of legislation (s 15(3)(a)). In order to achieve legal certainty about the validity of Muslim marriages, legislative recognition should be given to Muslim marriages in South Africa. The Recognition of Customary Marriages Act 120 of 1998 serves as an example of such an Act by recognising polygamous customary marriages as valid marriages. It must be remembered that any legislation recognising Muslim marriages or Muslim personal law will have to stand the test of constitutionality before it will be accepted. Furthermore, if the recognition is not acceptable to the Muslim community, the result will be mere paper law.

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FORMAL VERSUS SUBSTANTIVE EQUALITY AND THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT

National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 12 BCLR 1517 (CC), 1999 1 SA 6 (CC)

1 Introduction

In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC), 1999 1 SA 6 (CC), the National Coalition for Gay and Lesbian Equality challenged the constitutional validity of the common-law offence of sodomy, and of various statutory provisions that criminalised sexual acts engaged in by males. The statutory provisions were: section 20A of the Sexual Offences Act 23 of 1957, the inclusion of sodomy in Schedule 1 to the Criminal Procedure Act 51 of 1977, and the inclusion of sodomy in the Schedule to the Security Officers Act 92 of 1987. The Constitutional Court found that these common-law and statutory offences discriminated unfairly against gay men on the basis of both gender and sexual orientation. The offences therefore infringed on section 9(3) of the Constitution, which expressly prohibits unfair discrimination on the grounds of, *inter alia*, gender and sexual orientation. The court proceeded to find that these infringements could not be justified in terms of the limitation clause, and the offences were accordingly declared unconstitutional.

The principal judgment was delivered by Ackermann J (with whom the remaining members of the court concurred). Sachs J delivered a separate concurring judgment and Ackermann J reciprocated by agreeing with the judgment of Sachs J. Both judgments may therefore be considered together as the unanimous judgment of the court (see Pantazis "How to decriminalise gay sex" 1999 *SAJHR* 188). In arriving at their respective decisions, Ackermann and Sachs JJ explained that the Constitutional Court has adopted a substantive as opposed to a formal interpretation of the right to equality under both the Constitution of the Republic of South Africa, Act 200 of 1993 and the Constitution of the Republic of South Africa, Act 108 of 1996. The purpose of this note is to examine the manner in which the Constitutional Court has defined and applied a substantive approach to

equality in its equality-rights jurisprudence. (For a detailed and insightful discussion of the reasons behind the Constitutional Court's decision to strike down the various offences criminalising sodomy, see Pantazis 1999 *SAJHR* 188.)

2 Formal and substantive equality

When discussing the meaning of equality, the courts, academics and other commentators have often distinguished between formal and substantive equality. As Albertyn and Goldblatt have explained, the distinction between formal and substantive equality arises out of the critique developed by critical feminist scholars in respect of traditional liberal legal theory (Albertyn and Goldblatt "Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality" 1998 *SAJHR* 248 251–254).

Liberal political and legal theory emerged in the seventeenth century as a response to the inequalities and hierarchies that characterised the feudal system. Liberalism promoted three principal notions: rationality, the maximisation of individual liberty, and the control of state power through the rule of law (Barnett *Introduction to feminist jurisprudence* (1998) ("Barnett") 96). First and foremost, however, liberalism emphasised the freedom of the individual from undue political, legal and economic restraint. In stressing the primacy of the individual, liberal theory assumed that every individual was, as a result of his or her capacity for rational thought, inherently free and equal. Each individual was therefore assumed to share the same characteristics and was accordingly equal. Liberal legal theorists therefore argued that the purpose of equality was to ensure that each and every individual was equal before the law (Barnett 121). While liberalism has provided a legal framework in terms of which express discrimination based upon factors such as race, sex, religion, disability, and so on can be eliminated by securing the equal protection of the law for all, its ability to provide a legal framework in terms of which other forms of discrimination and disadvantage can be eliminated has been questioned (see, in this respect, Sinclair *The law of marriage* Vol I (1996) 28–66).

Critical feminist theorists in particular have argued that the liberal concept of the individual as inherently free and equal is misleading because it ignores actual social patterns of discrimination and disadvantage based upon factors such as race, sex, religion and disability. By rendering these factors legally irrelevant, through its abstract concept of the individual, liberalism has failed to acknowledge the extent to which they sustain and perpetuate the patterns of disadvantage individuals actually experience in their real lives (Rhode "Feminist criticial theories" in Bartlett and Kennedy (eds) *Feminist legal theory: Readings in law and gender* (1991) 333). Critical feminist scholars argue that these factors should be recognised and taken into account by the law. It is only by recognising that they inhibit the ability of people to compete on an equal footing that the law can begin to address the patterns of disadvantage which exist in society (Cain "Feminism and the limits of equality" in Weisbeg (ed) *Feminist legal theory: Foundations* (1993) 237). The purpose of equality, critical feminist scholars argue, is therefore to eradicate and remedy the complex patterns of disadvantage which characterise society (Olsen "Statutory rape: A feminist critique of rights analysis" in *Feminist legal theory: Foundations* 485).

Formal equality, which is rooted in a traditional liberal understanding of the law, therefore means sameness of treatment. The law must treat individuals in the same manner regardless of their circumstances. Difference, in other words, is

the problem, and the purpose of the right to equality is to create a society in which individuals are treated in exactly the same way. Distinctions based upon (eg) race, sex, religion or disability should not be taken into account. In terms of this view, inequality can be eliminated simply by extending the same rights and entitlements to everyone in accordance with the same standard of measurement. In this respect the purpose of equality is freedom. We are all free, and equally free (Albertyn and Goldblatt 1998 *SAJHR* 254).

Substantive equality, which is rooted in a more critical understanding of the law, does not see difference itself as the problem. Difference becomes a problem only when it is used in order to perpetuate the subordination of individuals who are members of a disadvantaged group. The purpose of the right to equality is therefore not to eliminate differences, or to treat everyone in exactly the same way. Instead, the purpose of equality is to eliminate differential treatment which perpetuates the subordination of disadvantaged groups. In this respect the purpose of the right of equality is remedial. It is designed to protect those groups who suffer social, political and legal disadvantage. In order to determine whether differentiation is perpetuating the subordination of an individual or group, the court must take into account the social context, that is, the concrete circumstances in which an individual finds him- or herself (Albertyn and Goldblatt 1998 *SAJHR* 252–253).

For example, under a formal interpretation of equality, all students who are applying for admission to a university must be judged according to exactly the same criteria, regardless of race. Admission criteria, in other words, should be "colour-blind". Given the history of apartheid education in South Africa, however, a disproportionately large number of black students are unlikely to meet those criteria. The educational disadvantages black students have experienced as a result of apartheid would therefore be perpetuated. A substantive interpretation of equality would accordingly require the admission criteria to take into account distinctions based upon race in order to overcome the past disadvantages suffered by black students in South Africa as a result of apartheid education.

The concepts of difference and disadvantage therefore lie at the heart of the distinction between formal and substantive equality.

3 The approach of the Constitutional Court

In its first judgment on the right to equality, *Brink v Kitshoff* 1996 6 BCLR 752 (CC), 1996 4 SA 197 (CC), the Constitutional Court appeared to have endorsed a substantive interpretation of the right to equality. In her majority judgment, O'Regan J emphasised the importance of adopting a contextual approach when interpreting the right to equality:

> "The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted" (par [40]).

Later in her judgment, O'Regan J also highlighted the remedial nature of the right to equality:

> "Section 8 [of the 1993 Constitution] was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of section 8 and, in particular, [subsecs] (2), (3) and (4)" (par [42]).

Both of these concepts underpin a substantive interpretation of the right to equality. This approach was generally welcomed by commentators, who argued that given South Africa's history, it was only logical that the equality clause should be interpreted in a substantive manner. In addition, it was also pointed out that the express inclusion of an affirmative-action clause, as well as the express prohibition of indirect discrimination, supported a substantive reading of the equality clause (see eg, Loenen "The equality clause in the South African Constitution: Some remarks from a comparative perspective" 1997 *SAJHR* 401 403).

In its next equality decision, however, the Constitutional Court appeared to adopt a more individualistic and thus formal approach to equality when it placed the concept of dignity at the heart of its enquiry into unfair discrimination. In *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC), 1997 4 SA 1 (CC) Goldstone J explained that the purpose of the prohibition on unfair discrimination was not simply to remedy past patterns of discrimination suffered by disadvantaged groups:

> "In my view, the fact that the individuals who were discriminated against by a particular action, such as the one under consideration, were not individuals who belonged to a class who had historically been disadvantaged does not necessarily mean that the discrimination is fair" (par [40]).

Rather, the goal of the right to equality was to create a society in which each human being's inherent dignity was protected:

> "The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked" (par [41]).

The argument that dignity should play a central role in the prohibition of unfair discrimination was adopted by Goldstone J from the equality jurisprudence of the Canadian Supreme Court:

> "In *Egan v Canada* L'Heureux-Dubé J analysed the purpose of section 15 of the Canadian Charter (which entrenches the right to equality) as follows:
>
> 'This Court had recognised that inherent human dignity is at the heart of individual rights in a free and democratic society: *Big M Drug Mart Ltd* [(1985) 13 CRR 64] at 97 . . . (*per* Dickson J (as he then was)). More than any other right in the Charter, section 15 gives effect to this notion. . . . Equality, as that concept is enshrined as a fundamental human right within section 15 of the Charter means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity'" (par [41], footnotes omitted).

Hugo was followed by *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC), 1997 3 SA 1012 (CC) (in which judgment was delivered on the same day as that in *Hugo*) and *Harksen v Lane* 1997 11 BCLR 1489 (CC), 1998 1 SA 300 (CC). In both of these cases the Constitutional Court appeared to reconfirm its more formal and individualistic approach to equality by once again placing the concept of dignity at the centre of its enquiry into unfair discrimination. For example, in *Harksen* Goldstone J explained that the following criteria must be taken into account when considering the impact of the discrimination on the complainant to determine whether or not it is unfair:

> "(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
>
> (b) the nature of the provision or power and the purpose sought to be achieved by it . . . ;
>
> (c) the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature" (par [51]).

Following these judgments, various commentators argued that the replacement of group-based disadvantage with dignity seemed to indicate a shift to a more liberal and individualised conception of the right to equality (see, in particular, Albertyn and Goldblatt 1998 *SAJHR* 248, Albertyn and Goldblatt "The decriminalization of gay sexual offences" 1998 *SAHJR* 461 and Davis "Equality: The majesty of legoland jurisprudence" 1999 *SALJ* 398).

The reason for this is that dignity is traditionally understood as being concerned with individual personality issues rather than with issues of equality. Dignity is concerned with the way in which we perceive ourselves and the way in which others perceive us. In this respect, dignity may be impaired in a wide range of ways that have nothing to do with the groups to which we belong. Equality, on the other hand, is concerned with material interests and social relationships. It is concerned with individuals who are experiencing some sort of socio-economic, political or legal disadvantage that will perpetuate the subordination of the vulnerable group to which the individual belongs. The objective of equality, therefore, is not simply to recognise a certain dignity of the human being as such, but also to provide the individual with the opportunity – equal to that guaranteed to others – for protecting and advancing his or her social, economic, political and legal interests.

4 The *National Coalition for Gay and Lesbian Equality* case

Following these criticisms, the question whether the Constitutional Court should adopt a substantive or a formal interpretation of equality was expressly raised in the *National Coalition for Gay and Lesbian Equality* case. In an *amicus curiae* submission, the Centre for Applied Legal Studies (CALS) argued that by focusing on dignity, the Constitutional Court had not given enough weight to the notion of substantive equality. CALS argued that if the court wished to give effect to the notion of substantive equality, it should shift the emphasis of its equality jurisprudence from the prohibition of unfair discrimination in section 9(3) to the general right to equality in section 9(1). At the same time, the court should adopt a new interpretation of section 9(1) which gave effect to the notion of substantive equality, since its interpretation of section 8(1) of the 1993 Constitution had failed to do so.

Ackermann J rejected the CALS argument, on the basis that the Constitutional Court had in fact adopted a substantive approach to equality. In support of his view, the judge explained that the purpose of the equality clause in the South African Constitution is a remedial or restitutionary one:

> "[I]n a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied"' (par [60]).

And:

> "The need for such remedial or restitutionary measures has therefore been recognised in s 8(2) and 9(3) of the interim and 1996 Constitutions respectively. One could refer to such equality as remedial or restitutionary equality. In addition, as was recognised in *Hugo*, treating people identically can sometimes result in inequality:
>
> 'We need, therefore, to develop a concept of unfair discrimination which recognises that, although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.'
>
> It is in this latter way that we have encapsulated the notion of substantive as opposed to formal equality" (par [61], footnotes omitted).

In his concurring judgment, Sachs J argued that the court should continue to emphasise respect for human dignity at the core of its unfair-discrimination analysis. He went on to explain that, in this regard, a distinction must be made between (a) dignity in the context of the right to equality and (b) dignity in the context of the right to dignity:

> "One of the great gains achieved by following a situation-sensitive human rights approach is that analysis focuses not on abstract categories, but on the lives as lived and the injuries experienced by different groups in our society. The manner in which discrimination is experienced on grounds of race or sex or religion or disability varies considerably – there is difference in difference. The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality has to be understood in this light. The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality" (par [126]).

And:

> "At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. The indignity and subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from

> powerlessness within the mainstream; they may also be derived from the location of difference as a problematic form of deviance in the disadvantaged group itself, as happens in the case of the disabled. In the case of gays it comes from compulsion to deny a closely held personal characteristic. To penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality. This aspect would not be well captured, if at all, by the Centre's approach, which falls to be rejected" (par [129], footnotes omitted).

The difficulty with this argument, however, is that it leaves us with a somewhat unusual and rather strained definition of dignity. If we follow the reasoning of Sachs J, it would appear that in the context of equality, an impairment of dignity will occur when an individual is treated in a disadvantageous way because he or she has a closely held personal characteristic (such as race, sex, religion or disability) which is shared with other members of a disadvantaged group, and this characteristic is the reason why the group has suffered disadvantage in the past. In other words, the impairment of dignity takes place because the law or conduct in question perpetuates the subordinate status of the disadvantaged group to which the individual belongs.

5 Comment

If the concept of dignity is to be understood as encapsulating material interests as well as socioeconomic, political and legal relationships, and if an infringement of dignity is to be understood as some sort of socio-economic, political or legal disadvantage which will perpetuate the subordination of a vulnerable group, then it would appear that the Constitutional Court has, correctly it is submitted, adopted a substantive notion of equality, at least in so far as section 9(3) is concerned.

The continuing difficulty with this approach, however, is that, on the one hand, it requires equality to be defined with reference to dignity and, on the other hand, it gives dignity a new and unusual meaning. We are accordingly left with a concept of equality that has no independent meaning and a concept of dignity that has no settled meaning. Dignity, as Davis observes, can now be used in whatever form and shape a court requires (1999 *SALJ* 413).

Finally, it is also important to note that a substantive interpretation of equality is not without problems of its own. The institutional role courts are designed to play limits the extent to which they can eradicate social disadvantages. The courts are best suited to deal with particular wrongs, rather than with patterns of systematic disadvantage. The eradication of patterns of disadvantage through the redistribution of resources is usually best achieved through legislative rather than judicial intervention (see Freedman "Understanding the right to equality" 1998 *SALJ* 243).

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We often contradict an opinion when it is really only the tone in which it is expressed that is unsympathetic to us.

Nietzsche

DIE DRANKWETSONTWERP: VOORAF KONTROLE EN GRONDWETLIKE GESAGSVERDELING VERDER OMLYN

Ex Parte President of the Republic of South Africa In re: Constitutionality of the Liquor Bill 2000 1 BCLR 1 (KH)

Die eerste beslissing van die Konstitusionele Hof wat in die nuwe millenium gerapporteer is, is uniek omdat dit die eerste geval verteenwoordig waarin die President 'n wetsontwerp wat vir bekragtiging aan hom voorgelê is, ingevolge artikel 79 van die Grondwet vir 'n beslissing na die Konstitusionele Hof verwys het. Dit is egter ook 'n belangrike beslissing omdat kernbepalings van die Grondwet in verband met die verdeling van gesag tussen die nasionale en provinsiale regeringsfere vir die eerste keer gesaghebbend vertolk is, spesifiek ten opsigte van die Parlement se bevoegdheid om in bepaalde omstandighede wetgewing oor eksklusiewe provinsiale bevoegdhede aan te neem. In hierdie bespreking word vooraf kontrole oor wetgewing ingevolge die artikel 79-prosedure kortliks bespreek, voordat die belang van die beslissing vir grondwetlike gesagsverdeling in groter diepte behandel word.

Die agtergrond van die beslissing is kortliks dat die President die Drankwetsontwerp van 1998 op 22 Januarie 1999 met sy voorbehoude na die Nasionale Vergadering teruggestuur het nadat dit op 2 November 1998 vir bekragtiging aan hom voorgelê is. Die Parlement het die wetsontwerp heroorweeg en dit op 3 Maart 1999 onveranderd aan die President teruggestuur, waarop hy dit op 8 Maart 1999 ingevolge artikel 79 na die Konstitusionele Hof verwys het vir 'n beslissing oor die grondwetlikheid daarvan. Die President se voorbehoude het gewentel rondom die vraag of die wetsontwerp die eksklusiewe wetgewende bevoegdhede van die provinsies op 'n ongrondwetlike wyse aantas.

1 Die artikel 79-prosedure

1 1 Agtergrond

Artikel 79 van die Grondwet handel oor die bekragtiging van wetsontwerpe deur die President en bepaal onder meer dat hy 'n wetsontwerp wat aan hom voorgelê word in bepaalde omstandighede na die Konstitusionele Hof kan verwys vir 'n beslissing aangaande die grondwetlikheid daarvan. (Sien ook a 84(2)(b) en (c), wat die verantwoordelikheid vir sodanige verwysing spesifiek aan die President opdra.) Dieselfde moontlikheid word in artikel 121 geskep ten aansien van die bekragtiging van provinsiale wetsontwerpe deur 'n Premier (en sien ook hier a 127(2)(b) en (c)). Artikels 79 en 121 maak derhalwe voorsiening vir 'n vorm van vooraf kontrole oor parlementêre en provinsiale wetsontwerpe (Rautenbach en Malherbe *Staatsreg* (1999) 258).

Artikel 79(1) van die Grondwet bepaal dat die President 'n wetsontwerp wat deur die Parlement aangeneem is, moet bekragtig en onderteken, of, indien hy voorbehoude het oor die grondwetlikheid daarvan, die wetsontwerp na die Nasionale Vergadering moet terugverwys vir heroorweging. Die Nasionale Raad van Provinsies moet deelneem aan die heroorweging van die wetsontwerp indien die President se voorbehoude verband hou met 'n prosessuele aangeleentheid

waarby die Raad betrokke is, of artikel 74(1), (2) of (3)(b) of 76 by die aanname van die wetsontwerp van toepassing was (a 79(3)). (A 74(1), (2) en (3)(b) handel oor grondwetwysigings waarby die Raad betrokke is en a 76 oor die prosedure vir die aanname van gewone wetsontwerpe wat die provinsies raak.)

Volgens voorskrif van die Grondwet (a 79(2)), maak die gesamentlike reëls van die Parlement volledig voorsiening vir die prosedure waarvolgens die wetsontwerp deur die huise van die Parlement heroorweeg moet word (reëls 202–212 van die *Joint rules of Parliament* Maart 1999). Die reëls bepaal dat die wetsontwerp na 'n komitee verwys word wat oor die President se voorbehoude verslag moet doen, met 'n komitee van die Nasionale Raad van Provinsies oorleg moet pleeg, waar van toepassing, en aanbevelings oor verdere optrede moet maak. Daarop word die aangeleentheid in die Nasionale Vergadering gedebatteer. Die Nasionale Vergadering kan die wetsontwerp onveranderd na die President terugverwys (of, waar die Nasionale Raad van Provinsies geraak word, dit na die Raad verwys), of die wetsontwerp ooreenkomstig die President se voorbehoude wysig en na hom terugverwys (of waar die Raad geraak word, dit na die Raad verwys). Wanneer 'n wetsontwerp na die Raad verwys word, word 'n soortgelyke prosedure gevolg: 'n komitee van die Raad moet dit oorweeg en verslag doen, waarop 'n debat in die Raad volg. Indien die Vergadering en die Raad nie eenstemmigheid bereik oor die wetsontwerp nie, word die wetsontwerp na die bemiddelingskomitee verwys vir beslegting (sien a 76(1)(d) en 78 van die Grondwet). Ná afhandeling van die heroorweging in albei huise, word die wetsontwerp, gewysig al dan nie, weer vir bekragtiging aan die President voorgelê.

Artikel 79(4) bepaal dat indien 'n wetsontwerp ná heroorweging deur die Parlement, ten volle aan die President se voorbehoude voldoen, die President die wetsontwerp moet bekragtig en onderteken. Indien die wetsontwerp nie aan sy voorbehoude voldoen nie, moet hy daarby berus en die wetsontwerp bekragtig en onderteken, óf die wetsontwerp na die Konstitusionele Hof verwys vir 'n beslissing oor die grondwetlikheid daarvan. Indien die Konstitusionele Hof beslis dat die wetsontwerp grondwetlik is, moet die President die wetsontwerp bekragtig en onderteken (a 79(5)).

Die Grondwet bepaal nie watter prosedure verder moet volg as die hof die President gelyk gee nie. Die bevel wat die hof in die onderhawige geval gemaak het (par 2 6 hieronder) en die hof se standpunt dat dit sigself net kan uitspreek oor die bepalings van 'n wetsontwerp waaroor die President voorbehoude het en dat die uitspraak nie toekomstige litigasie oor ander aspekte van die wetsontwerp uitskakel nie (par 1 2 hieronder), werp ook nie meer lig op die onderwerp nie. Verval die wetsontwerp in sy geheel, of net ten opsigte van daardie bepalings of aspekte wat ongrondwetlik verklaar is? In die afwesigheid van enige bepalings hieroor, moet waarskynlik aanvaar word dat die Parlement *functus officio* is (dit het per slot van rekening die betrokke wetsontwerp reeds 'n tweede keer onder oë gehad en met die oorspronklike besluit volstaan, anders sou die saak nie tot in die Konstitusionele Hof gevorder het nie), dat die wetsontwerp dus in sy geheel verval en dat 'n nuwe, gewysigde wetsontwerp van voor af by die Parlement ingedien moet word indien die regering met die wetgewing wil voortgaan.

Vooraf kontrole ingevolge artikel 79 het die moontlikheid vir vooraf kontrole wat ingevolge die Oorgangsgrondwet bestaan het, vervang. Volgens artikel 98(9) van die Oorgangsgrondwet kon die Konstitusionele Hof beslis oor die grondwetlikheid van 'n wetsontwerp op versoek van minstens een derde van die lede van die Nasionale Vergadering, of van die Senaat, of van 'n provinsiale wetgewer. Minstens vier nasionale en provinsiale wetsontwerpe is ingevolge hierdie

bepaling aan die Konstitusionele Hof voorgelê (sien *In re: The National Education Policy Bill No 83 of 1995* 1996 4 BCLR 518 (KH), 1996 3 SA 289 (KH); *In re: The School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 537 (KH), 1996 3 SA 165 (KH); *In re: KwaZulu-Natal Amakhozi and Iziphakanyiswa Amendment Bill of 1995; In re: Payment of Salaries, Allowances and other Privileges to the Ingonyama Bill of 1995* 1996 7 BCLR 903 (KH), 1996 4 SA 653 (KH)). Lede van die Parlement en van 'n provinsiale wetgewer kan die hof ook ingevolge die 1996 Grondwet nader, maar slegs nadat 'n wetsontwerp aangeneem en bekragtig is en dus wet geword het (sien a 80). Dit is dus 'n vorm van abstrakte kontrole en nie vooraf kontrole nie (Rautenbach en Malherbe (1999) 259).

Die bevoegdheid van die President om 'n wetsontwerp wat vir bekragtiging aan hom voorgelê word na die Parlement terug te verwys, is nie nuut nie. Formeel het die Britse monarg ook die bevoegdheid behou om wetsontwerpe terug te verwys, al dwing die konvensie hom of haar om toestemming te verleen (sien bv Marshall *Constitutional conventions* (1984) 216; Turpin *British government and the Constitution: Text, cases and materials* (1985) 74). Hierdie patroon is in Suid-Afrika nagevolg (a 64 van die Zuid-Afrika Wet), en uiteindelik is in die 1983-Grondwet bepaal dat die Staatspresident verplig was om toestemming te verleen, tensy die wetsontwerp nie volgens voorskrif van die Grondwet aangeneem is nie (a 33(1)). Dit is vertolk as 'n verwoording van die Westminsterkonvensie en as 'n aanduiding dat die staatshoof 'n wetsontwerp slegs op grond van grondwetlike prosessuele tekortkominge kon terugstuur (Sien die volledige bespreking hieroor deur Malherbe *Die wetgewende prosedure van die Parlement* (proefskrif RAU 1991) 506–516.) Hierdie posisie is in die Oorgangsgrondwet gehandhaaf (a 82(1)(b)).

Terugverwysing van 'n wetsontwerp kom in talle state (Malherbe (1991) 510 identifiseer minstens 21 gevalle) op 'n substantiewe veto neer en ten einde dit ongedaan te maak, moet die wetgewer dit formeel omverwerp – gewoonlik met 'n gewone of spesiale meerderheid. Die Amerikaanse President kan 'n wetsontwerp terugstuur (met sy redes) bloot omrede hy om politieke of ander redes nie met die inhoud akkoord gaan nie, in welke geval die wetsontwerp verval, tensy albei huise van die Kongres die veto met 'n tweederdemeerderheid van aanwesige lede omverwerp (a 17 van die Amerikaanse Grondwet – sien Hetzel *Legislative law and process: Cases and materials* (1980) 780 ev; Keefe en Ogul *The American legislative process: Congress and the states* (1985) 313 ev; Watson "The President's veto power" 1988 *Annals of the American Academy of Political and Social Science* 36 ev). Die Amerikaanse President moet sy besluit binne tien dae neem. Indien hy nie binne die spertyd reageer nie, word die wetsontwerp sonder meer wet, tensy die Kongres verdaag het en die President sodoende verhinder om die wetsontwerp terug te stuur (*Okanogan v United States* (1929) 279 US 655 – die sg *Pocket Veto*-saak).

Die bevoegdheid van die Suid-Afrikaanse President om 'n wetsontwerp terug te stuur, kom nie soos in die VSA op 'n algemene veto neer nie, omdat sy oordeel net tot die grondwetlikheid van die wetsontwerp beperk is. Wat wel verander het in vergelyking met die vorige posisie in Suid-Afrika, is dat die President se terugverwysingsbevoegdheid nie beperk is tot prosessuele tekortkominge nie. Hy kan 'n wetsontwerp ook terugverwys op grond daarvan dat dit inhoudelik met die Grondwet onbestaanbaar is. Dit is wat in die onderhawige geval gebeur het. Dit is 'n vraag of die President 'n wetsontwerp effektief kan kelder deur die bekragtiging daarvan bloot te vertraag. Artikel 237 van die Grondwet bepaal dat alle grondwetlike verpligtinge getrou en sonder versuim

nagekom moet word, waaruit afgelei kan word dat hy 'n wetsontwerp nie op 'n onredelike wyse sal kan vertraag sonder om in botsing met artikel 237 te kom nie. Of die vertraging onredelik is, sal van die omstandighede van elke geval afhang. (In die onderhawige geval is 'n vertraging van meer as tien weke (sien hierbo) klaarblyklik deur geen betrokkene as onredelik beskou nie, maar in die geval van dringende wetgewing sou dit waarskynlik 'n perd van 'n ander kleur gewees het.)

Uniek egter is die bevoegdheid van die President om, indien hy nie met die Parlement se reaksie vrede het nie, die wetsontwerp vir 'n beslissing na die Konstitusionele Hof te verwys. In Duitsland en Oostenryk moet die staatshoof die grondwetlikheid van 'n wetsontwerp wat aan hom voorgelê word, verifieer, maar dit word nie vertolk as 'n substantiewe bevoegdheid nie en in Ierland kan die staatshoof 'n wetsontwerp vir 'n maksimum van 60 dae terughou in afwagting van 'n opinie van die hooggeregshof aangaande die grondwetlikheid daarvan (Malherbe (1991) 511). Die Indiese President kan die hooggeregshof vir 'n opinie oor 'n wetsontwerp nader (a 143 van die Grondwet) en in Kanada kan die hooggeregshof ook adviserende opinies oor konsepwetgewing gee (Hogg *Constitutional law of Canada* (1992) 216). In Frankryk mag geen "organiese" wet (wette oor sekere grondwetlike instellings en finansies) gepromulgeer word alvorens die *Conseil constitutionnel* 'n bevinding aangaande die grondwetlikheid daarvan gemaak het nie (a 46, 61 en 62 van die Franse Grondwet). Dit is egter 'n verpligte prosedure ten opsigte van 'n reeds aangenome en bekragtigde wet en die Franse President het geen diskresie in daardie verband nie.

Die Suid-Afrikaanse President se terugverwysingsbevoegdheid is 'n betekenisvolle illustrasie van sy betrokkenheid by die nasionale wetgewende proses, van sy verantwoordelikheid as staatshoof en van sy verpligting om die Grondwet te gehoorsaam, eerbiedig, onderhou en handhaaf (sien die ampseed in Bylae 2 van die Grondwet). Deur die terugverwysing van die Drankwetsontwerp het die President die sinvolheid van dié bevoegdheid as 'n effektiewe kontrolemaatreël in 'n demokratiese stelsel onderstreep.

1 2 Die hof se vertolking van artikel 79

Volgens die Konstitusionele Hof moes drie verbandhoudende vrae beantwoord word by die toepassing van artikel 79 (par 11): (1) Moet die hof slegs die President se voorbehoude beoordeel, of moet daar wyer gekyk word? (2) Moet die hof na elke bepaling ondersoek instel ten einde te kan beslis of die wetsontwerp in sy geheel grondwetlik is? (3) Skakel die hof se beslissing oor die grondwetlikheid van die wetsontwerp latere geregtelike hersiening van die wetsontwerp uit? In die beantwoording van die eerste vraag wys die hof daarop dat artikel 79 vereis dat die President sy voorbehoude duidelik aan die Parlement moet uiteensit en dat hy slegs 'n wetsontwerp na die hof kan verwys indien die Parlement sy voorbehoude nie volledig geakkommodeer het nie. Daaruit kan afgelei word dat die President 'n wetsontwerp slegs *met betrekking tot sy voorbehoude* na die hof kan verwys vir 'n beslissing aangaande die grondwetlikheid daarvan *en* dat die hof derhalwe deur artikel 79 gemagtig word om 'n beslissing te gee slegs ten opsigte van die President se voorbehoude (par 14). Daaruit volg tweedens dat die hof se funksie nie is om finaal te beslis of 'n wetsontwerp in sy geheel met die Grondwet strook nie. Die funksie van die hof ingevolge artikel 79 staan gevolglik in teenstelling met die sertifiseringsfunksie wat die hof ten opsigte van die Grondwet verrig het (par 16). Derdens skakel 'n beslissing van die hof ingevolge artikel 79 nie latere geregtelike hersiening van die wet uit nie, behalwe ten

opsigte van daardie aspekte waaroor die hof in verband met die President se voorbehoude 'n beslissing gegee het (par 20). Laastens wys die hof daarop dat artikel 79 'n proses veronderstel waarby die Parlement 'n aktiewe deelnemer is en dat dit daarom gepas is dat die hof die politieke partye in die Parlement en enige ander belanghebbende die geleentheid bied om voorleggings oor die aangeleentheid aan die hof te maak.

2 Die beslissing

2 1 Die gesagsverdeling in die Grondwet

Die beslissing het hoofsaaklik betrekking op die grondwetlike verdeling van bevoegdhede tussen die nasionale en provinsiale sfere van regering. Hierdie gesagsverdeling bly een van die vernaamste bronne van grondwetlike geskille tussen owerheidsorgane en ten spyte van die voorskrif in artikel 42(3) van die Grondwet dat regerings alle ander middele moet uitput voordat hulle 'n hof nader om die geskil te besleg, word hierdie geskille gereeld tot in die howe gevoer. (Sien die pleidooi van Van Wyk "Subsidiarity – in South Africa?" in Konrad Adenauer-Stiftung *Seminar report: Constitution and law III* (1999) 53 55 dat die howe meer moeite behoort te doen om toe te sien dat die partye in so 'n geskil ander remedies uitput voordat hulle 'n hof nader.) Die gesagsverdeling tussen die nasionale en provinsiale regeringsfere, wat betref hulle wetgewende bevoegdhede, kan soos volg opgesom word (sien die volledige bespreking deur Rautenbach en Malherbe (1999) 278 ev en Chaskalson en Klaaren "Provincial government" en Klaaren "Federalism" in Chaskalson, Kentridge, Klaaren, Marcus, Spitz en Woolman *Constitutional law of South Africa* (1999) 4–1 ev; 5–1 ev):

(a) Die Parlement het wetgewende gesag oor enige aangeleentheid, insluitende die konkurrente funksionele terreine wat in Bylae 4 van die Grondwet genoem word waaroor die Parlement en die provinsies wetgewende gesag deel, maar met die uitsluiting van die funksionele terreine in Bylae 5 waaroor die provinsies eksklusiewe wetgewende gesag het (a 4(1)(a)(ii)).

(b) Die Parlement kan deur middel van wetgewing in 'n eksklusiewe funksionele terrein van die provinsies ingryp wanneer dit nodig is om nasionale veiligheid, ekonomiese eenheid of noodsaaklike nasionale standaarde te handhaaf, minimum standaarde vir die lewering van dienste te bepaal, of onredelike optrede deur 'n provinsie wat nadelig is vir die belange van 'n ander provinsie of die land as geheel, te voorkom (a 44(2)).

(c) Die provinsies het eksklusiewe wetgewende gesag oor die funksionele terreine in Bylae 5 genoem en het konkurrente wetgewende gesag saam met die Parlement oor die funksionele terreine in Bylae 4 genoem (a 104(1)(b)(i) en (ii)). 'n Provinsiale wetgewer het ook eksklusiewe bevoegdheid om 'n grondwet vir daardie provinsie aan te neem wat ten opsigte van wetgewende en uitvoerende strukture en prosedures mag afwyk van die bepalings daaroor in die Grondwet (sien *In re: Certification of the Constitution of the Western Cape, 1997* 1997 9 BCLR 1167 (KH), 1997 4 SA 795 (KH); *Premier of the Province of the Western Cape v Electoral Commission* 1999 11 BCLR 1209 (KH)).

(d) Indien nasionale en provinsiale wetgewing oor 'n konkurrente aangeleentheid bots, geniet die nasionale wetgewing wat eenvormig in die hele land geld, voorrang bo die provinsiale wetgewing indien dit aan enige van die volgende voorwaardes voldoen (a 146):

(i) Indien die nasionale wetgewing handel oor 'n saak wat nie doeltreffend deur die provinsies afsonderlik gereël kan word nie.

(ii) Indien die nasionale wetgewing handel oor 'n saak wat ter wille van die doeltreffende regulering daarvan eenvormigheid dwarsdeur die land vereis en die nasionale wetgewing sodanige eenvormigheid voorsien deur norme en standaarde, raamwerke of nasionale beleid te bepaal.

(iii) Die nasionale wetgewing nodig is vir die handhawing van nasionale veiligheid of ekonomiese eenheid, die beskerming van die gemeenskaplike mark ten opsigte van die beweeglikheid van goedere, dienste, kapitaal en arbeid, die bevordering van ekonomiese bedrywighede oor provinsiale grense heen, die bevordering van gelyke geleenthede of gelyke toegang tot regeringsdienste, of die beskerming van die omgewing.

(iv) Nasionale wetgewing geniet ook voorrang indien dit gemik is op die voorkoming van onredelike optrede deur 'n provinsie wat nadelig is vir die ekonomiese, gesondheids- of veiligheidsbelange van 'n ander provinsie of die land as geheel, of die uitvoering van nasionale ekonomiese beleid belemmer. Die voorwaarde dat die nasionale wetgewing eenvormig in die land as geheel moet geld, is nie hier van toepassing nie (Rautenbach en Malherbe (1999) 283).

(e) Artikel 146 tot 149 bevat verskeie bepalings waarin voorrang in die geval van botsings tussen nasionale en provinsiale wetgewing verder gereël word. Dit is veral belangrik om daarop te let dat artikel 146 nie beperkings plaas op die uitoefening van die Parlement en die provinsies se wetgewende gesag nie en dat hulle ongehinderd kan voortgaan om wette oor die konkurrente funksionele terreine aan te neem. Artikel 146 kom slegs ter sprake wanneer 'n botsing voorkom (Rautenbach en Malherbe (1999) 283). 'n Tweede opmerking is dat 'n hofbeslissing dat een wet voorrang bo 'n ander geniet nie laasgenoemde wet ongeldig maak nie. Die wet, of liewer, die betrokke wetsbepaling, het egter geen uitwerking solank die botsing voortduur nie. Dit bly van krag en van toepassing ten opsigte van daardie gedeeltes waaroor geen botsing bestaan nie en sodra die botsing uit die weg geruim is, herleef die wet (sien bv *Papachristoforou v MEC for Finance and Economic Affairs, North West Province* 1998 10 BCLR 1237 (B) en sien die bespreking deur Rautenbach en Malherbe (1999) 285–286).

(f) Die gesagsverdeling tussen die nasionale en provinsiale regeringsfere moet beoordeel word binne die raamwerk van die beginsel van samewerkende regering soos uiteengesit in Hoofstuk 3 van die Grondwet. Die samewerking in goeie trou en die wedersydse ondersteuning wat van elke sfeer vereis word, die grondwetlike verpligting om hulleself geen funksies of bevoegdhede toe te eien behalwe dié wat in die Grondwet aan hulle opgedra word nie, die verpligting om die geografiese, funksionele of institusionele integriteit van regering in 'n ander sfeer te eerbiedig en nie inbreuk daarop te maak nie, en die verpligting om in geskille alle ander middele uit te put voordat hulle die howe nader (a 41(1) en (3)), is voorskrifte wat 'n belangrike invloed op die grondwetlike gesagsverdeling in Suid-Afrika behoort uit te oefen. (Sien die kommentaar in par 2 6 hieronder.)

Die voorgaande is die grondwetlike raamwerk waarbinne die onderhawige beslissing beoordeel moet word. Die bevoegdheid van die Parlement in artikel 44(2) om in bepaalde omskrewe omstandighede wetgewing oor eksklusiewe provinsiale funksionele terreine aan te neem (par (b) hierbo), is veral van belang in hierdie beslissing. Let daarop dat die beslissing dus betrekking het op die toepassing van artikel 44(2) en nie artikel 146 nie, hoewel die vraag na die *nodigheid* van wetgewing in die twee bepalings in beginsel waarskynlik nie verskillende vrae is nie. Soos aangetoon, is die uitwerking van die twee bepalings egter verskillend: In geval van artikel 146 word een wet ondergeskik gestel aan 'n ander sonder om dit ongeldig te verklaar. In geval van artikel 44(2) is die vraag of die Parlement *ultra vires* opgetree het, al dan nie, wat ongeldigheid van die wetgewing tot gevolg kan hê.

2 2 Die President se voorbehoude

Die President se voorbehoude oor die grondwetlikheid van die Drankwetsontwerp is gebaseer op die feit dat dranklisensies ingevolge Bylae 5 van die Grondwet 'n funksionele terrein is wat onder die eksklusiewe wetgewende bevoegdheid van die provinsies ressorteer en dat die President nie met sekerheid kon bepaal of die Drankwetsontwerp deur die Parlement se ingrypingsmagte ingevolge artikel 44(2) geregverdig word nie. Die President verklaar onder meer (par 21):

> "If the legislation is not so necessary then Parliament may not enact legislation dealing with matters falling within a functional area listed in Schedule 5. The question as to whether this legislation is 'necessary' within the meaning of this section and for the purpose set out in section 44(2)(b)–(e) is a question I am unable to answer with certainty even though I am satisfied that the purposes the legislation seeks to achieve are commendable. Whether the particular requirements set out in section 44(2) have been met has proved difficult to determine relying as they do on an assessment of legal, factual and policy considerations and in respect of which there are no constitutional or jurisprudential guidelines. . . . The implementation of this legislation without a clear indication of its constitutionality may be chaotic and could lead, not only to a legislative vacuum if the framework should be set aside, but also to uncertainty in respect of any actions already undertaken thereunder including any registrations duly granted."

Die President se worsteling met die nodigheid van die wetgewing is die presiese oorweging op grond waarvan die Amerikaanse *Supreme Court* in die jongste verlede huiwerig was om in jurisdiksiegeskille tussen die federale en deelstaatregerings betrokke te raak en dit eerder te beskou as 'n kwessie wat deur die politieke proses, spesifiek in die Kongres, waar die deelstate verteenwoordig is, uitgesorteer behoort te word (*Garcia v San Antonio Metropolitan Transit Authority* (1985) 469 US 528 – sien die skerp reaksie wat daar op die beslissing was waarna in Rautenbach en Malherbe (1999) 280 vn 87 verwys word). Die Konstitusionele Hof het in die onderhawige uitspraak nie dieselfde huiwering geopenbaar nie, maar dit is 'n vraag of die hof die nodigheid van die wetgewing volledig deurgetrap het (sien par 2 5 en 2 6 hieronder).

2 3 Die prosessuele vraag

Aangesien wetgewing ongrondwetlik kan wees indien dit volgens 'n ander prosedure aangeneem is as dié wat daarvoor in die Grondwet voorgeskryf word (Rautenbach en Malherbe (1999) 173), het die hof verplig gevoel om eers die bewering van die Wes-Kaapse regering in hierdie verband te oorweeg voordat dit die President se voorbehoude kon ondersoek. Daarmee het die hof inderdaad wyer as net na die President se voorbehoude ondersoek ingestel, maar, verklaar

die hof, "we are prepared to assume that the issue is relevant to those reservations" (par 23). Ingevolge die Grondwet word wetsontwerpe wat die provinsies raak volgens die prosedure voorgeskryf in artikel 76 oorweeg, terwyl wetsontwerpe wat nie die provinsies raak nie, volgens die prosedure voorgeskryf in artikel 75 oorweeg word. Aangesien die Minister van Justisie aangevoer het dat die wetgewing binne die nasionale bevoegdheidsfeer van die Parlement val en dat die mate waarin dit ook met dranklisensies handel bloot insidenteel is tot die hoofoogmerke van die wetgewing, was die Wes-Kaapse regering se standpunt dat as die wetgewing nie ingevolge artikel 44(2) oor 'n eksklusiewe funksionele terrein van die provinsies handel nie, dit ongeldig is omdat dit volgens die artikel 76-prosedure aangeneem is asof dit die provinsies raak.

Die hof wys daarop dat die verskille tussen die artikel 75- en 76-prosedures hoofsaaklik wentel rondom die sterker invloed van die Nasionale Raad van Provinsies in die geval van wetgewing wat die provinsies raak (die a 76-prosedure). Indien die Raad in sulke gevalle 'n wetsontwerp afkeur, moet die Bemiddelingskomitee (a 78) aangestel word om die geskil tussen die huise te besleg. Indien die Raad steeds nie instem nie, kan die wetgewing slegs deurgevoer word indien die Nasionale Vergadering dit met 'n tweederdemeerderheid weer aanneem. 'n Ander verskil is dat in die geval van die artikel 76-prosedure die Raad per provinsie stem en dat minstens vyf provinsies die wetgewing moet steun (a 65(1)). Die Hof verklaar tersyde dat dit uiters formalisties sou wees om in die onderhawige geval die wetsontwerp ongrondwetlik te verklaar op grond daarvan dat dit *bona fide* volgens die artikel 76-prosedure aangeneem is wat juis aan die provinsies in die Raad groter seggenskap daaroor gee en dit sodoende vir die Nasionale Vergadering moeiliker maak om die wetgewing deur te voer (par 26). Die basis waarop die hof die Wes-Kaap standpunt verwerp, is egter artikel 76(3) wat bepaal dat wetgewing oor die konkurrente aangeleenthede in Bylae 4 volgens die artikel 76-prosedure oorweeg moet word. Volgens die hof kan dit beswaarlik betwyfel word dat 'n groot aantal bepalings van die wetsontwerp binne die konkurrente bevoegdheidsterreine van die nasionale en provinsiale regerings val soos dit in Bylae 4 uiteengesit word, spesifiek ten opsigte van handel en nywerheidsbevordering, dat die wetsontwerp dus inderdaad volgens die artikel 76-prosedure aangeneem moes gewees het en dat die Wes-Kaap standpunt dus geen meriete het nie (par 28–29).

Die hof se standpunt in hierdie verband kan sonder meer aanvaar word. Alle gewone wetgewing wat die provinsies raak, moet volgens die artikel 76-prosedure oorweeg word. Dit geld nie net wetgewing oor die konkurrente aangeleenthede in Bylae 4 nie, maar juis ook wetgewing wat ingevolge artikel 44(2) aangeneem word ter ingryping in 'n eksklusiewe provinsiale aangeleentheid in Bylae 5. Sowel artikel 76(4) as artikel 44(2) bepaal dit uitdruklik.

2 4 Ingryping ingevolge artikel 44(2)

Artikel 44(2) spruit uit en stem inderdaad grootliks ooreen met grondwetlike beginsel XXI.2 waarin die nodigheid van die nasionale regering se ingryping in provinsiale aangeleenthede in bepaalde omstandighede erken is. Die beginsel het verwys na ingryping deur middel van "wetgewing of die ander stappe wat in die Grondwet omskryf mag word". Dienooreenkomstig maak artikel 44(2) voorsiening vir ingryping deur middel van wetgewing, terwyl artikel 100 voorsiening maak vir ingryping deur die uitvoerende gesag.

In die Sertifiseringsuitspraak (1996 10 BCLR 1253 (KH), 1996 4 SA 744 (KH)) moes die Konstitusionele Hof beslis of hierdie bepalings met grondwetlike

beginsel XXI.2 strook. Daar is naamlik deur die beswaarmakers aangevoer dat die nasionale regering se ingrypingsbevoegdheid nie van toepassing is op die eksklusiewe provinsiale aangeleenthede in Bylae 5 nie en net betrekking het op die konkurrente funksionele terreine in Bylae 4. Die hof het tereg daarop gewys dat die Parlement in elk geval bevoeg is om wette ten opsigte van die konkurrente aangeleenthede aan te neem en nie verdere magtiging daarvoor nodig het nie. Gevolglik moet grondwetlike beginsel XXI.2 noodwendig betrekking hê op die eksklusiewe provinsiale aangeleenthede (par 255). Die hof maak egter twee belangrike bykomende opmerkings (par 264 en 266, onderskeidelik):

(a) Ingryping ingevolge artikels 44(2) en 100 moet uitgeoefen word onderworpe aan die beginsel van samewerkende regering en spesifiek die voorskrifte in artikel 41(1)(e), (f) en (g). Volgens hierdie paragrawe moet regerings in elke sfeer:

> "(e) die grondwetlike status, instellings, bevoegdhede en funksies van regering in die ander sfere eerbiedig;
>
> (f) hulself geen bevoegdheid of funksies toe-eien behalwe dié wat ingevolge die Grondwet aan hulle opgedra is nie;
>
> (b) hul bevoegdhede uitoefen en hul funksies verrig op 'n wyse wat nie inbreuk maak op die geografiese, funksionele of institusionele integriteit van regering in 'n ander sfeer nie."

(c) Spesifiek ten aansien van die ingrypingsmagte van die Parlement ingevolge artikel 44(2) (maar daar is geen rede waarom die opmerking nie ook van toepassing moet wees op die nasionale uitvoerende gesag se ingrypingsmag ingevolge a 100 nie), verklaar die hof:

> "This power of intervention is defined and limited. Outside that limit the exclusive provincial power remains intact and beyond the legislative competence of Parliament. If regard is had to the nature of the NT [new text] sch 5 powers and the requirements of NT 44(2), the occasion for intervention by Parliament is likely to be limited."

Die hof het met hierdie opmerking waardevolle riglyne neergelê vir die toepassing van artikel 44(2). Selfs, en dalk veral, as die Parlement (of die nasionale uitvoerende gesag ingevolge a 100) ingryp in eksklusiewe provinsiale aangeleenthede, moet die beginsels van samewerkende regering eerstens getrou gevolg en toegepas word. Daar moet dus onder meer uitdruklik nagegaan word of die nasionale regering deur sy wetgewende of uitvoerende optrede steeds die status, instellings, bevoegdhede en funksies van die provinsies eerbiedig, of die nasionale regering sigself dalk bevoegdhede of funksies toe-eien wat nie ingevolge die Grondwet daaraan opgedra is nie, en of die nasionale regering dalk in die proses die geografiese, funksionele of institusionele integriteit van die provinsies aantas. Tweedens moet telkens by die uitoefening van die ingrypingsmagte bepaal word of dit so 'n beperkte geval is soos die hof dit in die Sertifiseringsuitspraak in die vooruitsig gestel het. In laasgenoemde verband verklaar Rautenbach en Malherbe (1999) 299:

> "Die bevoegdhede van die nasionale regering om in provinsiale sake in te gryp, kom verreikend voor, maar is streng omskryf en klaarblyklik bedoel om slegs in uitsonderlike omstandighede uitgeoefen te word."

Hierdie maatstaf kan nie swaarder weeg as die nodigheidstoets in artikel 44(2) self nie, maar skep moontlik minstens 'n drempeltoets wat 'n verpligting op die nasionale regering plaas om twee keer te dink voordat dit die ingrypingsmagte van artikel 44(2) aanwend.

Hieronder word nagegaan of die hof in die onderhawige uitspraak sy eie riglyne nougeset genoeg toegepas het.

2 5 Ontleding van die Drankwetsontwerp

Die hof skets die agtergrond en wetgewende geskiedenis van die wetsontwerp (par 30–32) en toon daarop aan dat die wetsontwerp eerstens die dranknywerheid in drie vlakke verdeel, naamlik die vervaardiging (produksie), verspreiding en kleinhandelverkope van drank. Tweedens verdeel die wetsontwerp die verantwoordelikheid vir die dranknywerheid deur die vervaardiging en verspreiding van drank as nasionale kwessies en kleinhandelverkope as 'n provinsiale kwessie te beskou (par 35–36). Na aanleiding van hierdie indeling plaas die wetsontwerp 'n verpligting op die provinsies om wetgewing aan te neem vir die daarstelling van provinsiale beheer- en appèlliggame. Die registrasie van vervaardigers en verspreiders word ingevolge die wetsontwerp op 'n nasionale basis gereguleer, terwyl dit aan die provinsies opgedra word om aansoeke vir kleinhandelregistrasie te oorweeg.

Volgens die Wes-Kaapse regering is die wetsontwerp ongrondwetlik, eerstens omdat dit die provinsies enige betrokkenheid by die lisensiëring van vervaardigers en verspreiders van drank ontneem en, tweedens, op grond van die mate waarin die wetsontwerp nasionale inmenging toelaat in die provinsies se bevoegdheid om kleinhandellisensiëring te reguleer. Dit is 'n aantasting van die provinsies se eksklusiewe wetgewende bevoegdheid ten aansien van dranklisensies (par 37–38).

Die gewilligheid van die hof om die aangeleentheid in diepte te ondersoek en dit nie bloot as 'n politieke kwessie wat in ander fora beslis moet word, af te maak nie (sien weer die enkele verwysing na beleidsoorwegings in die President se verklaring aangehaal in par 2 2 hierbo), blyk uit die volgende stelling (par 40):

> "The terms of the President's referral, and the conflicting contentions of the Province and of the Minister, require this Court to consider the ambit of national and provincial powers conferred by the Constitution and their interrelation where, as here, the national legislature is said to encroach on an exclusive provincial competence. That requires a determination of the scope of the exclusive provincial legislative competence within the functional area of 'liquor licences', which in turn requires consideration of the national and provincial context against which that exclusive competence is afforded. Whether the Bill, or parts of it, should properly be characterised as a liquor licensing measure must also be considered."

Die hof skets vervolgens ook die grondwetlike raamwerk waarbinne die wetsontwerp beoordeel moet word, onder meer met verwysing na die beginsel van samewerkende regering vervat in Hoofstuk 3 van die Grondwet. Die hof wys op enkele belangrike aspekte:

(a) Wat betref die wetgewende bevoegdhede van die nasionale en provinsiale regerings wys die hof op die potensiaal wat bestaan vir oorvleueling tussen die eksklusiewe provinsiale funksionele terreine in Bylae 5 en die konkurrente funksionele terreine in Bylae 4. As voorbeelde noem die hof (eerstens uit Bylae 4 en tweedens uit Bylae 5) handel en dranklisensies; omgewing en provinsiale beplanning; kultuur-aangeleenthede en provinsiale kultuur-aangeleenthede, asook biblioteke, behalwe nasionale biblioteke; en reëling van padverkeer en provinsiale paaie en verkeer (par 48). 'n Mens sou daarby kon voeg streeksbeplanning en provinsiale beplanning; en dierebeheer- en siektes en veeartsenykundige dienste. (Daarmee word boonop nog glad nie verwys na die oorvleueling wat kan plaasvind tussen funksionele

terreine wat nie in die Bylaes genoem word nie (en dus onder die eksklusiewe gesag van die Parlement val), aan die een kant, en die funksionele terreine wat wel in die Bylaes genoem word, aan die ander kant.)

(b) In geval van konflik tussen provinsiale en nasionale wetgewing oor konkurrente funksionele terreine, geld die bepalings van artikel 146. In geval van konflik tussen provinsiale en nasionale wetgewing oor eksklusiewe funksionele terreine, geld artikel 147(2), wat bepaal dat nasionale wetgewing wat ingevolge artikel 44(2) aangeneem is, voorrang geniet. (Die hof herinner ons nietemin aan die Sertifiseringsuitspraak waarin verklaar is (sien par 2 4 hierbo) dat die Parlement se ingrypingsmagte ingevolge a 44(2) waarskynlik slegs in beperkte gevalle uitgeoefen sal word (1996 10 BCLR 1253 (KH), 1996 4 SA 744 (KH) par 257).) Die punt is egter volgens die hof dat die provinsies se Bylae 4- en Bylae 5-bevoegdhede duidelik van mekaar onderskei moet word (par 51). Die hof verklaar dan ook later:

> "But the exclusive provincial competence to legislate in respect of 'liquor licences' must also be given meaningful content, and . . . the constitutional scheme requires that this be done by defining its ambit in a way that leaves it ordinarily distinct and separate from the potentially overlapping concurrent competences set out in Schedule 4" (par 56).

Dit is onduidelik waarom die hof soveel moeite met hierdie onderskeid doen nadat dit aangetoon het watter oorvleueling kan ontstaan *en* voordat dit later in besonderhede verduidelik waarom die skeiding tussen die Bylae 4- en Bylae 5-aangeleenthede nooit absoluut kan wees nie (par 6 2 – sien hieronder).

(c) Volgens die hof is dit betekenisvol dat artikel 104(1)(b) bepaal dat 'n provinsie slegs vir daardie provinsie wette mag maak, dit wil sê intra-provinsiaal. Dit is juis die grondslag vir nasionale voorrang wanneer 'n aangeleentheid inter-provinsiaal, of dan nasionaal, gereguleer moet word – ongeag of dit oor 'n konkurrente of eksklusiewe saak handel. Daaruit volg dat insoverre die provinsies eksklusiewe wetgewende bevoegdheid het, dit slegs betrekking het op aangeleenthede wat intra-provinsiaal gereël kan word (par 52–53).

Teen hierdie agtergrond, en ook in die lig daarvan dat handel en nywerheidsbevordering konkurrente funksionele terreine is, poog die hof vervolgens in breedvoerige terme om betekenis aan die funksionele gebied "dranklisensies" te gee. Anders as wat die Wes-Kaap aanvoer, moet die begrip beperkend uitgelê word. Bylae 5 verwys nie na drank in die algemeen, of na die drankhandel of die drankbedryf nie, maar net na dranklisensies. Die struktuur van die Grondwet dui daarop dat die nasionale regering die gesag het om die drankhandel in alle opsigte, behalwe ten opsigte van dranklisensies, te reguleer (par 59). Die hof verduidelik weer dat daar oorvleueling tussen die Bylae 4- en Bylae 5-aangeleenthede kan wees en dat die hof verplig is om vas te stel binne watter bevoegdheidsfeer die substansie van wetgewing val, of te wel wat die karakter van die wetgewing is. Dit is naamlik goed moontlik dat 'n bepaalde wet binne meer as een bevoegdheidsfeer kan val (par 63). Dit is 'n redelik voor die hand liggende gevolgtrekking, maar bevestig nietemin die hof se bereidwilligheid om wetgewing in besonderhede te ontleed ten einde 'n jurisdiksiegeskil te besleg.

Die argument lei die hof uiteindelik tot die vraag of die Drankwetsontwerp binne die bevoegdheidsfeer van die Parlement of binne die eksklusiewe sfeer van dranklisensies val (par 65 en 69). Ná 'n ontleding van die bepalings daarvan kom die hof tot die gevolgtrekking dat die wetsontwerp drie oogmerke nastreef:

(a) 'n verbod op oorkruisbeheer tussen die vlakke van produksie, verspreiding en kleinhandelverkope van drank; (b) die daarstelling van 'n eenvormige nasionale stelsel vir die registrasie van vervaardigers en verspreiders van drank; en (c) detail voorskrifte aan provinsiale wetgewers vir die daarstelling van meganismes vir die kleinhandel-lisensiëring van drank (par 70).

2 6 Bevinding

Wat (a) betref, oordeel die hof dat die verbod binne die Parlement se bevoegdheid val om handel te reguleer, maar dat die meganisme wat die wetgewer daarvoor gekies het, naamlik nasionale registrasie, op lisensiëring van drank neerkom. Voordat aaanvaar kan word dat die meganisme binne die Parlement se bevoegdheid val, moet die nasionale regering kan aantoon dat die meganisme "nodig" is soos vereis in artikel 44(2) van die Grondwet, óf dat dit ingevolge artikel 44(3) insidenteel is tot die doeltreffende uitoefening van 'n Bylae 4-bevoegdheid (par 71). (Lg moontlikheid is deur geen party geopper nie en die hof spreek sigself ook nie verder daaroor uit nie – sien par 82.) Ten opsigte van (b) aanvaar die hof dat die produksie en verspreiding van drank duidelik 'n nasionale en selfs internasionale dimensie het. Daarom het die begrip "dranklisensies" soos bedoel in Bylae 5 net betrekking op die kleinhandel en nie op die produksie en verspreiding van drank nie. Dranklisensies in Bylae 5 beteken dus intra-provinsiale dranklisensies (par 75). Die hof gaan verder en verklaar dat selfs indien dranklisensies die lisensiëring van produksie en verspreiding insluit, die nasionale regering daarin geslaag het om aan te toon dat die lisensiëring daarvan vanaf nasionale vlak nodig is vir die handhawing van ekonomiese eenheid soos vereis in artikel 44(2). Die hof motiveer soos volg (par 76):

> "In the context of trade, economic unity must in my view therefore mean the oneness, as opposed to the fragmentation, of the national economy with regard to the regulation of inter-provincial, as opposed to intra-provincial, trade. In that context it seems to follow that economic unity must contemplate at least the power to require a single regulatory system for the conduct of trades which are conducted at a national (as opposed to an intra-provincial) level."

Die hof aanvaar derhalwe die Minister se verduideliking waarom nasionale regulering van lisensiëring in die geval van die produksie en verspreiding van drank nodig is vir die doeleindes van artikel 44(2). In geval van die lisensiëring van kleinhandelverkope geld egter ander oorwegings. Die voorskrifte in die wetsontwerp hieroor slaag nie die toets van artikel 44(2) nie. Die Minister voer aan dat 'n eenvormige benadering belangrik is, maar belangrikheid is nie dieselfde as noodsaaklikheid nie (par 81). Ten opsigte van die lisensiëring van kleinhandelverkope van drank kon die Minister nie daarin slaag om te bewys dat die Parlement die wetsontwerp binne sy bevoegdhede aangeneem het nie en verklaar die hof die Drankwetsontwerp ongrondwetlik. Op dieselfde basis verklaar die hof die bepalings van die wetsontwerp oor mikro-vervaardigers en vervaardigers van sorghumbier ongrondwetlik (par 84).

Dit is waarskynlik nie moontlik om met oortuiging te argumenteer dat die hof tot 'n ander gevolgtrekking moes kom nie. Die hof het, soos vroeër aangevoer, nie weggeskram van die vraag of die wetgewing ingevolge artikel 44(2) nodig is nie en die moedige stap gedoen om die wetsontwerp inhoudelik te ontleed ten einde die vraag te beantwoord. Die leemte in die uitspraak is dat die hof nie die riglyne wat dit self in die Sertifiseringsuitspraak vir die toepassing van artikel 44(2) ontwikkel het (sien par 2 4 hierbo), uitdruklik toegepas het nie. Dit is nie onbelangrik nie. Die betrekkinge tussen die sfere van regering moet geskoei

word op die beginsel van samewerkende regering soos uiteengesit in hoofstuk 3 van die Grondwet (sien Rautenbach en Malherbe (1999) 294–299; sien ook die sterk standpunte van De Villiers "*Bundestreue*: the soul of an intergovernmenatal partnership" Konrad Adenauer-Stiftung *Occasional Papers* Maart 1995; Venter "Aspects of the South African Constitution of 1996: an African democratic and social federal *Rechtsstaat*?" in 1997 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 51 60–63).

Die verwysings in paragrawe 42 en 43 van die uitspraak na die raamwerk wat deur hoofstuk 3 geskep word, sonder om weer die wetsontwerp uitdruklik daaraan te toets, gee nie genoegsaam erkenning aan die beginsels en maatstawwe van hoofstuk 3 nie. Die toepassing van daardie maatstawwe kon verdere stawing aan die hof gebied het vir die bevindinge wat dit wel gemaak het. Die hof kon byvoorbeeld aangetoon het dat in die mate wat die wetsontwerp die produksie en verspreiding van drank reguleer, dit nie funksies vir die nasionale regering toeeien wat nie deur die Grondwet daaraan toegeken word nie en dat dit nie inbreuk maak op die geografiese, funksionele of institusionele integriteit van die provinsies nie (a 44(1)(f) en (g)), maar dat vir sover die wetsontwerp die kleinhandellisensiëring van drank reguleer, dit inderdaad so inbreuk maak. Aangesien die hof in elk geval bereid was om die wetsontwerp inhoudelik te ontleed en te bevind dat die bepalings daarvan in verband met die lisensiëring van die vervaardiging en verspreiding van drank nodig is vir doeleindes van artikel 44(2), sou dit eweneens kon aantoon dat die wetsontwerp een van daardie beperkte gevalle verteenwoordig, soos deur die hof in die Sertifiseringsuitspraak bedoel, waarin ingryping ingevolge artikel 44(2) geregverdig is. Deur die versuim om die riglyne wat dit geskep het, uitdruklik toe te pas, het die hof 'n geleentheid laat verbygaan om die beginsel van samewerkende regering as rigsnoer vir die regulering van die verhouding tussen die sfere van regering verdere beslag te gee. Per slot van rekening is die beginsel, en veral die verpligting tot samewerking wat dit op die regeringsfere plaas, vierkantig van toepassing op die onderhawige geval waarin die hof self klem gelê het op die mate van oorvleueling wat tussen die onderskeie kategorieë funksionele terreine bestaan.

3 Samevatting

Samevattend kan verklaar word dat die uitspraak in die *Drankwetsontwerp*-saak die volgende ten aansien van grondwetlike gesagsverdeling bereik het:

(a) Die hof het die grondwetlike gesagsverdeling tussen die nasionale en provinsiale regeringsfere verder omlyn, spesifiek ten opsigte van die eksklusiewe provinsiale aangeleenthede en die nasionale regering se ingrypingsmagte ingevolge artikel 44(2). Die hof se waarskuwing aangaande die oorvleueling tussen die eksklusiewe en konkurrente funksionele terreine moet veral ter harte geneem word. Dit blyk in die onderhawige saak dat dranklisensies, 'n eksklusiewe provinsiale aangeleentheid, nie los gesien kan word nie van handel en nywerheidsbevordering, wat konkurrente aangeleenthede is. Dit blyk verder dat dranklisensies beperkend uitgelê moet word om net te verwys na kleinhandel-dranklisensies binne provinsies. Die uitspraak bring nie net groter helderheid oor hierdie spesifieke aangeleentheid nie, maar dui op die omsigtigheid en sensitiwiteit waarmee waarskynlik die meeste funksionele terreine in Bylaes 4 en 5 deur die verantwoordelike owerhede gereguleer behoort te word. Dit bied verdere regverdiging vir die noodsaaklikheid van samewerking tussen die regeringsfere ten einde effektiewe regering binne die raamwerk van die grondwetlike gesagsverdeling te verseker.

(b) Die groot mate van oorvleueling tussen die bevoegdhede van die verskillende sfere van regering ten opsigte van konkurrente aangeleenthede, wat reeds sedert die *National Education Policy Bill*-saak in 1995 duidelik geblyk het, is weer eens onderstreep. Wat nou bygekom het, is die oorvleueling wat tussen eksklusiewe en konkurrente aangeleenthede ook kan voorkom en die noodsaaklikheid dat ten opsigte van elke wet wat in geskil geplaas word, die karakter of hoofinhoud van die wet vasgestel moet word ten einde te bepaal binne welke gesagsveld die wet val, met die moontlikheid dat 'n wet onder meer as een gesagsveld kan ressorteer. Hierdie benadering herinner aan die benadering wat in federasies soos Kanada en Australië in soortgelyke geskille gevolg word (sien bv Hogg (1992) 377 ev, spesifiek 383–390, waar hy tov Kanada die kriteria behandel waarvolgens die sogenaamde "pith and substance" van 'n wet bepaal word; Hanks *Constitutional law in Australia* (1991) 218 ev).

(c) Die hof se versuim om meer pertinent op die beginsel en implikasies van samewerkende regering te let en die maatstawwe ten opsigte van samewerking en nie-inmenging wat in hoofstuk 3 uiteengesit word, uitdruklik toe te pas, het egter 'n gulde geleentheid laat verbygaan om jurisdiksiegeskille van hierdie aard binne die kader van samewerkende regering tuis te bring en die invloed van samewerkende regering op interowerheidsverhoudinge praktiese inhoud te help gee.

(d) Die hof het, wetend of onwetend, nie dieselfde huiwering as die Amerikaanse *Supreme Court* geopenbaar nie en het sonder meer voortgegaan om die onderhawige wetgewing inhoudelik te ontleed ten einde die nodigheid van die wetgewing te bepaal en sodoende die geskil te besleg. Die grondwetlike verhouding tussen die sfere van regering is nog nie naastenby met heldere sekerheid bepaal nie en daar lê nog 'n lang pad voor. Die hof se benadering in die Drankwetsontwerp-saak beloof in die algemeen egter voortgesette aktiewe optrede deur Suid-Afrikaanse howe om effektiewe gevolg te help gee aan die bepalings van die Grondwet en daardeur die gesagsverdeling tussen die regeringsfere konkrete inhoud te gee.

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Reason – cold, calculating, unimpassioned reason – must furnish all the materials for our future support and defence. Let those materials be moulded into general intelligence, sound morality, and in particular, a reverence for the Constitution and laws . . . and as truly as has been said of the only greater institution, the gates of hell shall not prevail against it.

Abraham Lincoln (1837)

BOEKE

PERSONALITY RIGHTS AND FREEDOM OF EXPRESSION: THE MODERN *ACTIO INJURIARUM*

by JONATHAN BURCHELL

Juta Cape Town 1998 541 pp

Price R298,00

It is well-nigh impossible to do justice to this comprehensive work by Burchell in a review of this nature. Consequently the focus will be placed on certain specific aspects such as free speech theories, the discussion surrounding the strict liability of the press and other important issues surrounding the debate on free expression and the protection of personality rights.

The book is divided into three parts. In the first the author discusses freedom of expression in the context of comparative law, constitutional law and cyberspace. In the second part, which is the most substantial one, he discusses the law of defamation and the action for the impairment of dignity, and in the third part he deals with remedies such as an award for damages, the granting of an interdict and certain extra-legal options.

One must agree with Burchell where he says that the media should not be placed in a "substantially inferior position to that of an ordinary individual so far as the transfer of information and comment is concerned" (4). This would run counter to the dictates of free speech and the principles of equality and equal protection and benefit of the law. On the other hand, mass media should not be entitled to greater rights of communication than those enjoyed by the ordinary citizen, despite the role played by free expression in a democratic society. He does concede, however, that the acceptance of substantially equal freedom of expression for the media and the individual does not preclude the possibility of developing exceptions to the rules of disclosure applicable to the media. However, these exceptions should be clearly defined and also subject to reasonable limits (6).

In discussing the traditional justifications for freedom of expression, Burchell questions whether these traditional theories should be modified or reinforced to meet the changes brought about by communication in cyberspace. In this regard he makes the interesting point that the virtual marketplace has surely expanded well beyond the sphere originally envisaged by the proponents of the "marketplace of ideas" theory (12).

One of the most interesting propositions put forward in the book is the individual autonomy theory of freedom of expression (also propounded by Dworkin and Baker), namely that freedom of expression is based on individual autonomy and dignity. Freedom of expression is part of individual autonomy – the individual's choice to express himself/herself as he/she wishes, whether in the political sphere

or outside it. However, individual autonomy is part of the wider aspect of personality, namely human dignity. He adopts the approach that dignity is an all-embracing concept, which includes the exercise of freedom of expression, the protection of reputation, privacy and personal liberty.

In the United States of America it is accepted that certain freedoms, notably the right to free speech, freedom of the press, freedom of association and the freedom to vote, are fundamental to the political process and as such require special protection. In other words, free speech is a "preferred freedom" since it has a special role to play in society and in the democratic process. Intrusions by governmental agencies are not permitted, with the result that legislation which impinges on free speech must undergo special scrutiny.

The first Article of the Basic Law of the Federal Republic of Germany, which provides that the dignity of man may not be infringed and that it is the duty of all state power to respect it, is important to the individual autonomy theory of free speech. In that country the concept of the "dignity of man" has been accepted by the Federal Supreme Court as the highest legal value contained in The Basic Law (27 *(BverfGE* 1 6 (1969) and 12 *BverfGE* 45 53).

Although Burchell reflects the German approach to the dignity of man, it must be pointed out that German jurisprudence specifically recognises the constitutive role of the press, which assists in the creation of public opinion. Although the dignity of man is recognised as the highest legal value, it must be remembered that in that country the constitutional rights to freedom of expression and freedom of the press constitute the basis of ordered liberty and democracy by making permanent public discussion of political matters possible.

An analysis of the South African Constitution (Act 108 of 1996) clearly reflects human dignity as one of the founding provisions of the Constitution (s 1). Section 7 provides that the Bill of Rights (as a cornerstone of democracy), enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. Section 10 specifically recognises that everyone has inherent dignity and the right to have this dignity respected and protected. These constitutional provisions lend credence to Burchell's proposition that human dignity is arguably the basis of all human rights (31).

One must agree with Burchell when he says that "expression" in section 16 of the Constitution is not confined to the political sphere or to the elusive pursuit of truth (16). Recognising that freedom of expression is a facet of individual dignity, he says that one may invoke the remedy for impairment of dignity which is part of the *actio injuriarum* "for both censorial infringements of one person's freedom to express *and* infringements of another's dignity as a result of the exercise of the right to free expression"(16). He is of the view that the balance to be struck in the common law between one person's reputation or dignity and another's freedom of expression (or even under the Constitution) strikes a true balance between equally important facets of human dignity. The jurisprudence on the application of the standards of reasonableness in the common law and jurisprudence in terms of the limitations clause under section 36 of the Constitution will, in his opinion, enrich each other.

At Roman law, the *actio injuriarum*, which protects the individual right to dignity, reputation and physical integrity, has always had to balance the conflicting rights of personality rights and free expression. In Burchell's view, the "modern *actio injuriarum*" is the remedy best suited to protecting these rights. Emphasising the importance of a modern *actio injuriarum*, he says that, on the one hand, it is impossible to teach or understand the *actio injuriarum* without a grasp of the

constitutional or freedom of expression dimensions, and that, on the other, the "constitutional free speech theory cannot appropriately be taught or understood without a knowledge of the balance already struck between protection of personality rights and freedom of expression under the *actio injuriarum*" (viii).

According to Burchell, the individual autonomy theory of freedom of expression recognises and accommodates the merits of the marketplace of ideas and the democratic process theories. He concedes that freedom of expression is a vital component of both the democratic process and individual self-fulfilment, but says that it is nevertheless merely a facet of human dignity (17). To elevate freedom of expression to an absolute right or even to a position of pre-eminence in a hierarchy of rights detracts from the true origin of the right freely to express one's views or opinions through words or conduct. Self-esteem, respect and individual privacy make up the totality of human dignity. Freedom of expression does not trump all other individual rights – it is, like these other rights, subject to reasonable and justifiable limits which in turn must reflect the dictates of freedom, equality, democracy and dignity.

One must agree with Burchell that freedom of expression should not be elevated to an absolute right or be regarded as a "preferred freedom". To do so, simply would not accord with South African jurisprudence. However, it is difficult to reconcile Burchell's individual autonomy or dignity theory with the idea of press or media freedom. He agrees that his theory of freedom of expression which is located in the concept of individual autonomy or dignity does not easily translate to the idea of press or media freedom (18). His argument in this regard is that even though the media are usually viewed as a faceless whole, the individual journalists and editors nevertheless exercise their rights or autonomy in publishing information.

To some extent one's preference for one or other of the three major theories of freedom of expression indicates one's approach to the vertical/horizontal debate surrounding the operation of the provisions of the bill of rights on the common law. Verticalists would tend to support the marketplace or the democratic process model of freedom of expression (or both) with the government/official seen as the major source of interference with freedom of political expression. Horizontalists would prefer the individual autonomy theory. If freedom of expression as a manifestation of individual autonomy or dignity is to have significance it must be protected against government and private individuals or institutions. Burchell examines the most important South African case law on the vertical/horizontal debate in chapter 4. One must bear in mind that the uncertainty regarding the impact of the bill of rights on common law and customary law has largely been eliminated by the inclusion of section 8(2) of the 1996 Constitution. In chapter 2 Burchell outlines free speech jurisprudence in the United States of America as well as the limitations to speech such as "low value" speech, "fighting words" and "commercial" speech.

In chapter 4 he discusses broad issues of freedom of expression which impact on concepts of dignity, privacy and reputation. In acknowledging that both Dworkin and Baker give a position of pre-eminence to freedom of expression, he says that if freedom of expression is a facet of the broader right to dignity, then it cannot be pre-eminent: it is as important as the other facets of human dignity (31). Once it is accepted that freedom of expression is no more important than other human rights, the way is clear to balance the right to free expression against other rights. He then includes an insightful discussion of hate speech and pornography in the context of the right to dignity.

In chapter 6 Burchell tackles the question whether a constitutional tort or delict should be developed, and the question of constitutional damages where human rights abuses occur. He considers it unnecessary to adopt a remedy for "a constitutional delict" and prefers the ordinary remedy under the common law for impairment of dignity (116). Relying on his broad approach to the concept of dignity, Burchell says that the common law provides a viable and reasonably well-developed remedy for impairments of dignity. He concedes that if the infringement of some of the rights contained in the bill of rights cannot be translated into impairments of dignity, there may be a need to "craft a limited version of a 'constitutional delict' for South Africa" (116).

In his discussion of freedom of expression in cyberspace Burchell points out the inherent difficulty that the common law of delict has to keep pace with constitutional complexities and modern technology. In his view the law of delict may have to take one of two routes:

> "[I]t may have to accommodate cyberspace by making a specific exception, allowing greater freedom of expression over the Internet, or it may have to 'assist' in policing the system"(121).

He questions whether a service provider is in the same position as a public library or news vendor. If the answer is in the affirmative and if the South African law of defamation applies in cyberspace, the appropriate fault element will be intention or negligence. He argues, however, that the dissemination of matter via the Internet is analogous to publication in the traditional media, and could be subject to the same requirements of reasonableness/unreasonableness as those laid down in *National Media Ltd v Bogoshi* 1998 4 SA 1195 (SCA). He accepts that information published via the Internet forms part of the mass media (because of the extent of the distribution), but rejects the view that those who facilitate distribution via the Internet should be subject to no-fault (strict) liability for publishing defamatory matter or invading privacy in cyberspace. A strict liability test would strangle the Internet (126).

Another very interesting question is where publication must be deemed to take place, since communication through cyberspace cuts across national and geographical boundaries. In the final analysis, the question is whether the vast interactive potential of the Internet, which provides for immediate replies, corrections and other participation, allows for greater leeway for publications on the Net.

In part 2 of the work, Burchell discusses the law of defamation and the action for impairment of dignity in the light of his approach that dignity is an all-embracing concept, which includes freedom of expression and the protection of reputation, privacy and personal liberty.

In chapter 10 he discusses who may and may not sue for defamation and in chapters 11 to 15 he gives an overview of the law of defamation and discusses the elements of defamation, namely publication, the defamatory words or conduct, reference to the plaintiff and causation.

Section G of part 2, dealing with the general criterion of unlawfulness and the defences excluding unlawfulness, constitutes a very substantial section of the book, extending from pages 207 to 300. He includes a long extract from the important decision in *National Media Ltd v Bogoshi* 1998 4 SA 1195 (SCA), which rejected strict or no-fault liability of the mass media as laid down in *Pakendorf v De Flaningh* 1982 3 SA 146 (A). His insightful comment on the judgment encompasses a number of interesting points, including the following:

- The dictates of freedom of expression may be accommodated within the general criterion of lawfulness.
- The central issue of a defamation case is whether the publication was unlawful and this unlawfulness is determined in terms of the criterion of reasonableness.
- This test of reasonableness, which demands a high degree of circumspection on the part of editors and editorial staff, includes factors such as the time and manner of publication, the status or degree of public concern in the information, its political importance, the tone of the publication, the reliability of its source, the steps taken to verify the information and whether the person referred to has been given and opportunity to verify, comment on or reply to the allegation.
- The unlawfulness investigation includes, but is broader than, the negligence enquiry.
- The defendant bears the onus of proving a defence excluding unlawfulness on a preponderance of probability.
- The judgment in *Bogoshi* is based on the common law rather than an evaluation of the constitutional emphasis on freedom of expression.
- On a constitutional level, the term "dignity" is of central importance in the bill of rights and includes reputation. In this case Hefer JA found that his conclusion on the common law in *Bogoshi* is compatible with constitutional imperatives.

Burchell points out that the *Bogoshi* case set broad, realistic and workable standards of reasonableness and due diligence for the media, but failed to make a clear conceptual distinction between the inquiry into unlawfulness and negligence respectively. In his view, the decision should be seen to reaffirm the role of the unlawfulness element as the host environment for accommodating the demands of freedom of expression under the criterion of unreasonableness, and to emphasise a fault criterion of negligence for the media, which may overlap with the unlawfulness investigation in some instances, but requires independent recognition. In other words, fault is a requirement for the liability of the individual and the media. In the case of the individual, intention is required, but negligence will suffice in the case of the media. The discussion of this case will prove to be of immense value to students and practitioners alike, or any persons involved in the media.

Section H deals with the requirement of fault and section I with the impairment of dignity. In the latter Burchell discusses the elements of liability and the potential scope of the modern action for impairment of dignity: recognised categories of impairment of dignity by words or conduct and privacy. He includes a very important aspect of privacy in his discussion, namely data protection. In both sections the discussion is based on leading judicial decisions dealing with the issues in question. This section will also be very useful to students and practitioners.

It is clear from this brief discussion that one can but touch on some of the issues which Burchell raises. One's approach to a review of this book will depend largely on one's subject interest: the issues which have been concentrated on relate more to the freedom of expression debate than to the law regulating the impairment of dignity. However, whatever the point of departure, this work will provide a number of valuable insights into the difficulties inherent in balancing the right to freedom of expression against the right to reputation and dignity. Those lawyers who have long felt uneasy about the position of the mass media in society and the strict liability of the media, will welcome Burchell's insightful discussions.

Readers of the book, whether they are practitioners or students, will appreciate the way in which he extracts and cites relevant passages from leading judicial decisions.

These extracts are placed in the appropriate place to illustrate both the legal principles involved and the legal arguments he develops. He homes in on the principles enunciated by the court and then provides his own excellent and penetrating comment on the principles in issue. The book is well written and difficult legal concepts are explained in a simple uncomplicated fashion. It is highly recommended to practitioners and students alike in that it provides good insight into the legal principles governing freedom of expression and the protection of personality rights.

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Principle is not very easy to define. We have to avoid on the one hand the rock Scylla where sits the austere figure of Austin and on the other the whirlpool Charybdis where some modern theorists for ever go round in circles.

Lord Reid 1972–1973 Journal of the Society of Public Teachers of Law 26.

HULDEBLYK AAN HOOFREGTER ISMAIL MAHOMED

Die eerste hoofregter om ingevolge die 1996-Grondwet aangestel te word, regter Ismail Mahomed, is op 17 Junie 2000 in die ouderdom van 68 jaar oorlede. Regter Mahomed is in1931 in Pretoria gebore, die oudste van ses kinders. Hy behaal die grade BA en BA (Honneurs) (Politieke Wetenskappe) met lof en voltooi die LLB aan die Universiteit van die Witwatersrand in 1956. Hy sluit in 1957 by die Johannesburgse balie aan en word in 1957 as seniorconsultus aangestel. Hy het as praktisyn veral bekendheid verwerf vir sy kennis van die Wet op Groepsgebiede en vir sy rol in politieke verhore waar hy dikwels as regsverteenwoordiger van anti-apartheid aktiviste opgetree het.

Hy was verder ook betrokke by grondwetlike ontwikkeling in Namibië, later as regter (1991–1996) en hoofregter (vanaf 1993). Verder was hy 'n regter van die Swazilandse appèlhof van 1979–1996 en van die appèlhof van Lesotho van1982–1996, en word in 1992 as President van laasgenoemde hof aangestel. In 1991 word hy as regter van die Hoggeregshof van Suid-Afrika (Transvaalse Provinsiale Afdeling) aangestel en in 1993 as waarnemende appèlregter. Toe die eerste konstitusionele hof in 1994 in Suid-Afrika ingestel is, word Mahomed as regter aangestel en as adjunk-president in 1995, waar hy gedien het totdat hy in 1997 as hoofregter aangestel is.

Daarbenewens was regter Mahomed ook die voorsitter van die Suid-Afrikaanse Regskommissie en die Regterlike Dienskommissie. Onder die eerbewyse wat hom toegeval het, was ere doktorsgrade van die Universiteite van Delhi, Pennsylvanië, Natal, Pretoria, die Witwatersrand, Kaapstad en die Nasionale Universiteit van Indië, Bangalore.

Ismail Mahomed was not only South Africa's first black chief justice; he was also the first black senior counsel and the first black judge to be appointed. He had an all-consuming passion for the law and for the achievement of justice in South Africa and was known as a relentless workaholic. As judge, later deputy president, of the first Constitutional Court of South Africa and as chief justice of this country, he made a considerable and important contribution to the development of our constitutional jurisprudence. It is clear from the reported cases that he was committed to the cultivation of a human rights culture permeated with the ethos and values espoused in the Constitution. A gifted orator, his often flamboyant verbal style is reflected in many of his judgments. Perhaps his most often quoted dictum is the one from the Namibian case of *S v Acheson* 1991 2 SA 805 (NmSC) in which he described a constitution as

> "'a mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government".

Among his other dicta there are the following:

> "Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated . . .

> [The] truth, which the victims of repression seek so desperately to know, . . . is much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve . . . With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the 'reconciliation and reconstruction' which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue [to the 1993 Constitution]" (*Azanian Peoples Organisation (AZAPO) v President of the RSA*);

and:

> "What is patent from the preamble, the postscript and the substance of the [1993] Constitution is a very clear and eloquent commitment to the creation of a defensible society based on freedom and equality setting its face firmly and vigorously against the racism which has dominated South African society for so long and the repression which became necessary to perpetuate its untenable ethos and premises. To leave individuals free to perpetuate advantages, privileges and relations, quite immune from the discipline of Chapter 3, would substantially be to allow the ethos and pathology of racism effectively to sustain a new life, subverting the gains which the Constitution seeks carefully to consolidate" (*Du Plessis v De Klerk* 1996 3 SA 850 (CC)).

Ander uitsprake waarby regter Mahomed as regter van die konstitusionele hof betrokke was, is die volgende: *S v Makwanyane* 1995 3 SA 391 (KH), waar die konsitusionele hof eenparig beslis het dat die oplegging van die doodvonnis vir moord met die 1993-grondwet onbestaanbaar was; *Shabalala v Attorney-General, Transvaal,* 1996 1 SA 725 (KH), waarin die regte van 'n beskuldigde om toegang te verkry tot dokumente in 'n polisiedossier uitgebrei is; en *Fraser v Children's Court, Pretoria North* 1997 2 SA 253 (KH), waarin die regte van ongehude vaders by aannemingsverrigtinge erken is. As hoofregter was hy verantwoordelik vir die beslissing van die appèlhof in *Amod v Multilateral Motor Vehicle Accident Fund* 1999 4 SA 1319 (HHA), waar die hof die gemenereg ontwikkel het om toe te laat dat 'n weduwee wat volgens Islamitiese reg getroud was, 'n eis om skadevergoeding instel vir verlies gely as gevolg van die dood van haar man in 'n motorongeluk. Verder was daar *Speaker of the National Assembly v De Lille* 1999 4 SA 847 (HHA); *Beinash v Wixley* 1997 3 SA 721 (HHA); *S v Chapman* 1997 3 SA 341 (HHA); *Fedsure Life Assurance Ltd v Greater Johannesburg Metropolitan Council* 1998 2 SA 1115 (HHA); *Uitenhage Municipality v Molloy* 1998 2 SA 735 (HHA); *Moodley v Umzinto North Town Board* 1998 2 SA 188 (SCA); *S v Salzwedel* 2000 1 SA 786 (HHA).

It is difficult to predict how history will judge Ismail Mahomed. It was hoped that some of the discomfort (for want of a better word) in the relationship between the Constitutional Court and the Supreme Court of Appeal could have been addressed during his regime. Clearly, Mahomed's illness and premature death have had an effect on what he could have achieved during his tenure. It is equally clear that the painful experiences he endured during the apartheid era must have exerted an influence (both positive and negative) as well. One wonders, finally, whether the office of Chief Justice really compensated for the disappointment of missing out as President of the Constitutional Court, and whether the Constitutional Court was not, in fact, the best place for him to have made a lasting contribution. (On the other hand, of course, it could equally well be argued that it is in the sphere of issues that

are not patently of a constitutional nature, that the influence of the ethos of the Constitution is often most needed – see the extract from his judgment in *De Klerk v Du Plessis* above.)

Dit is uiters jammer dat hierdie buitengewone en begaafde man deur politiek en swak gesondheid die geleentheid ontneem is om sy stempel op die Suid-Afrikaanse reg af te druk in die mate waartoe hy in staat was.

GRETCHEN CARPENTER

REDAKSIONELE KOMMENTAAR

Een van die kenmerke van die regswetenskap is sy relatiewe "gereedskaploosheid". Die beoefenaars van die mediese wetenskap, die verskillende natuurwetenskappe, en selfs baie van die sosiale wetenskappe, is bekend vir die verskeidenheid van instrumente en gereedskap wat hulle gebruik. Daarteenoor het die juris in die reël net sy of haar boeke. Toegegee, moderne juriste maak ook baie van moderne rekenaartegnologie gebruik, maar dan tog maar hoofsaaklik om vinniger toegang te kry tot dit wat hulle vroeër in elk geval in boeke sou gesoek het. (Sekerlik is die juris se rekenaargebruik op 'n totaal ander vlak as byvoorbeeld dié van 'n ingenieur of grafiese ontwerper.) Toegegee, die moderne juris maak baie gebruik van moderne kommunikasiemiddele en vervoer. Toegegee, die moderne juris moet dikwels kennis neem van die resultate wat die beoefenaars van ander wetenskappe met hulle instrumente en gereedskap bereik het. Maar ek dink die meeste lesers sal my gelyk gee dat die gemiddelde juris – in vergelyking met wetenskaplikes uit baie ander velde – 'n relatief "gereedskaplose" wetenskaplike is.

Op 'n besondere manier is taal die "gereedskap" van die regsgeleerde. Die regte en verpligtinge van staat en onderdaan en eiser en verweerder vind uitdrukking in taal. Die bronne wat daagliks deur regsgeleerdes geraadpleeg word, het in taal neerslag gevind. Taal is in 'n sin die wapen wat litigante teen mekaar gebruik, en taal is die medium waarin die uitspraak van die hof beslag kry. Kontrakte en testamente word in taal gegiet . . . en so kan voorbeelde vermenigvuldig word.

Daar is dan ook regswetenskaplikes wat op 'n hoë vlak die wisselwerking tussen reg en taal ondersoek en bestudeer. Ek wil nie op dié vlak 'n bydrae lewer nie (en is ieder geval nie daartoe bevoeg nie). Die rede waarom ek so pas op die belang van taal vir die regsgeleerde gewys het, is omdat ek op 'n heel eenvoudige vlak kommentaar wil lewer op 'n redelik onlangse verskynsel wat my verontrus: dat 'n mens (sonder dat jy spesifiek probeer) in die laaste tyd heelwat tikfoute in regstekste soos hofverslae en wette raak-lees.

Voor ek nou verder oor hierdie saak kommentaar lewer, wil ek myself net eers in die rede val. As lid van die redaksie van die *Tydskrif* is proeflees een van my hooftake – en ek moet toegee dat tikfoute verstommend maklik deurglip. Gedagtig daaraan dat 'n mens met dieselfde maat gemeet gaan word as dié waaraan jy ander gemeet het, is dit met 'n mate van huiwering dat ek sê wat ek op die hart het. Tien teen een sal daar nou die gruwelikste tikfout in hierdie einste redaksionele kommentaar insluip en sal die rooiste gesig my eie wees . . . Verder plaas ek graag op rekord dat ek nog altyd teen venynige kritiek gekant was. Vir die ontwikkeling van regspleging en regswetenskap is gesonde kritiek natuurlik onontbeerlik, en die *Tydskrif* was nog altyd 'n forum vir sodanige kritiek. Nietemin dink ek dat dit gewoonlik makliker is om iets wat deur 'n ander tot stand gebring is, te kritiseer, as om self iets nuuts tot stand te bring. En daarom glo ek dat dit goed is om kritiek altyd met 'n goeie dosis egte waardering te balanseer.

Met dit alles gesê, wil ek eerstens my waardering betuig teenoor die instansies en individue wat regstekste aan Suid-Afrikaanse regsgeleerdes in die besonder, maar ook die Suid-Afrikaanse publiek in die algemeen, beskikbaar stel. Dit is 'n groot en noodsaaklike taak. Ek glo nie dit is oordrewe om te beweer dat ons regstelsel

daarsonder nie behoorlik sal kan funksioneer nie. Dan wil ek tog 'n pleidooi rig – aan almal wat met die skepping en verspreiding van regstekste gemoeid is – vir noukeuriger taalgebruik. My pleidooi is nie vir 'n dogmatiese navolging van onbuigsame reëls oor sinskonstruksie nie. Ek dink my pleidooi is veral vir leesbaarheid en verstaanbaarheid. Sommige tikfoute skep net 'n slordige indruk – wat op sigself al irriterend is – maar in sommige gevalle kan die werklike betekenis heeltemal verlore gaan.

'n Kollega wys my 'n rukkie gelede 'n verrassende regsteks (om dit sagkens te stel). Dit kom uit 'n Afrikaanse vertaling van die hoogste reg van die land – die Grondwet – en lees soos volg:

> "35. Gearresteerde, aangehoue en beskuldigde persone. – (1) Elkeen wat weens 'n beweerde oortreding gearresteer word, het die reg om –
>
> (a) te swyg;
>
> (b) onverwyld *vernietig* te word . . ."

(My beklemtoning. Dit blyk dat die bedoelde persone eintlik die reg moet hê om verwittig te word – van hulle swygreg en die gevolge van die uitoefening daarvan.)

Ek leen graag 'n stukkie taalgereedskap by die Engelssprekende juris en sê: I rest my case.

Noukeurige taalgebruik is belangrik vir regspleging en regswetenskap.

JOHANN KNOBEL
Assistent-redakteur

(Johann Knobel sal vir die volgende jaar met studieverlof wees, wat moontlik vir hom logistiese probleme as assistent-redakteur kan veroorsaak. Professor Margaret Beukes van die Departement Staats- en Volkereg, Universiteit van Suid-Afrika, het goedgunstiglik ingestem om vir hierdie tydperk in sy plek waar te neem – Redakteur.)

Die spanningsveld tussen regsekerheid en geregtigheidsekerheid: 'n Regsantropologiese evaluasie van die evolusie van die *stare decisis*-reël*

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Professor in Regspluralisme en Regshermeneutiek aan die Universiteit van Pretoria

Artikel opgedra aan professor FJ van Zyl met sy 70ste verjaardag op 20 Augustus 2000

Professor Van Zyl se entoesiasme en passie vir regsteorie, en bygevolg die verklarende regswetenskap, het 'n wydreikende effek op my benadering tot die reg en die regswetenskap (asook op dié van vele van sy ander studente) gehad. Sinvolle regsontwikkeling voorveronderstel telkens 'n hoër vlak van abstraksie, met ander woorde 'n meer verfynde regsteorie wat die gevolg van 'n kritiese evaluasie van die bestaansreg van, dit wil sê die rasionele en geregtigheidsmatige bestaansmotivering vir, 'n regsnorm of kompleks van regsnorme is. Regsteoretiese stimulering beliggaam hiervolgens die enigste sinvolle grondslag vir effektiewe en langtermyn betekenisvolle regsopleiding en -ontwikkeling. Dit beliggaam ook die potensiaal om die kreatiewe in individue te aktiveer.

SUMMARY

The field of tension between legal certainty and certainty of justice: An anthropo-legal evaluation of the evolution of the *stare decisis* rule

Historically, the origin of the *stare decisis* rule can be traced to both the Roman-European and English common law. It is pointed out that the concept of justice is a dynamic phenomenon. The *stare decisis* rule, being founded on notions of justice, therefore, also has a dynamic nature. The content of the *stare decisis* rule in South Africa is expounded in this contribution, and the functions traditionally ascribed to the rule explained. The effect of the evolution of knowledge, cognitive anthropology and mutation of values in human society on the *stare decisis* rule is investigated. A preference is expressed for the more relaxed and justice-friendly manifestation of the *stare decisis* rule in German and Dutch law.

* 'n Deel van hierdie navorsing is in 1997, asook in 1999, met die finansiële steun van die Alexander von Humboldt-Stiftung en die Universiteit van Pretoria aan die Ludwig Maximilians-Universität in München (Duitsland) onderneem. 'n Verdere deel van dié navorsing is in 1998 met die finansiële steun van die Universiteit van Pretoria onderneem aan die Northwestern University (Chicago, Illinois) en die Harvard University (Cambridge, Massachussetts) in die VSA, asook aan die Vrije Universiteit van Amsterdam in Nederland. Die menings hierin uitgespreek, word nie noodwendig deur dié instellings gedeel nie.

1 INLEIDING

Padden[1] verwys na *stare decisis* as "a court's policy to follow its precedent unless there are good reasons to deviate from it". Die begrip *stare decisis* is 'n afkorting van die Latynse frase *stare decisis et non quieta movere* (om te staan by wat gesê is en om nie die rustigheid te versteur nie).[2] Rehnquist[3] wys tereg daarop dat, aangesien gewoonte die mees rudimentêre vorm van reg beliggaam en dit wesenlik 'n gehoorsaamheid aan voorafgaande presedente beteken, die bestaan van die *stare decisis*-reël glad nie as 'n verrassing kom nie. Dit verklaar meteens ook waarom dit nie tot *common law*-lande beperk is nie.[4]

O'Keefe[5] beweer dat *stare decisis* 'n regsbeginsel en nie 'n regsleerstuk is nie en vervolg:

> "No firm rules guide its application; no judicially discoverable common law origins articulate its rationale; and no legislative history reveals its purpose. Often, the appropriateness of its use can only be determined subjectively by reference to one's own political and judicial philosophy, or objectively by an historical sense of the relevant social mores. Accordingly, its invocation or rejection is seldom satisfactorily explained."

Sonder om in eindelose en soms uitsiglose tegnikaliteite en fiksiedenke, wat so tipies van veral tradisionele Anglo-Amerikaanse regsdenke is, te verval, kan bloot opgemerk word dat die *stare decisis*-reël self 'n inherente dinamiek het, met ander woorde die *stare decisis*-reël self is in finale sin nie onderworpe aan ('n rigiede) *stare decisis* nie.

Die gesaghebbende element of bindingskern van die *stare decisis*-reël is die *ratio decidendi*, dit wil sê die rede of motivering vir 'n beslissing. Hoewel die konkrete beslissing van die hof die betrokke gedingspartye bind, het slegs die (abstrakte) *ratio decidendi* wyer regskrag, met ander woorde dit het 'n funksie wat die betrokke geskil transendeer.[6] Enige deel van 'n regsbeslissing deur 'n hof wat betrekking het op 'n geskil buite die spesifieke feite van die betrokke saak is 'n *obiter dictum*.[7] Na hierdie problematiek word later weer verwys.

Wallace[8] wys daarop dat verskeie regsgeleerdes die standpunt huldig dat die *stare decisis*-reël tweesydig is. Dit beliggaam naamlik beide 'n streng en 'n liberale presedentereël:[9]

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1 "Overruling decisions in the Supreme Court: The role of a decision's vote, age, and subject matter in the application of stare decisis after *Payne v Tennessee*" 1994 *Georgetown LJ* 1689 1691.

2 Wallace "*Stare decisis* and the Rehnquist court: The collision of activism, passivism and politics in *Casey*" 1994 *Buffalo LR* 187 189.

3 "The power that shall be vested in a precedent: *Stare decisis*, the Constitution and the Supreme Court" 1986 *Boston Univ LR* 345 347.

4 Vgl in die algemeen Lobingier "Precedent in past and present legal systems" 1946 *Michigan LR* 955.

5 "*Stare decisis*: What should the Supreme Court do when old laws are not necessarily good laws? A comment on Justice Thomas' call for reassessment in the Supreme Court's voting rights jurisprudence" 1996 *Saint Louis Univ LJ* 261 271–272. Sien ook MacCormick "Why cases have *rationes* and what these are" in Goldstein (red) *Precedent in law* (1987) 155.

6 Sien Goodhart "Determining the *ratio decidendi* of a case" 1930 *Yale LJ* 161. Sien ook Langenbucher *Die Entwicklung und Auslegung vom Richterrecht* (1996) 93.

7 Aldisert *The judicial process* (1996) 185. Vgl Goodhart 183.

8 191.

9 Wasserstrom *The judicial decision* (1969) 50–51 aangehaal en geredigeer deur Wallace 191–192. Vgl Mattis en Yalowitz "*Stare decisis* among (sic) the Appelate Court of Illinois" 1979 *De Paul LR* 571 573–574.

> "According to the strict rule of precedent, a court is bound by its own previous decisions and by the previous decisions of all higher courts. There is no provision made in this theory for the departure from or alteration of a rule that has been previously asserted and followed. The only valid justification for refusing to apply the rule is that the fact situation of the present case is not controlled by the rule, ie, is not subsumable under the class . . . The liberal rule . . . is one which . . . allows for flexibility and growth; under its dictates precedents need not always be followed. The doctrine . . . allows for both definite expectation and innovations . . . And if the judge should conclude that the prior cases were wrongly decided – that the precedents are incorrect – then the cases should be openly overruled. For if the rule of stare decisis demanded that precedents be followed regardless of the amount of good or harm produced in society by so doing, then this rule might be open to the objection that certainty is being procured at too great a price."[10]

Die laasgenoemde, naamlik die liberale reël, vind veral toepassing by die interpretasie van die fundamentele (konstitusionele) regte van regsonderdane.[11]

Die *stare decisis*-reël het, soos Schauer[12] tereg aantoon, die effek dat 'n voorafgaande beslissing "solely because of its historical pedigree" later in 'n soortgelyke geval toegepas word.[13] Met die eerste oogopslag sou 'n mens die indruk kon kry dat die *stare decisis*-reël die effek het dat individuele kreatiwiteit en sosiale, en bygevolg juridiese, ontwikkeling onderdruk word. Soos reeds uit bogaande bespreking blyk, het die *stare decisis*-reël self 'n organiese of dinamiese onderbou. Die spanningsveld – die konflikdinamika derhalwe – tussen die statiese en dinamiese kragte wat onvermydelik in die *stare decisis*-reël ingebou is, word eerstens in die onderhawige artikel uiteengesit en verduidelik en tweedens regsantropologies geëvalueer.

2 HISTORIESE AGTERGROND

In dié verband is dit belangrik om te onderskei tussen die regstegniese en regsantropologiese historiese agtergrond.

2 1 Regstegniese agtergrond

Gewoonte is in die Romeinse reg as die primêre hulpmiddel by wetsuitleg beskou (*optima enim est legum interpres consuetudo*).[14] Volgens Severus verkry gewoonte

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10 Vgl McNamara "*Buckley, Imbler* and *stare decisis*: The present predicament of prosecutorial immunity and an end to its absolute means" 1996 *Albany LR* 1135 1154; Laird "*Planned Parenthood v Casey*: The role of *stare decisis*" 1994 *Modern LR* 461 464; Koehler "Justice Souter's 'Keep-what-you-want-and-throw-away-the rest' interpretation of *stare decisis*" 1994 *Buffalo LR* 859; Powell "*Stare decisis* and judicial restraint" 1990 *Washington and Lee LR* 281 284.

11 Vgl *Burnet v Coronado Oil and Gas Co* 285 US 393, 76 L Ed 815, 823–824 (1932) per Brandeis R (afwykend): "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions."

12 "Precedent" 1987 *Stanford LR* 571.

13 Vgl ook Murphy en Pritchett *Courts, judges and politics* (1986) 389–401; Douglas "Stare decisis" 1949 *Columbia LR* 735: "Most lawyers, by training and practice, are all too apt to turn their interests and their talents toward the finding not the creating of precedents. This lawyerly search is for moorings where clients can be safely anchored. But the search has, as well, a deeper, more personal impetus. For the lawyer himself shares the yearning for security that is common to all people everywhere. And this yearning grows as the world seems to grow more *insecure*."

14 *D* 1 3 37. Vgl in die algemeen Winkel "The role of general principles of Roman law" 1996 *Fundamina* 103 104–108.

of die gesag van voorafgaande beslissings wat gelykluidend geskied het by 'n uitlegsgeskil regskrag.[15] In 'n uitstekende artikel[16] oor die presedentestelsel in Suid-Afrika wys Kahn daarop dat uit die werk van Glossatore en Post-glossatore blyk dat, hoewel gewoontereg deur 'n bestendige judisiële praktyk tot stand kon kom, nie daaruit afgelei kan word dat voorafgaande beslissings gevolg moet word nie. Volgens Gomezius[17] moet in die eerste instansie gewoonte, en daarna die natuurlike rede, by interpretasie van 'n wet aangewend word. Gewoonte kan volgens verskeie skrywers oor die Romeins-Europese reg 'n wet wysig en selfs afskaf.[18] Volgens Brunnemann[19] is gewoonte die beste uitlegger van 'n wet. Hierdie siening blyk algemeen te wees.[20] In 'n Utrechtse Konsultasie[21] gee ene Bruno Porteugen die volgende advies: *sebsecuta observatio declarat et interpretatur statutum.* Walch[22] wys daarop dat wetgewing daagliks deur gewoonte en latere navolging (*per usum et observationem subsequutam*) uitgelê word. Van der Linden,[23] wat aan die einde van die fase van die Romeins-Europese gemenereg geskryf het, staan op die standpunt dat gewoonte "door eene onafgebrokene reeks van gewijsden" regskrag verkry. Kahn[24] verwys na 'n ander werk van Van der Linden[25] waarin die mening geopper word dat hoewel 'n regter nie voorafgaande beslissings hoef te volg nie, hy slegs daarvan behoort af te wyk na deeglike oorweging en vir 'n oortuigende rede. Volgens Kotze[26] verteenwoordig dit ons gemenereg.

Die *stare decisis*-reël het egter via die Engelse reg in Suid-Afrika posgevat.[27] In die 12de en 13de eeu het regters van die Engelse koninklike howe respek afgedwing as juriste wat die koning se voorreg en taak waargeneem het om reg te spreek in 'n verskeidenheid sake.[28] Die beroemdste van almal was Bracton wat 'n presedentestelsel in 'n verhandeling waarin na ongeveer 500 sake verwys word, geformuleer het. Hy het van die standpunt uitgegaan dat analoë gevalle dieselfde behandel moet word (*si tamen similia evenerint per simile iudicentur*) aangesien dit 'n gesonde beginsel daarstel om soortgelykes soortgelyk te behandel (*a similibus ad similia*).[29] Die moderne *stare decisis*-reël in die Engelse reg het in die 15de eeu posgevat en geleidelik ontplooi totdat dit in die 19de eeu omvattend ingeburger was.[30] Die

15 *D* 1 3 38.

16 "The rules of precedent applied in South African courts" 1967 *SALJ* 43 175 308.

17 *Variae Resolutiones* 1 1 8–9.

18 Vgl bv Zoesius *Commentarius ad D* 1 3 95; Pothier *Pandectae Justinianeae* 1 3 15; Christinaeus *Practicarum quaestionum* 4 8 53 14.

19 *Commentarius in Pandectas* 1 3 34 2–3.

20 Sien bv Tuldenus *Commentarius in D* 1 3 7 14; Groenewegen *De legi abr* ad *D* 1 3 34; Van Leeuwen *RHR* 1 3 11; J Voet *Commentatarius ad Pandectas* 1 3 19; P Voet *De statutis* 2 12 4; Eckhard *Hermeneutica iuris* 1 1 37–38.

21 3 5 17

22 Aantekening op Eckhard 1 3 38.

23 *Regtsgeleerd, practicaal en koopmans handboek* 1 1 7.

24 44.

25 *Verzameling van merkwaardige gewijsden*, Voorberigt. Hierdie werk het in 1803 verskyn, terwyl sy ander werk, hierbo genoem, in 1806 verskyn het.

26 "Judicial precedent" 1917 *SALJ* 280 284–285.

27 *Fellner v Minister of the Interior* 1954 4 SA 523 (A) 529; Kahn 44–45.

28 Hogue *Origins of common law* (1966) 188.

29 *De legibus et consuetudinibus Angliae* fol 1b; Hogue 188–189.

30 Wallace 189; Lewis "The history of judicial precedent" 1931 *LQR* 28 *et seq*; Plucknett *A concise history of common law* (1956) 342–350.

stare decisis-reël het in die hele Anglo-Amerikaanse wêreld posgevat, maar is binne die spesifieke jurisdiksies aangepas om met konstitusionele beginsels en plaaslike hofstrukture en behoeftes te sinchroniseer.[31]

2 2 Regsantropologiese agtergrond

In die vroegste menslike gemeenskap het die *pater* (heilige oervader en dié se opvolgers) reg gespreek ten aansien van die skending van heilige taboes. Hierdie taboes het hyself in hoofsaak *ex post facto* geskep, met die gevolg dat die reg eers na die beslissing ontstaan het.[32] Die funksionele onderskeid, in primêre sin, tussen regspreker en regskepper is van relatief onlangse oorsprong.[33] Die koning, asook sy regters, was erfgename van die heilige status van die oervader.[34] Hulle is as almagtig en onfeilbaar beleef en daarom was gebondenheid aan 'n menslike reël, soos dié van *stare decisis*, sonder relevansie.[35] Die latere en onrealistiese bedoelingsteorie by wetsuitleg het hieruit voortgevloei.[36] Realisme en kennis het mettertyd die feilbaarheid van, en die mens in, die regsprekende gesag blootgelê.[37] Die opkoms van die *ratio decidendi*-begrip, naamlik dat 'n rede vir of motivering van 'n beslissing die beslissingskern vorm, het in finale instansie momentum gegee aan die ontplooiing van die *stare decisis*-reël.[38]

Soos elders[39] aangetoon, is geregtigheid 'n dinamiese begrip wat onderlê word deur universele regsantropologiese evolusieprosesse, naamlik dié van dereligiëring, individualisering, dekonkretisering, humanisering, egalisering en outonomisering. In die lig hiervan val regsekerheid, soos beliggaam in die *stare decisis*-reël, en geregtigheidsekerheid nie noodwendig saam nie.

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31 Sien Marshall "The binding effect of decisions of the judicial committee of the privy council" 1968 *ICLQ* 743; Edge "Decisions of the judicial committee of the privy council in other jurisdictions: Limits of *stare decisis* in commonwealth jurisdictions" 1994 *Commonwealth Law Bulletin* 720; Allsop en Greg "Privy council decisions in Australia: The law of excessive force in self-defence" 1979 *Sydney LR* 731.

32 Ball *The law and the cloud of unknowing* (1976) 150.

33 Simon "Historische Beiträge zur Rechtsprechungslehre" in Achterberg (red) *Rechtsprechungslehre* (1986) 229 230–234.

34 Sien Maine *Ancient law* (1930) 23–24; Ball 150–150; Cam *Law-finders and law-makers* (1963) 12–16 85–94; Labuschagne "Die heilige oervader, regsevolusie en redematige administratiefregspleging" 1995 *SAPR/PL* 444; Legendre "The other dimension of law" in Goodrich en Carlson (red) *Law and the postmodern mind* (1998) 175 190. Sien ook Ollinger *Die Entwicklung des Richtersvorbehalts im Verhaftungsrecht* (1997) 133: in die Middeleeue was die regter direk aan God verantwoording verskuldig.

35 Vgl Lindahl "'Vorst op God na.' Politieke macht en de symbolisering van soevereiniteit" 1997 *R en R* 122 124; Tezner *Rechtslogik und Rechtswirklichkeit* (1985) 29; Ollinger 183 ev:

36 Sien Bassham *Original intent and the constitution. A philosophical study* (1992) 2–12; Labuschagne "Die opkoms van die teleologiese benadering tot die uitleg van wette in Suid-Afrika" 1990 *SALJ* 569. Vgl Nietzsche *Menschliches Allzumenschliches* (1878) 304; Wyduckel "Die Herkunft der Rechtsprechung aus der Iurisdictio" in Achterberg (red) 247 265–266.

37 Sien Blaustein en Field "'Overruling' opinions in the Supreme Court" 1958 *Mich LR* 151.

38 Evans "Change in the doctrine of precedent during the nineteenth century" in Goldstein (red) *Precedent in law* (1987) 35 71.

39 Labuschagne "Evolusielyne in die regsantropologie" 1996 *Suid-Afrikaanse Tydskrif vir Etnologie* (*SATE*) 40–45.

3 DIE SUID-AFRIKAANSE REG BINNE REGSVERGELYKENDE PERSPEKTIEF

In hierdie afdeling word die basiese reëls ten aansien van die presendentestelsel, soos in Suid-Afrika toegepas, beskryf.[40] Analise daarvan en kritiek daarop word in die res van die artikel geïntegreer. Soos reeds uit bogaande bespreking[41] blyk, is die *stare decisis*-reël via die Engelse reg by ons ingevoer. In die lig hiervan word, ter wille van kontrastering en die daaruitvoortvloeiende intellektuele en wetenskaplike stimulering, kortliks na die posisie in enkele ander regstelsels verwys.

Van Zyl[42] wys daarop dat die *stare decisis*-reël, vir sover dit die gebondenheid aan voorafgaande beslissings betref, twee kante of verskyningsvorme het.[43] Onder sekere omstandighede is 'n hof absoluut gebonde aan 'n vorige uitspraak van 'n hof met 'n hoër rang of 'n gelyke hof wat met meer lede beman was, dit wil sê 'n "voller" hof. In sekere gevalle is 'n hof slegs gekwalifiseerd gebonde om die uitsprake van gelyke howe te volg. Indien 'n hof van oordeel is dat 'n voorafgaande beslissing van 'n gelyke hof klaarblyklik verkeerd is, verval gebondenheid daaraan. Gebondenheid van enige aard is uiteraard net ter sprake indien dieselfde regsbasis voor hande is.[44] Indien 'n voorafgaande hof ten aansien van die toepaslike reg (gemenereg, wetgewing of gewysdereg) gedwaal het of indien die regsbasis waarop 'n voorafgaande hofuitspraak gefundeer is intussen verval het, het die *ratio* van die *stare decisis*-reël geen toepassing nie.[45]

Dit word problematies wanneer 'n hof "regtens" gebonde is aan voorafgaande botsende uitsprake.[46] Is die botsende uitsprake deur gelyke howe binne die betrokke jurisdiksiegebied gelewer, het die hof 'n vrye keuse tussen dié botsende uitsprake of selfs 'n ander alternatief.[47] Is die voorafgaande botsende uitsprake deur 'n hiërargiese hoër hof of 'n "voller" hof gelewer, sou die hof, beoordeel binne konteks van die tradisionele Anglo-Amerikaanse *stare decisis*-konsep, aan die jongste van die botsende beslissings gebonde wees.[48] Soos elders[49] aangetoon, is 'n rigiede

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40 Vir 'n meer gedetailleerde uiteensetting van die ontwikkeling van die *stare decisis*-reël in Suid-Afrika kan lesers verwys word na die reeks artikels van Kahn 1967 *SALJ* 43 175 308.

41 2 1.

42 In Van Zyl en Van der Vyver *Inleiding tot die regswetenskap* (1982) 299.

43 Vgl die afsonderlike uitspraak van Schreiner AR in *Fellner v Minister of Interior* 1954 4 SA 523 (A) 542: "It is well established that this Court applies the principle of precedent in the form that it is bound by its own previous decision, unless it is satisfied that that decision was plainly wrong . . . The previous decision is qualifiedly and not absolutely binding. In this respect our adherence to *stare decisis* differs from that of the House of Lords, the Court of Appeal and a Divisional Court in England, but is similar to that of Courts in some other parts of the Commonwealth and in the United States of America."

44 Van Zyl 300.

45 *Idem* 304.

46 *Idem* 305 vn 86: "Hofuitsprake is botsend as hulle van mekaar verskil onder omstandighede waar die vroeëre(s) nie in die latere(s) oorweeg en verwerp is nie. As daar wel so 'n verwerping plaasgevind het, het die vroeëre(s) weggeval as sg presedent(e) en is daar dus geen botsing nie."

47 Vgl Kahn 183 317–318; Van Zyl 305.

48 Vgl Kahn 314; Van Zyl 305: "As 'n mens egter bedink dat nòg die ouere nòg die jongere uitspraak gekwalifiseerde gebondenheid vir 'n *gelyke* hof meebring, wil dit voorkom dat nòg die ouere nòg die jongere uitspraak *absolute* gebondenheid vir 'n laer hof, of 'n hof saamgestel uit minder regters, behoort mee te bring. In beginsel behoort so 'n hof dus 'n vrye keuse tussen die botsende uitsprake te hê en behoort selfs vry te wees om tot sy eie, selfstandige beslissing te kom."

49 Labuschagne "Chronologisisme, strydige bepalings en wetsuitleg" 1995 *TRW* 193; "Uitleg van strydige bepalings: 'n Nuwe wending" 1991 *De Jure* 201.

chronologistiese benadering tot regsvinding en -vorming arbitrêr en sonder 'n geregtigheidsbasis. Trouens, dit is nie met die regstaatidee versoenbaar nie.[50]

Die posisie ten aansien van absolute gebondenheid aan voorafgaande uitsprake is, in 'n neutedop saamgevat, in Suid-Afrika soos volg: uitsprake van die Appèlhof[51] bind alle (hiërargies) ondergeskikte howe.[52] Die Appèlhof self is blykbaar nie gebonde aan sy voorafgaande, ook "voller" hof-, uitsprake nie.[53] Landdroshowe binne die jurisdiksiegebied van die betrokke hoë hof (hooggeregshof)[54] is absoluut gebonde aan laasgenoemde se uitsprake. 'n Hof met een (of twee) regter(s) is insgelyks gebonde aan 'n beslissing van dieselfde hof bestaande uit meer regters.[55] Die vraag of landdroshowe binne 'n spesifieke jurisdiksiegebied aan mekaar se uitsprake gebonde is, is (veral hedendaags) 'n strydvraag onder juriste.[56] Die opkoms van die regstaatidee en die prioritisering van fundamentele waardes en menseregte in Suid-Afrika het onvermydelik 'n effek op die status, aard en inhoud[57] van die *stare decisis*-reël. Hierdie problematiek word in die verdere bespreking aan die orde gestel.

In die Duitse reg kan 'n hof van 'n beslissing van 'n voorafgaande (ook hoër) hof afwyk indien dit behoorlik gemotiveer word. Ontbreek sodanige motivering word die verbod op regterlike willekeur ("Willkürverbot"), beliggaam in artikel 20(3) van die Duitse Grondwet, geskend.[58] Dit is in beginsel ook die benadering in die Nederlandse reg[59] en in die Verenigde Arabiese Emirate.[60]

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50 Vgl Labuschagne "Regmatige verwagting, redematige administratiefregspleging en die menseregtelike status van fiksies" 1997 *SAPR/PL* 522 530–531.

51 Sien nou a 168 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996. Al sou sommige van die howe tans, soos die hoogste hof van appèl, anders genoem word, word daarna as die Appèlhof verwys, die benaming wat algemeen deur juriste oor die jare, en nog steeds, gebruik word.

52 *Collett v Priest* 1931 AD 290 297; *Ex parte Sadie* 1940 AD 26 30; *R v Lusu* 1953 2 SA 484 (A) 491–492; Van Zyl 306.

53 Van Zyl 306.

54 Sien a 169 van die Grondwet.

55 Vgl Van Zyl 306–307. Vgl verder oor die *stare decisis*-problematiek in die destydse hooggeregshowe in Suid-Afrika Oelschig, Midgley en Kerr "Stare decisis in provincial and local division" 1985 *SALJ* 370; Midgley "Stare decisis and conflicting full-bench decisions" 1987 *SALJ* 35.

56 Vgl Kahn 324; Van Zyl 309; Dendy "Stare decisis and the maverick magistrate" 1990 *SALJ* 104; Kerr "Stare decisis in magistrates' courts and in the Supreme Court" 1990 *SALJ* 551; Dendy "Stare decisis and magistrates' lib: A reply to Professor Kerr" 1993 *SALJ* 340; Kerr "Further consideration of stare decisis" 1994 *SALJ* 167 171.

57 Vgl ten aansien van jurisdiksionele probleme Kerr "Stare decisis in a reunited state. The dependant's action where the deceased's obligation was in customary law. Public policy concerning polygamous marriages" 1996 *SALJ* 222.

58 BVerfG, Beschl v 19/7/1995, NJW 1995, 2911; Labuschagne "Menslike waardigheid, regterlike onpartydigheid en redematige strafregspleging" 1996 *Obiter* 323 324.

59 Sien Van Delden "Samenwerking tussen rechters" 1989 *NJB* 1642; Corstens en Vegter "Samenwerking tussen strafrechters" 1989 *NJB* 1635; Leijten "Het zal je hof maar wezen" 1997 *NJB* 1065; Corstens "Eenheid van rechtspraak" 1998 *NJB* 297; Snijders "Wordt de samenwerkende rechter tot bestuurder en/of wetgewer?" 1997 *NJB* 1793 1797: "Een argument dat tegen de klassieke angelsaksische precedenten-stelsels wordt aangevoerd, namelijk de verstarrende werking die ervan uitgaat ('starre' decisis), mag bij ons geen opgeld doen. De wetgever heeft de mogelijkheid van wetswijziging, een mogelijkheid waartoe het parlement of de publieke opinie het aanzet. De rechter heeft tot dusverre altijd de mogelijkheid gehad om soepel met precedenten om te gaan. Voor zover rechterlijke samenwerking bindende afspraken oplevert, behoren deze ook stelselmatig op hun actuele waarde bezien en zonodig bijgesteld te worden ... Voor zover de rechter afwijk van een rechterlijke afspraak die geacht kan worden rechtskracht voor de betrokken rechters te hebben, lijkt een motiveringsplicht voor afwijking met toetsing in cassatie aangewezen, voor zover althans cassatie tegen betrokken uitspraken openstaat."

60 Al Tamimi "Rulings of the courts of cassation in the United Arab Emirates" 1995 *Middle East Comm LR* 176 177: "The doctrine of *stare decisis* is not applicable to UAE courts and precedents are, strictly speaking, not binding on courts even if they happen to be decisions of

vervolg op volgende bladsy

4 FUNKSIES WAT TRADISIONEEL AAN DIE *STARE DECISIS*-REËL TOEGESKRYF WORD

Die behoefte aan die *stare decisis*-reël is met verloop van tyd vanuit verskeie hoeke gemotiveer. Hierdie motiverings of funksies sou beswaarlik in denkdigte kompartemente verdeel kon word. Teen dié agtergrond kan die volgende vermeld word:

(a) Dit respekteer kollektiewe wysheid

Dit is by geleentheid ten aansien van die Supreme Court van die VSA gesê dat "(l)ong-standing precedents reflect 'the wisdom of this Court as an institution transcending the moment'".[61] Die rasionele[62] behoort egter onder geen omstandigheid aan gesag of mag, as sodanig, ondergeskik gestel te word nie.[63]

(b) Dit bevorder die legitimiteit van en openbare vertroue in die regsprekende gesag

Die *stare decisis*-reël beliggaam 'n versekering aan die publiek dat howe se beslissings nie arbitrêr is nie en dat hofbeslissings "[are] hedged about by precedents which are binding without regard to the personality of [their] members".[64] Dit is interessant om daarop te let dat omstandighede van so 'n aard kan wees dat die presedentestelsel die effek kan hê om 'n regstelsel wat in 'n legitimiteitskrisis verkeer, te perpetueer. So verklaar Cloete[65] ten aansien van die voormalige Suid-Afrikaanse regsorde:

> "If one looks at the current precedent system existing in our law, and the role it has played in maintaining a juridical and political *status quo* which is detrimental to the interests of the majority of the people of our country, one realizes that binding precedents could easily become perpetuations of the ignorance and prejudice of individuals of the past."

Cameron[66] stel die vraag of die regsprekende gesag aan die siening van die meerderheid, in 'n demokratiese sin, verantwoording verskuldig is en wys dit, myns insiens tereg, soos volg af:

> "For one thing, it is offensive to the idea of the separation of powers, according to which the constitutional responsibilities of the judiciary differ from those of the legislature and the executive. In itself the separation of powers is no more than constitutional dogma. But it emphasizes that judging is different from the execution

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a higher court with the exception of the Courts of Cassation which it will be seen are binding. In practice, however, subordinate courts usually treat precedents of higher courts as having persuasive value and try, as far as possible, to decide cases in line with precedents."

61 Anoniem "Constitutional stare decisis" 1990 *Harvard LR* 1344 1349 met verwysing na *Welch v State Dep't of Highways and Pub Transp* 483 US 468, 479 (1987) waarin die afwykende beslissing van Frankfurter R in *Green v United States* 355 US 184, 215 (1957) met goedkeuring aangehaal word.

62 Vgl Koehler 859 wat uit Marshall R se afwykende mening en kritiek teen sy ampsbroers in *Payne v Tennessee* 501 US 808, 844 (1991) aanhaal: "Power, not reason, is the new currency of this Court's decision-making."

63 Sien Easterbrook "Stability and reliability in judicial decisions" 1988 *Cornell LR* 422; Anoniem 1349: "Because precedent represents not only the experience of other judges, but also their different talents and expertise, stare decisis enables judges to draw on the knowledge of their peers."

64 White R in 'n afwykende uitspraak in *Pollock v Farmer's Loan and Trust Co* 157 US 429, 652 (1895) met goedkeuring aangehaal deur Anoniem 1349. Vgl McKeever *Raw judicial power? The supreme court and American society* (1995) 28–47.

65 "Codification and *stare decisis* in a new South African legal order" 1991 *TRW* 58 68.

66 "Judicial accountability in South Africa" 1990 *SAJHR* 251 254. Cf Pickett "The Canadian judicial system" 1997 *Consultus* 133 135–136. Vgl Fombad "Judicial power in Cameroon's amended Constitution of 19 January 1996" 1996 *Lesotho LJ* 1 9 *et seq.*

> of government policy and from law-creation by the legislature. And it delineates the particular responsibility of the judiciary in two important areas : . . . (a) upholding the rule of law (in the modest sense of ensuring that executive power is exercised only according to law); and (b) protecting individual rights and the rights of minorities (ensuring that despite public or executive sentiment laws are interpreted and applied at least according to fundamental judicial precepts like that of formal equality). None of these functions could be realized if judicial accountability entailed subservience to majority (or, in a racial oligarchy, executive) feeling."

In 'n oningeligte, robuuste en 'n pluralisties-verdeelde regstaat sal 'n "legitieme" regsprekende gesag 'n ekshibisionistiese en selfs 'n pretensievolle beeld moet reflekteer; met ander woorde plurieë,[67] binne die betrokke staat, sal in een of ander vorm op die regbank gereflekteer moet word.[68]

'n Ingeligte en regsverfynde publiek, soos in 'n effektiewe en geregtigheidsensitiewe regstaat die geval behoort te wees, sal die regsprekende gesag[69] slegs as legitiem aanvaar, en vertroue in hulle onpartydigheid en konsistensie behou, indien die howe se oordeel rasioneel en waardematig, oortuigend en regstaatmatig is.[70] Deur diepliggende beginselskommelinge te inhibeer, koester die *stare decisis*-reël openbare stabiliteit deur morele verwarring en geestelike onrus te voorkom.[71]

(c) Dit dra by tot die transendering van die mensfaktor in regspraak

Navorsing van psigososiale wetenskaplikes lê duidelik bloot dat persoonlike eienskappe en waardes van regters hulle beslissings beïnvloed.[72] Aangesien 'n algehele waardevrye en persoonontkoppelde objektiwiteit nie moontlik is nie, is dit van kardinale belang dat lede van die regsprekende gesag opsiematig goed ingelig en bewus moet wees van hulle persoonlike vooroordele en tekortkominge. Selfkennis, asook interne en eksterne meganismes om ongemotiveerde vooroordele te herken en te bestry, vorm 'n hoeksteen van 'n betroubare en geregtigheidsoriënterende regsprekende gesag.[73] Die irrasionele by die betrokke regter(s) moet normatief, veral by wyse van nougesette respektering van toepaslike proses- en bewysreëls, en deur opleiding asook selfevaluering en -kennis voortdurend beveg word.[74] Maltz[75] wys daarop dat dit as 'n kernwaarde in die VSA (en ander regstate) gereken word dat beginsels wat die gemeenskap orden, beliggaam moet wees in

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67 Ten aansien van dié begrip sien Labuschagne "Menseregtelike en strafregtelike bekamping van groepsidentiteitmatige krenking en geweld" 1996 *De Jure* 23 en "Die misdaadkonkurrensie van grafskending en pluriekrenking" 1998 *THRHR* 684.

68 Vgl Mokgatle "The exclusion of Blacks from the South African judicial system" 1987 *SAJHR* 44; Dlamini "The appointment of Blacks as judicial officers" 1990 *Consultus* 31; Dlamini "Apartheid and the black judge" 1989 *SAJHR* 246.

69 Wallace 199; Schauer 601–602.

70 Rehnquist 347.

71 Vgl Anoniem 1350: "The need to ensure 'legitimacy' is especially compelling in constitutional law because overruling opinions may 'transform' entire areas of the law as well as fundamental social relationships."

72 Smith *Courts, politics and the judicial process* (1997) 201–210; Carp en Stidham *Judicial process in America* (1996) 405–408; Langenbucher 93.

73 Vgl hieroor Alexy "Rechtssystem und praktische Vernunft" 1987 *Rechtstheorie* 404 418; Gizbert-Studnicki "Das hermeneutische Bewußtsein der Juristen" 1987 *Rechtstheorie* 344 366–367.

74 Sien bv Herdegen "Die revisionsgerichtliche Kontrolle der Beweiswürdigung – Diskussionsbeitrag" in *Arbeitsgemeinschaft Strafrecht des DAV* (red) *Rechtsicherheit versus Einzelfallgerechtigkeit* (1992) 30 33.

75 "The nature of precedent" 1988 *North Carolina LR* 367 371.

"rules of law and not merely the opinions of a small group of men who temporarily occupy high office".[76] Hierdie grondwaarde van 'n regstaat word op twee wyses deur die *stare decisis*-reël herbevestig: Eerstens koester dit die beeld van sekerheid en onpartydigheid deur die verskaffing van 'n "neutrale gesagsbron" waarop regters ter motivering van hulle beslissings kan steun. In die tweede instansie het die *stare decisis*-reël die neiging om die impak van individuele regters op regsvorming te beperk.[77] Dit stimuleer derhalwe judisiële terughoudendheid ("judicial restraint") in die regskeppingsproses. In die woorde van Wallace:[78]

> "Thus, *stare decisis* restrains an individualistic, idiosyncratic, or activist judge from injecting his or her own personal mores and beliefs into the law. The doctrine requires the judge to follow precedent rather than fashion his or her own rule. The advantages of *stare decisis* are thus two-fold: (1) it acts as an effective restraint upon the commission of error in that it compels a judge to utilize and employ the reasoning and decisions of predecessors, and (2) prevents the infusion of bias and personal preferences. While this argument is valid only if the original judge was free from bias and error, in the abstract at least, it provides for correct decisions. *Stare decisis* in this regard, serves as a straitjacket, preventing future justices from abuse and derogation of law."[79]

(d) Dit bevorder gelyke behandeling van regsonderdane

Die *stare decisis*-reël, soos 'n anonieme kommentator[80] in die *Harvard Law Review* dit stel, "encourages the Court to be fair by reminding the Justices to treat like cases alike".[81]

O'Keefe[82] wys daarop dat die howe in die VSA konstitusionele en (ander) statutêre presedente verskillend behandel. Hierdie digotomie het 'n eenvoudige verklaring. Die wetgewer kan naamlik presedente wat op wetgewing gebou is, deur latere wetgewing ongedaan maak. Slegs die hof (in besonder die Supreme Court) of

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76 Met beroep op Stevens R in *Florida Dep't of Health v Florida Nursing Home Ass'n* 450 US 147, 154 (1981). Sien ook Sizani "The role of the judiciary in democratic societies: Lessons for a post-apartheid South Africa" 1994 *TSAR* 560 561.

77 Sien ook Gerhardt "The role of precedent in constitutional decisionmaking and theory" 1991 *George Washington LR* 68 145; McNamara 1154; Smith 11.

78 201.

79 Vgl ook Eskridge "The case of the amorous defendant: Criticizing absolute stare decisis for statutory cases" 1990 *Mich LR* 2450; Schwartz "Rehnquist, *Runyon*, and *Jones* – The chief justice, civil rights, and stare decisis" 1995 *Tulsa LJ* 251 262; Easterbrook 425; Burton *Judging in good faith* (1998) xvi 53 bespreek deur Harwood 1998 *Law and Philosophy* 203; Monaghan "Stare decisis and constitutional adjudication" in Rakove (red) *Interpreting the constitution. The debate over original intent* (1990) 263.

80 1349.

81 Sien ook Cooper "Stare decisis: Precedent and principle in constitutional adjudication" 1988 *Cornell LR* 400; Schauer 595–596: "Among the most common justifications for treating precedent as relevant is the argument from fairness, sometimes couched as an argument from justice. The argument is most commonly expressed in terms of the simple stricture, 'Treat like cases alike.' To fail to treat similar cases similarly, it is argued, is arbitrary, and consequently unjust or unfair. We achieve fairness by decisionmaking rules designed to achieve consistency across a range of decisions. Where the consistency is among individuals at the same time, we express this decisional rule as 'equality.' Where the consistency among decisions takes place over time, we call our decisional rule 'precedent.' Equality and precedent are thus, respectively, the spatial and temporal branches of the same larger normative principle of consistency."

82 263 *et seq.* Vgl ook Eskridge "Reneging on history? Playing the Court/Congress/ President civil rights game" 1991 *Calif LR* 613 679 *et seq.*

'n konstitusionele wysiging kan aan konstitusionele presedente verander.[83] Ten aansien van die Konstitusie in die VSA verduidelik Chandler[84] soos volg:

> "It endures because it is still an unfinished work. Each generation of Americans provides new framers to devise ways to secure the blessings of liberty to ourselves and our posterity."

Dit wil egter nie sê dat howe konstitusionele presedente op 'n lukrake wyse kan hanteer nie. In die beslissing van die Supreme Court van die VSA in *Arizona v Rumsey*[85] word verduidelik dat "[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification".[86] Hierdie benadering het 'n regstaatlike en bygevolg 'n rasionele basis en is daarom ook vir Suid-Afrika onderskryfbaar.[87]

(e) Dit bevorder regsekerheid en ordelikheid

Koehler[88] se opmerking dat die *stare decisis*-reël 'n hersenskim ("chimerical myth") is, is, vir sover dit na die eksakte en meganiese aanwendbaarheid daarvan verwys, ongetwyfeld korrek. Die regswerklikheid, soos die mens se geestelike en kulturele werklikheid in die algemeen, sal altyd 'n brose onderbou hê. Die *stare decisis*-reël beliggaam wesenlik 'n onontbeerlike ideaal wat gerig is op die neutralisering van willekeur.

Die grondslag van die funksie van die *stare decisis*-reël in dié verband is dat regsonderdane hulle aktiwiteite rig op en vertroue vestig in geartikuleerde regsreëls. Wasserstrom[89] merk tereg op dat "the failure to give effect to those activities and commitments which were undertaken *in justified reliance* upon the pronouncements of that system could serve, arguably, only to make the legal system ill-conceived, irresponsible, and vicious".[90]

In die saak *Mine Workers Union v Prinsloo*[91] wys appèlregter Greenberg daarop dat 'n "decision by this Court would have a retrospective effect, unlike a legislative enactment, which could preserve existing rights".[92] Gewysdereg, anders as wetgewing, ontstaan uiteraard eers na die betrokke handeling of gebeurtenis. Dit het in dié sin, asook ten aansien van soortgelyke gevalle, terugwerkende krag. Geregtigheid verg egter dat in gevalle waar die hof van 'n presedent afwyk, in sekere omstandighede slegs prospektiewe werking aan gewysdereg toegeken word.[93] Howe,

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83 Sien ook Wallace 194 en 249; Padden 1715 *et seq*; Kinsler "Sensible application of stare decisis or a rewriting of the Constitution: An examination of *Helling v Kinney*" 1994 *Saint Louis Univ Public LR* 705; Rehnquist 345.

84 "Forward" in Ontiveros (red) *The dynamic constitution. A historical bibliography* (1986) xi xiv.

85 467 US 203, 212 (1984) aangehaal deur Rycroft "The doctrine of stare decisis in Constitutional Court decisions" 1995 *SAJHR* 587 588.

86 Vgl ook Laird 467.

87 Sien ook Laird 592; Jazbhay "Stare decisis. Are courts bound thereby in the interpretation of the interim Constitution?" 1996 *De Rebus* 37.

88 891.

89 *The judicial decision* (1969) 67 met goedkeuring aangehaal deur Wallace 196.

90 Sien ook Maltz 368; Schauer 597: "The most commonly offered of the substantive reasons for choosing strong over weak precedential constraint is the principle of predictability. When a decisionmaker must decide this case in the same way as the last, parties will be better able to anticipate the future. The ability to predict what a decisionmaker will do helps us plan our lives, have some degree of repose, and avoid paralysis of foreseeing only the unknown."

91 1948 3 SA 831 (A) 852.

92 Sien ook Padden 1692; Labuschagne "Retroaktiewe wetgewing" 1986 *SAPR/PL* 135 138 149.

93 Labuschagne "Die sekerheidsbasis van die strafreg" 1988 *SAS* 52 66.

veral hoërhowe, behoort self in gepaste omstandighede uitdruklik te beslis dat 'n nuut gevormde presedent slegs vir toekomstige gevalle geld.[94] Misbruik van die reg, ook die gewysdereg en bygevolg die *stare decisis*-reël, behoort egter onder geen omstandighede geduld te word nie.[95]

(f) Dit bevorder administratiewe doeltreffendheid en vergemaklik die regterstaak Regter Cardozo[96] verduidelik in dié verband soos volg:

> "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own secure bricks on the secure foundation of the courses laid by others who had gone before him."[97]

Dit het bykomend die effek dat 'n regter nie elke keer die persoonlike verantwoordelikheid op hom/haar moet neem om nuwe reg *in vacuo* te skep nie.[98] 'n Regter se verantwoordelikheid word as 't ware deur die *stare decisis*-reël gebuffer.

5 DIE EFFEK VAN DIE EVOLUSIE VAN KENNIS EN DIE VERANDERING VAN WAARDES OP DIE *STARE DECISIS*-REËL

Padden[99] wys daarop dat daar tradisioneel drie omstandighede is wat die omverwerping van 'n presedent magtig: (a) indien daar intussen regsontwikkeling plaasgevind het wat dit sanksioneer; (b) indien dit blyk dat dit onwerkbaar is; en (c) indien dit verouderd is of nie met kontemporêre waardes sinchroniseer nie. In *Digesta* 1 3 17 word die volgende verklaar: *scire leges non hoc est verba earum tenere sed vim ac potestatem* (om wette te ken, beteken nie slegs om die woorde daarvan te verstaan nie maar ook hulle krag en impak (effek)).[100] Wat Justinianus duidelik hiermee laat blyk, is dat hy daarvan bewus was dat die reg nie staties is nie. Daar bestaan 'n dimensie van 'n wet wat buite die woorde daarvan gevind word. Die krag en impak (of effek) van 'n wet sou hieruitvoortvloeiend gemeet word aan uitwendige en dinamiese omstandighede,[101] wat uiteraard nie deurgaans dieselfde is nie.

Reg is reeds vroeg in die moderne Europese geskiedenis met die menslike rede in verband gebring. So verduidelik Cicero:[102] *Lex est summa ratio insita in natura*

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94 Vgl die Duitse sake BVerfG, Beschl v 22/6/1995, NJW 1995, 2624; BFH, Beschl v 11/3/1998, NJW 1998, 2552.

95 LG Koblenz, Urt v 30/10/1996, NStZ-RR 1997, 104; Labuschagne "Openbare onsedelikheid en ekshibisionisme met 'n kunspenis" 1998 *SAS* 84; Labuschagne "Die dinamiese aard van die inhoud van die misdaad aanranding en geregtigheidskonforme analogie in die strafreg" 1998 *THRHR* 482 487.

96 *The nature of the judicial process* (1921) 149 met goedkeuring aangehaal deur Wallace 200.

97 Sien ook Schauer 599–601; Maltz 370–371; Padden 1692: "From an institutional standpoint, stare decisis laudably promotes efficiency. Once a previous court has addressed difficult policy questions, subsequent courts need not expend time and resources to readdress those issues, but can rely on the wisdom of the previous court. However, it is possible that this rationale is also overstated because the subsequent court must still determine what precedent exists, and whether or not it applies to the particular facts of the case before the court. In addition, if a party advocates that the subsequent court should overrule the precedent, the subsequent court may be required to reexamine the policy rationales underlying the first decision. Finally, efficiency alone is not an adequate justification. Although quick decisions are desirable, it is usually better to decide a case correctly and slowly than incorrectly and quickly."

98 Stevens "The lifespan of a judge-made rule" 1983 *New York Univ LR* 1 2. Vgl ook Bronaugh "Persuasive precedent" in Goldstein (red) *Precedent in law* (1987) 217.

99 1694.

100 Hierdie teks is aangebring in die leeskamer en word in 'n losblad, met 'n vertaling, versprei onder die titel *Legal maxims in Langdell*, Harvard University (Cambridge, Massachussetts, VSA).

101 Rouland *Legal anthropology* (1994) 179 wys tereg daarop dat geen regsreël staties is nie.

102 *De legibus* 1 4 18; *Legal maxims in Langdell supra*.

(reg is die hoogste rede in die natuur ingeprent). 'n Presedent wat nie 'n rasionele basis het nie, of waarvan die rasionele basis weggeval het, het nie bestaansreg nie.[103] Die voorstel van 'n evoluerende benadering tot wetsuitleg wat Eskridge[104] maak, waarvolgens met 'n statutêre presedent weggedoen behoort te kan word indien "its reasoning has been exposed as problematic and its results pernicious, and it has not broadly influenced subsequent lawmaking and private planning" kom vir my as sinvol voor.[105] Die ontplooiing van die wetenskap en menslike kennis, die kognitiewe- of die bewussynsantropologiese derhalwe, het 'n dinamiese aard wat die bestaansreg van 'n presedent voortdurend onderworpe stel aan rasionele heroorweging.[106] Trouens, soos elders[107] aangetoon, is kennis- en insigmatige interaksie en kontrole, oor 'n wye front, van wesenlike belang vir 'n legitieme, kreatiewe en effektiewe regbank.[108]

In *Smith v Allwright*[109] verklaar regter Roberts van die Supreme Court in die VSA soos volg in 'n afwykende uitspraak:

> "The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject. In the present term the court has overruled three cases."

In die lig van die hedendaagse ontploffing van kennis is dit egter onvermydelik dat die howe nuwe kennis, insluitende historiese kennis,[110] al sou dit van resente oorsprong wees, by regsinterpretasie en regsvorming moet verreken.[111] Slegs 'n

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103 Sien McNamara 1157. Wetgewing wat nie 'n rasionele basis het nie, het insgelyks nie bestaansreg nie. A 13(IA) van die Wet op Grondhervorming (Huurarbeiders) 3 van 1996 bepaal bv soos volg: "Indien 'n geskilpunt in 'n saak voor 'n landdroshof of 'n Hoë Hof ontstaan wat van daardie hof vereis om hierdie Wet uit te lê of toe te pas en (a) geen mondelinge getuienis gelei is nie, moet sodanige hof die saak na die *Hof* oorplaas en mag geen verdere stappe in die saak in sodanige hof gedoen word nie . . ." Hoe 'n mens hoegenaamd met enige wetgewing kan omgaan sonder om dit te interpreteer, is onduidelik. Trouens, dit is 'n grap!

104 "Overruling statutory precedents" 1988 *Georgetown LJ* 1361 1385; O'Keefe 278.

105 Sien ook Devenish *Interpretation of statutes* (1992) 141 met verwysing na die Engelse saak *Attorney-General v Edison Telephone Co of London* (1880) 6 QBD 244 en Labuschagne "Gewone betekenis van 'n woord, woordeboeke en die organiese aard van wetsuitleg" 1998 *SAPR/PL* 145 148.

106 Labuschagne "Kennispyn: 'n bewussynsantropologiese perspektief op die evolusieproses van die persoonlikheidsreg" 1998 *THRHR* 313 316–317; Wank *Die Auslegung von Gesetzen* (1997) 43.

107 Labuschagne "Tussen onafhanklikheid en tirannie: Opmerkinge oor die kontrole-meganismes van die regsprekende gesag" 1993 *De Jure* 347 354–356.

108 Sien ook Cameron 253; De Villiers "Dra die keiser klere? Diskresie en wetteloosheid in strafregspleging – *quo vadis* Suid-Afrika?" 1997 *TSAR* 615 621 *et seq*; Steyn "The role of the bar, the judge and the jury: Winds of change" 1999 *Public Law* 51 58.

109 321 US 649, 669 (1944) met goedkeuring aangehaal deur Stevens 3 vn 17.

110 Sien *R v Nxumalo* 1939 AD 580 586–586; Van Zyl 307. Vgl in die algemeen Gordon "Critical legal histories" 1984 *Stanford LR* 57. Odersky "Rechtsgeschichte und Rechtsprechung" 1991 *Deutsche Notar-Zeitschrift* 108 118 wys daarop dat die regslandskap nie ontkoppel van die geskiedenis verstaan kan word nie en dat die historiese by inhoudgewing aan die geregtigheidsbegrip nie misgekyk mag word nie.

111 Labuschagne "Tussen onafhanklikheid en tirannie: Opmerkinge oor die kontrolemeganismes van die regsprekende gesag" 1993 *De Jure* 347 354–356; Smith "Hermeneutiek" in Cliteur, Labuschagne en Smith (reds) *Rechtsfilosofische stromingen van de twintigste eeuw* (1997) 199 206; Meuwissen "Dialecktiek, hermeneutiek en recht" in Kamstra, Kunneman en Maris (reds) *Nederlandse rechtswetenschap* (1988) 299 304; Crête, Normand en Copeland "Law reporting in nineteenth century Quebec" 1995 *J of Legal History* 147. Volgens Theune "Die revisions-

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regstelsel wat 'n rasionele (kennismatige) legitimiteit besit, kan sinvol en effektief funksioneer.[112] Die evolusionêre basis van kennis verskaf aan die *stare decisis*-reël, wat geregtigheidsmatig sinvol in kennis geanker moet wees, 'n onsekere dimensie.[113] Hieruit blyk ook meteens dat 'n voortdurende (kennismatige) interaksie behoort te bestaan tussen die wetenskap, waarby inbegrepe word die regswetenskap, en die regsprekende gesag, asook die regsprofessie in die algemeen.[114]

O'Keefe[115] wys daarop dat 'n (rasionele) uitsondering op die *stare decisis*-reël bestaan "when the statutory precedent is inconsistent with other statutory precedents, especially if the precedent was not the product of careful reasoning or appropriate consideration by the Court".[116] Die Suid-Afrikaanse Appèlhof[117] – tans genoem die Hoogste Hof van Appèl – het duidelik te kenne gegee dat dit 'n presedent wat nie met die basiese beginsels van ons reg sinchroniseer nie omver sal werp. Wat duidelik blyk, is dat 'n presedent wat op navolging aanspraak maak, nie net rasioneel

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gerichtliche Kontrolle der Beweiswürdigung des Tatrichters" in *Arbeitsgemeinschaft Strafrecht des DAV*, 13 14 is regsvorming onderworpe aan wetenskaplike kennis, die reëls van logika en ervaring ("Erfahrungssätze"). Sien ook Säcker "Zur demokratischen Legitimation des Richter – und Gewohnheitsrechts" 1971 *ZRP* 145 147; Koch "Zur Rationalität richterlichen Entscheidens" 1973 *Rechtstheorie* 183 197 *et seq*.

112 Vgl McNamara 1156; Schaefer "Forward: Stare decisis and the 'law of the circuit'" 1979 *De Paul LR* 565 567; Easterbrook "Stability and reliability in judicial decisions" 1988 *Cornell LR* 422 423: "Although the system of precedent impounds information and wisdom greater than any judge can bring to bear, no particular decision does so. A given case may have been tossed off between sandwiches or based on a factual blunder. In principle, modern judges have all the information available to their forbears, plus any discoveries in the interim, and the benefit of hindsight. Judges often decide cases on the basis of predictions about the effects of the legal rule. We can examine these effects – both for other strands of doctrine and for the world at large – and improve on the treatment of the earlier case. This possibility of improvement makes precedent unstable. It ought to be unstable, provided we can focus judges' attention and bring to the case sufficient care to be sure that our information exceeds that of the judges who acted earlier. Yet this also means that we do not have – never can have – a comprehensive theory of precedent, any more than we can have a complete theory of the 'just price' of wheat, or of when to spend more time studying the attributes of securities. There is an equilibrium degree of disequilibrium."

113 Easterbrook 422; O'Keefe 279; Labuschagne "Regsekerheid en betekeniskonstantheid by wetsuitleg" 1991 (2) *TRW* 15 16; Weinsheimer *Eighteenth-century hermeneutics* (1993) 12: die idee van 'n vasstaande waarheid word reeds weerlê deur die veelheid interpretasies daarvan.

114 Schrage "Van samenspel en wisselwerking" 1996 *WPNR* 6; LaForest "Who is listening to whom? The discourse between the Canadian judiciary and academics" in Markensinis (red) *Law making, law finding and law shaping: The diverse influences* (1997) 69 89.

115 276 met verwysing na Eskridge "Overruling statutory precedents" 1988 *Georgetown LJ* 1361 1372–1373.

116 Vgl ook Mattis en Mattis "Erie and Florida law conflict at the crossroads: The constitutional need for statewide stare decisis" 1994 *Nova LR* 1333; Brunner "Stare decisis in the elimination of the federal-state distinction in affirmative action cases" 1996 *Univ of Dayton LR* 779 792–794; Beaumont "Indirect effect of directives and stare decisis" 1988 *Scottish Law Gazette* 77; Easterbrook 425; Midgley "Stare decisis and conflicting full-bench decisions" 1987 *SALJ* 35 37; Wank 43.

117 *Dukes v Marthinusen* 1937 AD 12 22–23; Van Zyl 309; Kahn 189 vn 10 mvn verdere beslissings van die Appèlhof. Vgl ook Frankfurter R in *Helvering v Hallock* 84 L ed 604, 612 (1939): "We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

fundeerbaar moet wees nie, maar sinvol binne die konstellasie van regsreëls (en -beginsels) struktureerbaar moet wees.[118] Die chronologiese is ook in dié verband van wesenlike belang: 'n voortydige presedent sou oneffektief kon wees![119] Ons howe het by herhaling beslis dat 'n voorafgaande presedent wat opsigtelik verkeerd is, nie deur 'n latere hof, blykbaar slegs van dieselfde presedent-hiërargiese status, gevolg hoef te word nie.[120] In *Bloemfontein Town Council v Richter*[121] verklaar appèlregter Stratford soos volg:

> "The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake, a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors – such preference, if allowed, would produce endless uncertainty and confusion."[122]

Die begrip "manifest oversight" verwys klaarblyklik na onagsaamheid of 'n gebrek aan behoorlike navorsing en die begrip "misunderstanding" verwys na 'n gebrek aan begrip en insig, dit wil sê dit verwys na die rasionele. Waarom die hof sy bevoegdheid in dié begrip in dié verband tot 'n "palpable mistake" beperk, is onduidelik. Trouens, die inhoud daarvan is onseker. Geen ongeregtigheid, of dit nou op 'n "palpable mistake" gebaseer is of nie, behoort gekontinueer te word nie. Murphy en Pritchett[123] wys daarop dat verleentheidskeppende presedente dikwels bloot deur latere howe geïgnoreer word.

Volgens Krey[124] is drie vlakke of tipes regsvinding/regsvorming onderskeibaar, naamlik (i) *secundum legem*, dit wil sê die tradisionele wetsuitlegaksie en norm-konkretisering; (ii) *praeter legem*, met ander woorde wetsvoltooiende leemtevulling; en (iii) *contra legem*, dit wil sê "wetstrydige" regsvorming.[125] Hy wys later daarop dat twee uitsonderinge op die *contra legem*-verbod bestaan:[126] (i) Daar word van die regsprekende gesag verwag om te verseker dat wetgewing met die Grondwet sinchroniseer; en (ii) die regsprekende gesag moet in geval van waardestrydighede binne 'n wet(te) (en/of gewysdereg en/of gemenereg) waardesinchronisering bewerkstellig. Wetgewing en regsnorme in die algemeen moet in 'n regstaat grondwetmatig of -konform ("Verfassungskonform") wees.[127] Dit moet ook met

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118 Seiler *Höchstrichterliche Entscheidungsbegründungen und Methode im Zivilrecht* (1992) 104–105 215 wys daarop dat norme so uitgelê behoort te word dat "Unzuträglichkeiten, Unpraktizierbarkeiten oder Unbilligkeiten" (nadelighede, onpraktiseerbaarhede of onbillikhede) vermy word. Sien ook Krey "Gesetztreue und Strafrecht" 1989 *ZStW* 838 869.

119 Bauman *Hermeneutics and social science* (1978) 47.

120 Sien bv *Collett v Priest* 1931 AD 290 297 per De Villiers HR: "But when once the meaning of words in a section of an Act of Parliament has been authoritatively determined by this Court that meaning is the meaning which has to be given to those words in that section by all the Courts in the land. Even this Court is bound and cannot depart from the meaning so laid down except when it is clear to the Court that in so doing it erred." Sien ook *Fellner v Minister of the Interior* 1954 4 SA 523 (A) 542; Van Zyl 307.

121 1938 AD 195 232.

122 Sien ook *R v du Preez* 1943 AD 562 583.

123 *Courts, judges, and politics* (1986) 389–401.

124 "Zur Problematik richterlicher Rechtsfortbildung contra legem" 1978 *JZ* 361 (vervolg in 1978 JZ 428 en 465).

125 "Gesetzeskorrektur, Auflehnung des Richters gegen das Gesetz."

126 467–468.

127 Sien ook Pawlowski "Werte, Normen, Orientierung" in Häsemeyer, Pawlowski en Siburg (reds) *Rechtsprechung heute – Anspruch und Wirklichkeit* (1996) 99 100–101; Raiser "Richterrecht heute" 1985 ZPR 111 115; Ipsen "Rechtsprechung im Grenzbereich zur Gesetzgebung" in Achterberg (red) 435 447–448; Biaggini *Verfassung und Richterrecht* (1991) 339–357.

internasionale regsbeginsels, soos onder andere beliggaam in internasionale aktes van menseregte, versoenbaar wees.[128] In die algemeen kan gesê word dat in 'n regstaat geen plig op 'n regter rus om 'n ongeregtigheid te bewerkstellig of te kontinueer nie.[129]

In 'n insiggewende artikel oor die aard van regsdenke wys Devenish[130] daarop dat die toepassing van die presedentestelsel nie beteken dat die howe onthef word daarvan "to reach decisions on the basis of sound legal reasoning and value judgments" nie. Onderliggend aan die presedentestelsel lê 'n permanente en vaste basis van fundamentele regsbeginsels. Met beroep op Allen[131] word verklaar:

> "Throughout the whole application of the law, the principles are primary and the precedents are secondary, and if we lose sight of this fact precedents become a bad master instead of a good servant."

Waarop Devenish se siening, wat ek onderskryf, neerkom, is dat die presedentestelsel[132] ook binne 'n sekere historiese, sosiale, ekonomiese en filosofiese waardelandskap moet funksioneer. Die *stare decisis*-reël het myns insiens slegs geregtigheidswaarde as dit binne die breëre (rasionele) kennis- en waardelandskap in die betrokke gemeenskap sinvol kan funksioneer. Devenish[133] verwys vervolgens na Suid-Afrikaanse sake waarin die *stare decisis*-reël juis as gevolg hiervan versaak is. Hy noem dit "a triumph of reason over dogma".[134] Dit is interessant om daarop te let dat rede (rasionaliteit) en presedent deur die ou Engelse skrywers gelykgestel is.[135] Hobbes[136] stel die (heilige) soewerein (koning) se rede gelyk aan die "werklike" rede (*anima legis*; *summa ratio*). Die wetgewer, asook die howe, gebruik dikwels doelbewus vae begrippe, soms met 'n waardedinamiese kern, om latere betekenisgewers in staat te stel om regskeppend te kan optree.[137]

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128 BVerfG, Beschl v 8/4/1987, BVerfGE 75, 223 241–244. Sien ook Krey 855ff; Bydlinski "Über die lex-lata-Grenze der Rechtsfindung" in Koller *et al* (reds) *Einheit und Folgerechtigkeit im Juristischen Denken* (1998) 27.

129 Spendel *Rechtsbeugung durch Rechtsprechung* (1984) 21–35.

130 "The nature of legal reasoning involved in the interpretation of statutes" 1991 *Stell LR* 224 237–238. Vgl Van Blerk "The role of the judiciary in post-independence Commonwealth Africa: Some observations" 1993 *Codicillus* 4 5 *et seq*.

131 *Law in the making* (1946) 242.

132 Dit is afgesien van die (rasionele) kennisgebondenheid daarvan, soos hierbo genoem. Vgl Warner "Legal reasoning, drift, drive and the rule in *Rylands v Fletcher*" 1996 *Juridicial R* 201; Otte "Die unbegrenzte Auslegung" 1998 *NJW* 1918 1919; Wank 73 *et seq*.

133 238–239.

134 Vgl Labuschagne "Regsakkulturasie en wetsuitleg" 1985 *THRHR* 64 77 *et seq*; Dendy "A cavalier approach to stare decisis" 1988 *SALJ* 411; Rokeach *The nature of human values* (1973) 286–312. Sien ook tav die VSA Monaghan "Stare decisis and constitutional adjudication" 1988 *Columbia LR* 723; Bratz "Stare decisis in lower courts: Predicting the demise of Supreme Court precedent" 1984 *Washington LR* 87 100: "Lower courts serve a valuable function by refusing to follow on point precedents in appropriate circumstances. While they cannot overrule Supreme Court precedent, lower courts can help clarify the law by determining that the Supreme Court has implicitly overruled a precedent. But this lower court authority to disregard precedent should not be limited to the implicit overrule context. Occasionally, lower courts confront precedents that are not implicitly overruled, but that the Supreme Court predictably would not follow. In such circumstances, and where prediction would not exceed the bounds of judicial propriety, lower court authority to disregard predictably impotent precedent should be recognized as a valid and valuable characteristic of the legal system."

135 Postema "Some roots of our notion of precedent" in Goldstein (red) *Precedent in law* (1987) 9 11.

136 Macpherson (red) *Leviathan* (1968) 317 aangehaal deur Postema 12.

137 Labuschagne "Nietigverklaring van wetgewing weens vaagheid" 1991 *SAPR/PL* 172 en "Vaebegripmatige besluitneming en die regstaatlike grense van redematige administratiefregspleging" 1998 *De Jure* 357.

Slegs die *ratio decidendi*, as norm- en waardedraende begrip, het in die presedentestelsel bindende krag. In die lig van die benadering wat in die onderhawige artikel gevolg word, verloor die tradisionele skerp onderskeid – al sou dit in sekere omstandighede tot heelwat rasionalisasies kan aanleiding gee – tussen die *ratio decidendi* van 'n saak en 'n *obiter dictum* wesenlike relevansie. Dit word derhalwe daar gelaat.[138]

6 DIE *STARE DECISIS*-REËL, NORMGLOSSERING EN DIE REGSTAATLIKE WAARBORG VAN VASTEPUNTORIËNTERENDE REGSDENKE

Die wetgewingsproses, soos elders[139] aangetoon, het 'n hiërargiese struktuur. Die regsprekende gesag vorm deel van dié proses, maar beklee 'n hiërargies laer status as die wetgewer, al sou 'n hof in regstaatlike verband 'n wetgewerswet, of 'n deel daarvan, nietig kon verklaar.[140] Dit is insiggewend dat dit juis binne die konteks van die *stare decisis*-reël is dat ons howe (ten minste vroeër) bereid was om te erken dat hulle ook 'n regskeppende funksie vervul. So verklaar appèlregter Schreiner in *Fellner v Minister of Interior*:[141]

> "For any binding quality, as distinguished from persuasiveness, to exist in the previous decision the *ratio decidendi* must be discoverable and must be found; this applies just as clearly where a Provincial Division is asked to give effect to a *legal rule flowing from a decision of this Court*[142] as where this Court is considering the effect of a previous decision of its own. The inquiry is the same."[143]

Dit moet voortdurend in gedagte gehou word dat 'n hof nie 'n ongebonde regskeppende funksie vervul nie. Die hof moet, as hiërargies ondergeskikte regskepper (wetgewingskakel), denkmatig,[144] dit wil sê in die gang van sy denkproses, by 'n

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138 Van Zyl 302, na 'n analise van gewysderegtelike gesag, verduidelik die inhoud van die begrip *ratio decidendi* treffend soos volg: "Die *ratio decidendi* van 'n hofuitspraak is die regsreël of regsreëls waarop die hof hom beroep ter fundering van sy bevel . . . Die *ratio decidendi* bestaan nie slegs uit dié reël waarvan die toepassing deur die hof *direk* tot die hofbevel gelei het nie, maar ook dié reëls, indien enige, waarvan die toepassing *indirek* tot die hofbevel gelei het, selfs al kon die hof tot dieselfde beslissing geraak het deur die toepassing van ander reëls . . . Die reëls waarop die hof hom beroep moet 'nodig' vir die uitspraak wees; dit wil sê, daar moet *'n logiese verband* tussen die vermelding van die betrokke reël en die verkryging van die eindresultaat, die hofbevel, wees . . . As die hof hom op die bestaan van bepaalde regsreëls beroep as 'n blote aanvullende of bykomstige rede vir sy uitspraak, vorm daardie reëls nie deel van die *ratio decidendi* nie . . . Die hof se feitebevinding vorm ook nie deel van die *ratio decidendi* nie."

139 Sien bv Labuschagne "Die uitlegsvermoede teen staatsgebondenheid" 1978 *TRW* 42 61; "Die dinamiese aard van die wetgewingsproses en wetsuitleg" 1982 *THRHR* 402; "Regsdinamika: Opmerkinge oor die aard van die wetgewingsproses" 1983 *THRHR* 422; "Die konkurrensieproblematiek by wetsuitleg" 1986 *De Jure* 369 370–371. Sien ook Kennedy *A critique of adjudication* (1997) 23–38; Picker "Richterrecht oder Rechtsdogmatik – Alternativen der Rechtsgewinnung" 1988 *JZ* 162.

140 Sien ook Labuschagne "Gewone betekenis van 'n woord, woordeboeke en die organiese aard van wetsuitleg" 1998 *SAPR/PL* 145 147–148.

141 1954 4 SA 523 (A) 543.

142 My kursivering.

143 Sien ook Van Zyl 310 vn 102 waar na nog sake verwys word. Vgl ook Stone *Precedent and law. Dynamics of common law growth* (1985) 214; Abraham "Statutory interpretation and literary theory: Some common concerns of an unlikely pair" in Levinson and Mailloux (reds) *Interpreting law and literature* (1988) 115 117.

144 Vgl Aldisert "Precedent: What it is and what it isn't: When do we kiss it and when do we kill it?" 1990 *Pepperdine LR* 605 617: "In the law, the method of arriving at a general or, in the logician's language, a universal proposition (a principle or doctrine) from the particular facts of experience (legal rules or holdings of cases) is called *inductive generalization*. This is

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vaste punt in die regstelsel aanknoop.[145] Hierdie vaste punt is die struktuurreg.[146] Haverkate[147] verwys in dié verband na die normteks as bron van regsargumentering[148]en merk op dat die denkmetode die gevolg moet bewerkstellig en die gewenste gevolg nie die keuse van sodanige metode moet bepaal nie. Die struktuurreg bestaan uit die aanvanklike norm in die gemenereg of in 'n wet – wat 'n glos op die gemenereg kan wees[149] – en beliggaam die glosse wat die regsprekende gesag intussen daarop geskryf het.[150] Die vraagstuk van normglossering is by vorige geleenthede[151] meer diepgaande onder die loep geneem. Die inligting en argumente daarin geopper, word nie hier herhaal nie. Die regter is die finale skakel in die wetgewingsproses wat moet toesien dat, soos Rogge[152] dit noem "Einzelfallgerechtigkeit", dit wil sê geregtigheid in die konkrete geval voor hande, geskied.[153]

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reasoning from the particular to the general." Vir 'n analise van die aard van regsdenke in dié verband sien ook Devenish "The nature of legal reasoning involved in the interpretation of statutes" 1991 *Stell LR* 224; Burton *An introduction to law and legal reasoning* (1995) 29 *et seq*; Postema 21 *et seq*; Wroblewski *The judicial application of law* (1992) 321 *et seq*; Levin *How judges reason. The logic of adjudication* (1992) 57–58; Tezner 22–59; MacCormick *Legal reasoning and legal theory* (1978) 19 ev. Vgl Easterbrook "Stability and reliability in judicial decisions" 1988 *Cornell LR* 422 433: "Precedent decentralizes decisionmaking and allows each judge to build on the wisdom of others."

145 Hirsch Ballin "Onafhankelijke rechtsvorming: Staatsrechtelijke aantekeningen over de plaats en functie van de Hoge Raad in de Nederlandse rechtsorde" in *De plaats van de Hoge Raad in het huidige staatsbestel* (1988) 211 233–235; Watson *Failures of the legal imagination* (1988) 35–36; Langenbucher 43; Cameron 261.

146 Labuschagne "Tussen onafhanklikheid en tirannie: Opmerkinge oor die kontrole-meganismes van die regsprekende gesag" 1993 *De Jure* 347 358–359.

147 *Normtext-Begriff-Telos. Zu den drei Grundtypen des juristischen Argumentierens* (1996) 2 22–27.

148 Dit is ook die standpunt van die Duitse konstitusionele hof – BVerfG, Beschl v 14/2/1973, BVerfGE 34, 269 284–285. Sien ook Müller *Richterrecht* (1986) 49; Gusy "Der Vorrang des Gesetzes" 1983 *Juristische Schulung* 189 194; Bydlinski "Hauptpositionen zum Richterrecht" 1985 *JZ* 149 153–155; Hilgendorf *Argumentation in der Jurisprudenz* (1991) 26–27; Fikentscher "Die Bedeutung von Präjudizien im heutigen deutschen Privatrecht" in Blaurock (red) *Die Bedeutung von Präjudizien im deutschen und französischen Recht* (1985) 11 22; Biaggini 283; Zippelius "Über die rationale Strukturierung rechtlicher Erwägungen" 1999 *JZ* 112 116.

149 Firdham and Leach "Interpretation of statutes in derogation of the common law" 1950 *Vanderbilt LR* 438 444.

150 Vgl O'Keefe 273: "[T]he Court's original interpretation of a statute becomes part of the legislation and any subsequent changes by the Court would be viewed as legislative in nature." Sien ook Garrn *Zur Rationalität rechtlicher Entscheidungen* (1986) 100; Aldisert 611–612; Smith 197. Vgl egter Wesley-Smith "Theories of adjudication and the status of stare decisis" in Goldstein (red) *Precedent in the law* (1987) 73 87: "Judges owe their fidelity, not to the pronouncement of predecessors, but to the law."

151 Labuschagne 1998 *SAPR/PL* 145; "Normglossering, regterlike betrokkenheid by vakkundige aktiwiteite en die organiese aard van wetsuitleg" 1999 *TSAR* 338; "Vrees, selfbedrog, pretensie en die dinamiese aard van geregtigheid: 'n Regsantropologiese evaluasie van die evolusie van die reëls van wetsuitleg" 1999 *SAPR/PL* 1. Vgl verder Müller 110; Oppenheimer "Richterliche Rechtsfortbildung und Gesetzgebung" 1983 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenchaft* 57. Bydlinski "Hauptpositionen zum Richterrecht" 1985 JZ 149 155 verwys na "subsidiäre Verbindlichkeit des Richterrecht" waaruit afgelei kan word dat die gewysdereg nie dieselfde bindingskrag as die wetsteks het nie.

152 "Der Einzelfall und das Gesetz" in Häsemeyer, Pawlowski en Siburg (reds) *Rechtsprechung heute – Anspruch und Wirklichkeit* (1996) 21 28 *et seq*.

153 Sien ook Theune 22; Radecker "*Rechtsethiologie* – Wirkungsforschung zum Recht" 1999 *NJW* 1686 1687.

Afgesien daarvan dat selektiewe rapportering, of andersindse publikasie, van hofuitsprake tot die ongewenste situasie kan lei dat uitgewers of ander betrokkenes die regspleging sou kon manipuleer en beheer, sou geregtigheid in iedere geval slegs optimaal[154] gedien kon word indien alle hofuitsprake vrylik beskikbaar is.[155] Hopelik sal die elektroniese media in die toekoms hierdie probleem kan help oplos.[156] Die belangrike posisie in die Suid-Afrikaanse regspleging van landdroshowe, waar die grootste hoeveelheid regspraak plaasvind, behoort in 'n toenemende mate erken te word, spesifiek ook deur rapportering van hulle (aanvanklik miskien slegs juridies belangrike) beslissings.[157]

7 KONKLUSIE

In die *Digesta*[158] word verklaar: *Iustitiam namque colimus et boni et aequi notitiam profitemur* (want ons koester geregtigheid en bely kennis van dit wat billik en regverdig is). Hierdie geregtigheid waarna verwys word, is nie staties van aard nie. Die heilige status wat die oervader (en sy opvolgers) gehad het, het tot gevolg gehad dat sy uitsprake as onfeilbaar beleef is. In hierdie fase het gevolglik slegs ruimte vir 'n rigiede *stare decisis*-reël bestaan. Die regsantropologies-universele dereligiëringsproses het die heilige oervader (asook sy opvolgers) egter uiteindelik as feilbare mense uitgewys.[159] Hierdie feit, gepaardgaande met die evolusie van kennis en menslike waardes, onderlê deur die dekonkretiseringsproses en 'n verskeidenheid ander regsantropologies-universele evolusieprosesse, soos hierbo[160] genoem, het 'n starre presedentestelsel ontman.[161] Die *stare decisis*-reël kan slegs geregtigheidskonform bestaan indien dit binne 'n veranderde (waarde- en spesifiek) regslandskap sinvol en rasioneel (kennismatig) motiveerbaar is.[162] 'n Rigiede regsekerheid is in

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154 Vgl Snijders "Wordt de samenwerkende rechter tot bestuurder en/of wetgever?" 1997 *NJB* 1793 1797: "Rechters zijn niet onafhankelijk van de rechterlijke uitspraken van hun collegae. Ware dit anders, dan zouden zij onafhankelijk zijn van het recht zelf." Uit D'Oliveira ("Rechter die afstemmen en afhouden" 1999 *NJB* 377) se uiteensetting blyk tereg dat 'n te rigiede *stare decisis*-reël, veral by wyse van die stel van voorafgaande regspraak-riglyne, die regstaatlike aksioma van regterlike onafhanklikheid (en veral onpartydigheid) kan ondergrawe.

155 BVerwG, Beschl v 1/12/1992, NJW 1993, 675; BVerwG, Urt 26/2/1997, NJW 1997, 2694; Huff "Die Veröffentlichungspflicht der Gerichte" 1997 NJW 2651 2653; Biaggini 341; Olzen 163. Vgl Viljoen "Canonizing cases: The politics of law reporting" 1997 *SALJ* 318.

156 Brenner *Precedent inflation* (1992) 258.

157 Sien verder Cameron 259; Klopper "Die emansipasie van die landdros" 1993 *Consultus* 133; Whittle "Judging the magistrates. Lower courts' judiciary asserts independence as magistrates begin to speak out" 1995 *De Rebus* 534; Laue "The independence of the judiciary in the lower courts" 1995 *De Rebus* 519.

158 *D* 1 1 1 1; *Legal maxims in Langdell supra.*

159 Sien Baustein en Field 183; Lamprecht *Vom Mythos der Unabhängigkeit* (1996) 17; Labuschagne "Deliktuele aanspreeklikheid van die staat vir foute van die regsprekende gesag: Is die oervader uiteindelik ontheilig?" 1996 *THRHR* 479 en "Die deliktuele sanksie as kontrolemeganisme van die administratiefregspleging en die regsprekende gesag" 1996 *SAPR/PL* 582.

160 2 2 *supra.*

161 Vgl *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513 (HL) 535 *et seq.*

162 Vgl Yarnold *Politics and the courts* (1992) 12; McKeever 28 *et seq*; Langenbucher 45; Labuschagne "Die leemtebegrip by wetsuitleg as anachronisme" 1999 *THRHR* 300. Om regstaatlike waardes en geregtigheid te verwesenlik, rus op die regsprekende gesag soms die taak om ordeningsleemtes aan te val en as "noodwetgewer" op te tree – Schubarth "Zur richterlichen Rechtsfortbildung" 1988 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenchraft* 86 95; Säcker 146 (praat van die aanvul van 'n "Bewertungslücke"); Labuschagne "Herroeping van wetgewing en die vulling van ordeningsleemtes" 1993 *Stell LR* 190.

'n regstaat aan geregtigheidsekerheid onderworpe. Op die regsprekende gesag rus die plig om te verseker dat 'n ongeregtigheid nie ter wille van handhawing van 'n starre presedente-stelsel gekontinueer word nie. Die benadering in die Duitse en Nederlandse reg[163] is derhalwe te verkies:[164] enige hof kan van 'n beslissing van enige ander hof afwyk indien dit kennismatig (rasioneel) sinvol en gevolglik motiveerbaar is en indien dit geregtigheidskonform is.[165] Hierdie benadering word onderlê deur die regsantropologies-universele waarneming dat die geregtigheidsbegrip 'n dinamiese, en daarom onsekere,[166] kern het.[167] Enige beginsel of reël of regspreker wat dit ontken of ondergrawe, is, in finale sin, in diens van ongeregtigheid.

It is time for legal scholars to stop chanting the slogans of the new constitutional order (democracy, accountability, openness, the rule of law, human dignity, equality, freedom, purposive interpretation, etc) and to start debating the meaning of our constitutional ideals and commitments. The first step in that direction is, in my view, a recognition of the contested nature of our legal ideals. Only once we have recognised that constitutional rules and principles are (often) susceptible to more than one plausible interpretation, and that the choice between such interpretations is a matter of judgment, *not of applying rules and principles in a mechanical fashion, can we hope to escape from the formalism that continues to pervade legal thinking in this country.*

Henk Botha "The constitutional right of access to court: Ernst & Young v Beinash 1999 1 SA 1114 (W); Beinash v Young 1999 2 BCLR 125 (CC)" 1999 SA Public Law 215 222.

163 3 *supra*. Sien ook MacCormick 227.

164 Pilny 201–203 wat 'n intensiewe studie in dié verband gedoen het, is van mening dat die Anglo-Amerikaanse en die Europese regstelsels nader aan mekaar beweeg.

165 Sien ook Ladeur "Gesetzesinterpretation, 'Richterrecht' und Konventionsbildung in kognitivistischer Perspektive" 1991 *Archiv für Rechts- und Sozialphilosophie* 176 189–194; Weinberger "Juristische Entscheidungslogik" in Achterberg (red) 123 127 *et seq*.

166 Die onsekere dimensie wat 'n newe-effek van die dinamiese kern van die geregtigheidsbegrip is, is nie noodwendig van 'n ingrypende aard nie. In 'n regstaat is dit, weens die primêre status van die akte van menseregte, dikwels van 'n marginale aard – sien Labuschagne 1996 *SATE* 40 *et seq*.

167 Sien Scholz "Iustitia semper reformanda" 1999 *FamRZ* 554; Schröder *Gesetzesauslegung und Gesetzesumgehung* (1985) 124; Sommermann "Taugt die Gerechtigkeit als Maßstab der Rechtsstaatlichkeit?" 1999 *Jura* 337.

Comparative subnational constitutional law: South Africa's provincial constitutional experiments*

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Students of federal systems have tended to focus their attention on the federal constitutions that frame the entire polity while neglecting the constitutional arrangements of the constituent polities. Concern with constituent state constitutions has tended to be an American phenomenon and even there confined to those interested in state constitutional reform. In fact, the constitutions of constituent states are part and parcel of the total constitutional structure of federal systems and play a vital role in giving the system direction.

Daniel J Elazar[1]

Extolling the virtues of comparative state constitutional law – within federations or between nations – remains a novel and hazardous enterprise. Renewed enchantment with American state constitutions has, as yet, not engendered a renaissance of comparative state constitutional law scholarship . . . Benign neglect is . . . a pervasive characteristic.

James A Thomson[2]

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** Co-editor with G Alan Tarr of a forthcoming volume on subnational constitutions that will be a part of the *International encyclopedia of laws: Constitutional law*. I would like to thank my colleague G Alan Tarr of Rutgers and Franz Merli of the University of Heidelberg, for helpful comments and ideas. This article is based on the author's experience, teaching American federalism in Graz, Austria in the Spring of 1994 and on papers he presented in Barcelona Spain in October 1990, in Graz Austria in December 1991 and in Sao Paulo Brazil in October 1992 and August 1995. It is also based on presentations to the Comparative Federalism and Federation Research Committee of the International Political Science Association in Jacksonville Florida in October 1995, to the First World Law Conference in Brussels Belgium in September 1996 and to numerous audiences of visiting lawyers and government officials in Philadelphia Pennsylvania between 1984 and 1998. Further it is based on discussions with professors and judges in Johannesburg and Pretoria South Africa in March 1998 and 1999 and on discussions in September 1996 with members of the Parliamentary Committee which drafted the provincial constitution for the province of KwaZulu/Natal. I would like to thank the scholars from federal systems around the world too numerous to name who have generously responded to my written inquiries. See Williams "A research agenda in comparative state constitutional law" 20 *The Federalism Rep* 3–4 (Fall 1994).

1 *Exploring federalism* (1987) 174.

2 "State constitutional law: Some comparative perspectives" 20 *Rutgers LJ* 1059 1059–1064 (1989) (footnotes omitted).

1 INTRODUCTION

Comparative constitutionalism has always been an important field of study.[3] It has gained new importance, and practical urgency, in the past several years with the advent of so many new, emerging democratic governments.[4] As part of the study of comparative constitutionalism, *federal* constitutional systems have also taken on a renewed interest recently.[5] Within the field of comparative federal constitutional law, though, the study of *state* or *subnational* constitutions is only now becoming a major focal point of world-wide interest.[6] Russia[7] and South Africa present fascinating current examples of emerging federal systems where

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3 See generally *Constitutions that made history* (Blaustein and Sigler eds 1988); Symposium "Comparative Constitutionalism" 40 *Emory LJ* 723 (1991); Symposium "Comparative constitutionalim as interplay between identity and diversity: An introduction" 14 *Cardozo L Rev* 497 (1993); Weissbrodt "Globalization of constitutional law and civil rights" 43 *J Legal Educ* 261 (1993); Thomson "Comparative constitutional law: Entering the quagmire" 6 *Ariz J Int'l and Comp L* 22 (1989); Magnarella "The comparative constitutional law enterprise" 30 *Willamette L Rev* 509 (1994); Arato "Forms of constitution making and theories of democracy" 17 *Cardozo L Rev* 191 (1995); Finer *et al* Vernon Bogdanor and Bernard Rudden *Comparing constitutions* (1995); Kommers "The value of comparative constitutional law" 9 *J Marshall J Prac and Pro* 685 (1976).

4 See Symposium "Approaching democracy: A new legal order for Eastern Europe" 58 *U Chi LR* 439 (1991); Holmes "Back to the drawing board" 2 *E Eur Const Rev* 21 (Winter 1993); Elster "Making sense of constitution-making 1 *E Eur Const* Rev 15 (Spring 1992); Sunstein "Something old something new" 1 *E Eur Const Rev* 18 (Spring 1992); Richards "Comparative revolutionary constitutionalism: A research agenda for comparative law" 26 NYU *J Int'l L and Pol* 1 (1993); Ackerman "The rise of world constitutionalism" 83 *Va Rev* 771 (1997).

5 See generally eg *Comparative constitutional federalism: Europe and America* (Tushnet ed 1990); Lenaerts "Constitutionalism and the many faces of federalism" 38 *Am J Comp L* 205 (1990); Watts "The American constitution in comparative perspective: A comparison of federalism in the United States and Canada" 74 *J Am Hist* 769 (1987); Massey "The locus of sovereignty: Judicial review legislative supremacy and federalism in the constitutional traditions of Canada and the United States" 1990 *Duke LJ* 1229; Jackson and Tushnet *Comparative constitutional law* (1999) ch VIII. The national constitutions in federal systems are substantially longer than those of unitary nations. See Van Maarseveen and Van der Tang *Written constitutions: A computerized comparative study* (1978) 54 174–188.

6 See generally eg *State constitutions around the world: A comparative analysis* (Thomson ed forthcoming); Thomson "State constitutional law: Some comparative perspectives" 20 *Rutgers LJ* 1059 (1989); Symposium "State constitutional design in federal systems *Publius: The J of Federalism* Winter 1982 1; Duchacek "State constitutional law in comparative perspective" 496 *Annals* 128 (1988).

7 Walker "Designing center-region relations in the New Russia" 4 *E Eur Const Rev* 54 (Winter 1995); Tarr "State constitutionalism in the Russian Federation" 5 *State Const Commentaries and Notes* 21 (1994); Tarr "Russian federalism and state constitutionalism" 20 *The Federalism Rep* 6–7 (1995). Russia presents a very interesting emerging picture of asymmetrical federalism involving different kinds of subnational units or component entities. The central government is reaching agreements with the different kinds of subnational units that actually resemble treaties. As one scholar recently asked: "What sort of state is Russia becoming: a loose confederation of regional units, a true federation or a unitary state? Or, are asymmetries between the 57 predominantly Russian *oblasts* and *krais* and the 21 'ethnic homeland' republics producing a state in which '23 million Russian subjects will live in a federation and another 124 will live in a unitary state'." Solnick "Federal bargaining in Russia" 4 *E Eur Const Rev* 52 (Fall 1995) (citations omitted). See generally Tarr "Creating federalism in Russia" 40 *S Tex L Rev* 689 (1999).

subnational constitutions are beginning to play an important role. The redrafting of the constitutions of the former East German *Länder* has raised the level of interest in subnational constitutions in Germany.[8] In Australia, the recent unsuccessful statehood movement in the Northern Territory, as well as the debate on whether Australia should become a republic, have brought new attention to subnational constitutions.[9] There is renewed interest in federalism and devolution in other countries as well, such as Mexico.[10]

Subnational constitutions have been, and generally remain, low-visibility constitutions. Studies of constitutional federalism have tended to be almost exclusively top-down looks at the national constitution and its federal features, rather than a bottom-up look at the subnational constitutions themselves.

Daniel Elazar reported as recently as 1982 that "we found little, if any, work being done to explore constituent state constitutional design in other federal systems".[11] A system of constitutional federalism cannot be fully understood

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8 Professor Christian Starck of the University of Göttingen Germany himself a consultant to the commission that recommended the new 1994 *Land* (state) Constitution for Mecklenburg-Western Pomerania to the *Land* Assembly has recently written about the process there and in other former East German *Länder* which have adopted new state constitutions. See Starck "The constitutions of the New German Länder and their origins: A comparative analysis" (*Konrad Adenaur Foundation Occasional Papers* June 1995). For an excellent analysis of the process of adoption and content of the constitutions of the five former East German *Länder* see Quint *The imperfect union: Constitutional structures of German Unification* 73–99 (1997). Professor Quint concluded: "Even the most modest of these new state constitutions reflect the lessons of the GDR past and the 1989 revolution and – with all their similarities to the Basic Law – can still be said to represent a distinctly different and distinctly eastern constitutional consciousness. One important question of future constitutional development in Germany is the extent to which the consciousness of the GDR reformers – as embodied in the Round Table draft and to some extent in the new charters of the eastern states – may ultimately make its way through constitutional revision or judicial interpretation into the constitutional consciousness of the unified nation and the west itself" *id* 99. Professor Quint has recently surveyed the judicial interpretations of the new German subnational constitutions in Quint "The constitutional guarantees of social welfare in the process of German unification" 47 *Am J Comp* L 303 310–321 325 (1999). See Markovits "Reconcilable differences: On Peter Quint's The Imperfect Union" 47 *Am J Comp L* 189 194–197 206–209 (1999).

9 See Heatley and McNab "The Northern Territory Statehood Convention 1998" 9 *Pub Law Rev* 155 157 (1998): "The Constitution which emerged from the Convention was very different to the Final Draft prepared by the Sessional Committee. Significant in the material deleted from the draft were the Organic Law provisions and those relating to the protection of certain Aboriginal rights. In broad terms the Convention's Constitution followed more closely a second document put forward by one of the Government representatives, a senior Minister. Drawing upon the Final Draft, but modelled upon existing State Constitutions and embodying a minimalist approach, it was advocated as both 'realistic' and 'simple and straightforward'. It became the base agenda of the so-called 'Territory Working Group' and was generally supported by the dominant conservative disposition within the Convention. The major departures from the Government model were the inclusion of Aboriginal customary law and the recognition of local government both of which were accepted for pragmatic reasons." *Id* (footnotes ommitted). See also Heatley and McNab "The Northern Territory Statehood Referendum 1998" 10 *Pub Law Rev* 3 (1999); Nettheim "Aboriginal Constitutional Conventions in the Northern Territory" 10 *Pub Law Rev* 8 (1999).

10 See Rodríguez *Decentralization in Mexico: From reforma municipal to solidaridad to Nuevo Federalismo* (1997) 22–23; see also Fix-Zamudio and Fix-Fierro "Mexico" in 2 *International Encyclopedia of Laws: Constitutional Law* 105–09 (January 1994) ("Unfortunately state constitutional law has scarcely been studied").

11 Elazar "Introduction: State constitutional design in federal systems" *Publius: The J of Federalism* Winter 1982 1 5.

without analyzing the constitutional arrangements within the constituent units. The marketplace for the constitutional ideas generated in the laboratories of states within federal systems is now rapidly expanding to include the worldwide "global village".[12]

With respect to American state constitutions, one commentator has lamented:

> "The explanation for the comparatively small amount of intensive professional and scholarly interest in at least the basic study of comparative state constitutional provisions lies to a great extent in the nature of the state constitutional documents themselves. This can be proved, for anyone with the necessary time and patience, by reading ... the fifty state constitutions. With some exceptions, the state constitutions are not notable as masterpieces of legal draftsmanship or literary style."[13]

Is it possible that such a critique could be made of the subnational constitutions in most federal systems? Scholars in other federal systems do make similar observations.

On the other hand, Frank Grad has observed:

> "The field of state constitutional research has become in large measure a field of comparative law, and states that propose to amend their constitutions usually look to the constitutional language and experience of other states, either for example or avoidance."[14]

It is also a fair question whether these observations hold true in other federal systems.

There are several dozen *bona fide* federal political systems in the world, as well as unitary political systems that include "federal arrangements".[15] Daniel Elazar defines federalism as follows:

> "Federalism can be defined as the mode of political organization that unites smaller polities within an overarching political system by distributing power among general and constituent governments in a manner designed to protect the existence and authority of both national and subnational political systems, enabling all to share in the overall system's decision-making and executing processes."[16]

Elazar noted in 1982 that in nine of the fourteen "formally federal systems" the states had constitutions and that "many of the constituent units of other political

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12 See Friedman "Federalism's future in the Global Village" 47 *Vand L Rev* 1441 1441 (1994). Judge Dorothy Beasley of Georgia has noted this widened role for state constitutional law: "With the rapid growth in democratic reform and the development of global communication systems, state constitutional law takes on an added significance. Not only do vigorous development and application of state constitutions serve as laboratories on constitutionalism for our own nation's progress, but state constitutional law offers new democracies the opportunity to view varied constitutional theories which may be implemented abroad" – "Foreword emerging issues in state constitutional law" 67 *Temp L Rev* 925 925 (1994).

13 See Goldings "Massachusetts amends: A decade of state constitutional revision" 5 *Harv J on Legis* 373 (1968).

14 Grad Foreword to Sachs *Fundamental liberties and rights: A 50 State Index v New York: Legislative Drafting Research Fund*, Columbia University (Oceana Publications 1980).

15 See Elazar *supra* fn 1 38–47; Duchacek *supra* fn 6 129; Duchacek *Comparative federalism: The territorial dimension of politics* ix–xii (1987) (1970). For a useful, but somewhat outdated compilation of component units in federal systems, see Fisher *Provinces and provincial capitals of the world* (1985).

16 Elazar *American federalism: A view from the states* (1966) 2; see also Riker *Federalism: Origin operation significance* (1964) 11–12.

systems utilizing federal arrangements also have constitutions worthy of investigation".[17] Therefore, although the presence of states with their own constitutions is not a *necessary condition* of a federal system,[18] it is often the case.

In many federal systems the constituent polities, regardless of whether they are called states, estados, cantons, *Länder*, provinces, *oblasts* or some other term, have their own *constitutions*.[19] Whether these constituent polities have well-recognized names like New York, California, Lower Saxony, Baja California, or Zurich, or less commonly recognized names like Styria, Burgenland, Queensland, KwaZulu/Natal, Lucerne, Sao Paulo, Tasmania, Chechnya, or Chiapas, they all have important governmental powers, and some of them have constitutions. These subnational constitutions are probably not of a "plain vanilla"[20] brand, but rather they most likely exhibit a wide variety of forms and contents, both within and among federal systems. A preliminary question, of course, is what actually counts as a *constitution*. For example, although the provinces in Canada do not have separate written constitutions, the national constitution contains within itself the constitutional structures for the provinces.[21] It is generally thought that in other federal systems, such as India, the states do not have separate written constitutions, but also, there, the national constitution constitutes the state governments.[22]

2 COMPARATIVE SUBNATIONAL CONSTITUTIONAL LAW

In the United States of America, a federal system, it is necessary to study, analyze, and describe "comparative American constitutional law".[23] Here, the state constitutions can and should be studied in comparison to other American state constitutions, to our federal constitution, and to the federal and state constitutions of other nations. This is also true within other federal systems. The relatively recent practice in America of teaching state constitutional law[24] is beginning to

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17 Elazar *supra* fn 11 8–9.

18 See Duchacek *supra* fn 6 134.

19 There is no compilation of the constitutions of component units in federal systems. A start is provided in Blaustein and Blaustein eds *Constitutions of dependencies and special sovereignties* (1995 6 looseleaf binders). Also, in their new *International encyclopedia of laws: Constitutional law* Kluwer Law and Taxation Publishers include a section on the component entities of each of the federal systems, as well as bibliographic material on the subnational constitutions. Territories and dependencies may also have their own constitutions. See generally Alvarez-González "The protection of civil rights in Puerto Rico" 6 *Ariz J Int'l and Comp L* 88 (1989).

20 This is Carol Rose's term who noted that "the federal Constitution has the status of what might be called the 'plain vanilla' brand – a brand so familiar that it is assumed to be correct for every occasion" – "The ancient constitution vs the federalist empire: anti-federalism from the attack on 'monarchism' to modern localism" 84 *Nw UL Rev* 74 74 (1989).

21 See Watts *supra* fn 5 771–772 789.

22 See Agurwal "India" in 1 *International encyclopedia of laws: Constitutional law* 105–09 (July 1993).

23 I am indebted to Gisbert H Flanz for pointing out the applicability of the term "comparative constitutional law" to the study of American state constitutional law. See generally Medina "The origination clause in the American Constitution: A comparative survey" 23 *Tulsa LJ* 165 (1987) (comparing state constitutional origination clauses with the federal clause); *The Texas Constitution: An annotated and comparative analysis* 2 (Braden ed 1977); *The Illinois Constitution: An annotated and comparative analysis* (Braden and Cohn eds 1969).

24 An increasing number of American law schools are teaching state constitutional law. See also Gordon "The demise of American constitutionalism: Death by legal education" 16 S Ill *U LJ* 39 50 (1991); Williams "State constitutional law: Teaching and scholarship" 41 *J Legal Educ* 243 243 (1991).

be replicated, at least in Australia.[25] Other courses are likely to follow in federal systems as they "rediscover" their state constitutions.

In the context of the European Union the questions surrounding the federal nature of some of the member nations are of increasing interest.

> "In particular, the debate revolved around the question of how (prospective) EC member states with federal-type constitutions can maintain their decentralized political structure within a Community that is itself slowly developing into a federal union. The Austrian and German *Länder*, the Swiss Cantons, the Belgian regions, and the Spanish autonomous communities are intent on preserving and, if possible, extending their powers not only in the national, but also the Community context."[26]

One important, rather recent, activity of states in federal systems, at least in Europe and America, is the development of direct relationships with other countries or states within other countries.[27]

Virtually everyone in the world who is interested in law and government has some knowledge of the American *federal* Constitution. That constitution has had substantial influence on constitutionalism throughout much of the world.[28] Carl Friedrich contended that, more specifically, American constitutional *federalism* has substantial influence abroad.[29] The early American state constitutions also had some major influence, at least in Europe,[30] but now have been largely

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25 Letter from JC Waugh Lecturer *The University of Melbourne Law School* to Robert F Williams Professor *Rutgers University School of Law* (1995-19-01) (on file with author).

26 Goetz *Federalising Europe? The costs benefits and preconditions of federal political systems* Staatswissenschaften und Staatspraxis 149 158 (1992). See generally *The regional dimension of the European Union: Towards a third level in Europe?* (Jeffery ed 1997).

27 See generally Nass "The foreign and European policy of the German Länder" 19 *Publius: The J of Federalism* Fall 1989 165; Duchacek *supra* fn 6 131 ("In addition some Swiss cantons have become increasingly concerned with the modern trans-sovereign roles of sub-national governments."); Fry "State and local governments in the international arena" 509 *Annals* 118 (May 1990); Friedman *supra* fn 12 1442 ("In short as the barriers between countries fall, the lines we have drawn between the national government and the states will come under increasing strain."); "Special feature: State and local governments in international affairs – ACIR findings and recommendations" 20 *Intergovernmental Perspective* 33 (Fall 1993–Winter 1994).

28 See Billias "American Constitutionalism and Europe" in *American constitutionalism abroad* 13 13–14 (Billias ed 1990); Blaustein "Our most important export: The influence of the United States Constitution abroad" 3 *Conn J Int'l L* 15 15 (1987); Blaustein "The influence of the United States Constitution abroad" 12 *Okla City UL Rev* 435 435–436 (1987); Henkin and Rosenthal *Constitutionalism and rights: The influence of the United States Constitution abroad* (1990).

29 See Friedrich *The impact of American constitutionalism abroad* (1967) 43–69.

30 The Pennsylvania Constitution stimulated great interest in Europe, especially France. See generally Blaustein *supra* fn 28 18 (discussing the proselytising approach of the Founding Fathers toward Europe); Bourne "American constitutional precedents in the French National Assembly" 8 *Am Hist Rev* 466 466–467 (1903) (discussing the influence of the constitutions of the American states on French political ideas and attitudes); Selsam and Rayback "French comment on the Pennsylvania Constitution of 1776" 76 *Pa Mag Hist and Biog* 311 311 (1952) (discussing the role of Benjamin Franklin in promoting the constitutions of the American states to the French); Selsam "Brissot de Warville on the Pennsylvania Constitution of 1776" 72 *Pa Mag Hist and Biog* 25 26 (1948) (discussing the influence of Benjamin Franklin and the Pennsylvania constitution as influential figures of the French revolution); Billias *supra* fn 28 19 ("America's first state constitutions because of their availability, exercised the greatest influence on Europe in the period between the American and French revolutions.").

forgotten. Also, the role of the United States Supreme Court in enforcing rights contained in the federal Constitution, even when state officials violate such rights, is recognized throughout the world. It is much less widely recognized, however, that the American Constitution, like the national constitutions in many other federal systems, is in many important ways "incomplete" as a governing constitutional document.[31] According to Ivo Duchacek, "[a] federal nation is, as it were, an unfinished nation".[32] In other words, most Americans' daily lives are governed much more directly by *state* rather than federal laws, as enacted (and limited) pursuant to the provisions of the fifty state constitutions. Each of these state constitutions structures ("constitutes") the state government, and contains rights that the individual state's residents possess regardless of their federal constitutional rights, as they may be interpreted by the United States Supreme Court.

Since the 1970s, one of the most interesting aspects of the American state constitutional law experience has been the movement by many state courts to interpret their state constitutional rights provisions, even if they are worded identically to the federal guarantees, to provide *more expansive* rights protections in certain situations than are required by the federal constitution. This phenomenon, referred to as the new judicial federalism,[33] may have real importance for those in other federal systems, as John Kincaid recently observed:

> "Given that it is increasingly necessary to think globally while acting locally, it is pertinent to suggest that this American experience with the new judicial federalism . . . may have useful implications for an emerging federalist revolution worldwide . . . The new judicial federalism, moreover, is situated at a critical intersection between individual rights and local autonomy, a matter of increasing importance and conflict in the post-Cold War era.
>
> . . .
>
> The new judicial federalism, however, suggests a model that would enable rights advocates to continue pressing for vigorous national and even international rights protections, while also embedding in regional constitutions and local charters rights that cannot be embedded in the national constitution, effectively enforced by the national government, or enforced only at minimal levels. Such an arrangement would produce peaks and valleys of rights protection within a nation, but this rugged rights terrain is surely preferable to a flat land of minimal or ineffectual national rights protection. The peak jurisdictions can function, under democratic

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31 "State constitutions . . . comprise a significant portion of the American constitutional system. They authorize state power and with the United States Constitution also limit it. The United States Constitution of 1787 thus did not *create* the American constitutional system; rather it *completed* that system." Wachtler "Our constitutions – alive and well" 61 *St John's L Rev* 381 395–396 (1987) (alterations in original) (footnote omitted); see also Lutz "The United States Constitution as an incomplete text" 496 *Annals Am Acad Pol and Soc Sci* 23 26 (1988); Lutz "From covenant to constitution in America political thought" 10 *Publius: The J of Federalism* Fall 1980 101 101–102; Kincaid "State constitutions in the federal system" 496 *Annals Am Acad Pol and Soc Sci* 12 13 (1988): "Although the term 'American Constitution' is often used synonymously with 'Constitution of the United States', the operational American constitution consists of the federal Constitution and the 50 state constitutions. Together these 51 documents comprise a complex system of constitutional rule for a republic of republics."

32 Duchacek *supra* fn 15 192.

33 See Tarr "The past and future of the new judicial federalism" 24 Publius: *The J of Federalism* Spring 1994 63; Williams "Foreword: Looking back at the new judicial federalism's first generation 30 *Val U L Rev* xiii xiii (1996).

> conditions, as rights leaders for a leveling-up process. In an emerging democracy culturally hostile to women's rights, for example, such an arrangement could embolden at least one subnational jurisdiction to institutionalize women's rights, thus establishing a rights peak visible to the entire society without plunging the nation into civil war or back into reactionary authoritarianism."[34]

The American federal constitution, however, limits the range of choice a state has in these matters (the federal "floor" of rights) by providing that the federal constitution and federal law are the "supreme Law of the Land".[35] Therefore, the state and national constitutions form an interconnected whole.

> "Each is a distinct force which helps shape our national constitutional environment. Each force, however, is also dependent upon, limited by, and to some extent the product of, that very same environment. Federal and state constitutions thus are interdependent features of a greater *American* constitutional structure – the web of social institutions and practices the American people employ, sometimes unwittingly, to articulate and effectuate their highest ideals."[36]

To what extent can this be said of the national and subnational constitutions in other federal systems? Other federal systems will differ in the extent to which the national constitution is incomplete. The further the national, or federal, constitution goes toward mandating the content of state constitutions, the more "finished" or "complete" it would be. In federal systems where the states do not have their own constitutions, the national constitution could be said to be "complete", at least as a *constitutional* document. Possibly it could then be said that the less detail the national constitution requires of the subnational constitutions, the more important the subnational constitutions will be. Further, the greater the scope of authority left to the component units in a federal system, the more important the subnational constitutions become.

In the American federal system, there are few *national* requirements governing the structure and relationship of *state* government institutions. States are not even directly required to have constitutions. The American states remain relatively free to devise and change governmental institutions and arrangements as their citizens see fit. As Justice Oliver Wendell Holmes said:

> "We shall assume that when, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned."[37]

Thus, with respect to governmental structure, a state remains free to, in the famous words of Justice Louis Brandeis, "serve as a laboratory",[38] for what

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34 Kincaid "Foreword: The new federalism context of the new judicial federalism" 26 *Rutgers LJ* 913 944–947 (1995). See generally *Federalism and rights* (Katz and eds 1996); Solimine and Walker "Federalism, liberty and state constitutional law" 23 *Ohio NUL Rev* 1457 (1997).

35 Article VI, Clause 2 of the United States Constitution the "Supremacy Clause," provides: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby any Thing in the *Constitution* or laws of any State to the Contrary notwithstanding. US Const art. VI cl. 2 (emphasis added). A 1978 study found that thirteen other national constitutions in federal systems were similarly explicit with respect to federal law's supremacy over state constitutions. See also Van Maarseveen *supra* fn 5 75."

36 Bilionis "On the significance of constitutional spirit" 70 *NCL Rev* 1803 1805 (1992) (emphasis in original).

37 *Prentis v Atlantic Coast Line Co* 211 US 210 225 (1908).

38 *New State Ice Co v Liebmann* 285 US 262 311 (1932) (Brandeis J dissenting): "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to

continued on next page

Justice Oliver Wendell Holmes had earlier referred to as "social experiments . . . in the insulated chambers afforded by the several states".[39]

This experimental attribute of subnational units, one of the most important features of a federal system, supports the "states-as-laboratories" metaphor. The metaphor has had great power not only for scholars of *American* state constitutional law this century, but also for scholars of *European* federalism even last century. For example, an analyst of Swiss federalism in 1898 gave the following description of the Swiss cantons:

> "The Swiss cantons are the democratic workshops of Europe. On their twenty-five anvils are hammered out almost every conceivable experiment in political mechanics; and if a particular experiment proves successful, it is adopted by one canton after another, until it ultimately receives a definite consecration by becoming part of the Federal Constitution, which is, indeed, largely moulded on cantonal experience."[40]

The state constitutions occupy a unique place in the legal and political technology of American constitutional federalism. They are unique in their origin and function as well as in their hierarchical place in the pecking order of our legal system. State constitutions have a chameleon-like quality. They are at once supreme, constitutional documents, taking precedence over all other forms of *state* law, and at the same time subservient, lesser forms of law, giving way to any kind of valid *federal* law, authorised by the federal constitution, including federal common law and administrative regulations. They also range in content from the majestic "great ordinances" we think of as *constitutional* in nature to the trivial, lesser "constitutional legislation" for which many scholars have poked fun at state constitutions. Is this true for the state constitutions in other federal systems?

The primary characteristics upon which American state constitutions are denigrated, or compared unfavourably to the federal constitution, are their greater length, including their inclusion of relatively trivial, political matters that could be treated by legislation, and their ease of amendment and revision. These are, in fact, the characteristics that *do* distinguish the state documents from the federal charter, but these differences do not make them less constitutional. Rather, these differences reflect a different kind of constitution, or constitutions that are unique in the American federal system. Simply put, we have two differing kinds of constitutions, but each is constitutional. Is this also true in other federal systems?

In the last several decades in the United States, as Elazar and Thomson pointed out,41 there has been a substantial renewal of interest in state constitutions.[42] Still, however, many Americans, including lawyers and judges, know little of their state constitutions. In a 1988 national poll, the United States Advisory Commission on Intergovernmental Relations (ACIR) found that

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experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country".

39 *Truax v Corrigan* 257 US 312 344 (1921) (Holmes J dissenting).

40 Deploige *The Referendum in Switzerland* (1898) xiv (footnote omitted).

41 See Elazar *supra* fn 1 Thomson *supra* fn 2.

42 Williams "State constitutional law: Teaching and scholarship" 41 *J Legal Educ* 243 (1991); Maltz *et al* "Selected bibliography on state constitutional law 1980–1989" 20 *Rutgers LJ* 1093 (1989); Tarr "Understanding state constitutions 65 *Temp L Rev* 1169 (1992).

fifty-two percent of the respondents were not aware that their state had its own constitution.[43] A year later, ACIR defined the scope of the problem:

> "Even among lawyers, state constitutional law is relatively unknown and little practised. Compared to the U.S. Constitution, state constitutions are less frequently mentioned in the history and civics classes of public schools or the university, and regular reporting of state constitutional decisions, as well as the statistics of state court activities, has been, until very recently, quite rare. Even the law schools seldom offer courses in state constitutional law. If the American federal system is to be properly balanced – giving full rein to the potentials of local governments, the states, and the national government – then the field of state constitutional law needs to be developed more fully."[44]

If this is the state of affairs in America, then it is little wonder that people in other parts of the world, even those who are interested in American law and politics, have little understanding of *state* constitutions in the American constitutional system, or the subnational constitutions in their own systems. In the words of Mechthild Fritz, of the Faculty of Law, University of Vienna, Americans "will be surprised to discover that the constituent states play quite different roles in other federally organized nations than do the American states".[45] By the same token, Fritz continued, "non-Americans, especially those from a federal state, may have difficulty understanding the American system of dual sovereignty, which disperses governmental power between states and the Union, unless they understand the origins and the constitutional history of the United States".[46] The same state of affairs most likely pertains in other federal systems.

There is a range of general questions to be asked about the constitutions of states within any federal system.[47] The answers to these questions, of course, would vary greatly. Developing a research agenda organized around these questions, however, could greatly facilitate comparative constitutional study. Such comparative study of subnational constitutions should be descriptive as well as analytical and theoretical.

Without attempting to provide an exhaustive list of such general questions here, the following kinds of inquiries will illustrate my point. First, what is the theoretical function of the subnational constitutions? Do they limit residual governmental power, or grant enumerated powers? In the United States, of course, the answer is "some of each".[48] What about in other federal systems?

What are the processes for original adoption, amendment and revision of the subnational constitutions? Are there records of the debates on adoption, amendment and revision of such constitutions? Is there anything in the national constitution that mandates certain provisions or matters be contained in the state constitutions? In federal systems where the component units predated the formation of the federal government, were subnational constitutions used as models for

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43 See Kincaid "State court protections of individual rights under state constitutions: The new judicial federalism" 61 *J State Gov't* 163 169 (Sept–Oct 1988).

44 *Advisory Commission on Intergovernmental Relations, State Constitutions in the Federal System: Selected Issues and Opportunities for State Initiatives* (1989) 2.

45 Fritz "Religion in a federal system: Diversity versus uniformity" 38 *U Kan L Rev* 39 (1989).

46 *Ibid* (footnotes omitted).

47 In 1982 Dan Elazar proposed a set of five such questions as a "first step in what should become a subject of systematic inquiry . . . " Elazar *supra* fn 11 1–2; see Appendix A.

48 See Williams "State constitutional law processes" 24 *Wm and Mary L Rev* 169 178–179 (1983); *infra* fn 53 and accompanying text.

the federal constitution? What is the role of popular sovereignty or constituent power in the process of adopting, amending and revising the state constitution, and does constituent power (initiative, referendum, approval of borrowing, etc) come into play in the operation of governmental systems under the state constitutions?

How similar are the subnational constitutions to each other? Is there evidence that provisions in some state constitutions have been modelled from others, either within the country or from outside? What have been the processes of evolution of subnational constitutions over the years, both within the subnational polity and, more generally, within each federal system? Are governmental institutions, rights protections, distribution of powers and other matters different from or similar to those contained in the national constitution? Is there a standard set of matters and issues, or a checklist, that should be dealt with in any subnational constitution?

Which governmental institutions provide authoritative interpretation of the state constitutions? Is there a state judiciary that interprets the state constitution, and, if so, can such interpretations be reviewed by the national judiciary?

What are the politics of state constitutional change? Is the constitution frequently amended or revised, as a normal part of the state's politics, or are *constitutional* politics outside the scope of "normal politics"?[49]

Do the constitutions of the component entities contain detail normally found in statutory law ("constitutional legislation") or are they brief, confining themselves to "fundamental", core constitutional matters?[50] If the subnational constitutions do contain such "legislative detail", why and how has it been inserted into the constitutions?[51] Are there provisions in the state constitutions that stand in the way of progressive state policies desired by a majority of the people living in the subnational unit?

The origin of a nation's federal system can have substantial impact on a number of the questions. As Koen Lenaerts has noted, there are two basic models of federalism:

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49 See also *Constitutional politics in the States: Contemporary controversies and historical patterns* xvi–xvii (Tarr ed 1996).

50 One of the leading American experts on state constitutions and constitution making, Frank P Grad of the Columbia Law School had little patience for the notion that there is an "ideal" state constitution. Rather, Grad wrote: "[W]e must be content with something less than the Platonic ideal; we must aim rather for a constitutional document that is designed to enable the state to carry on its work of government today and in the foreseeable future with efficiency and economy and with minimum interference by unnecessary restrictions." "The state constitution: Its function and form for our time" 54 *Va L Rev* 928 928–929 (1968); see also Model State Constitution (New York: National Municipal League 1963) (exploring fundamental state constitutional questions).

51 Christian Fritz has surveyed the attitudes of state constitutional delegates in the nineteenth century toward the constitutional-legislative distinction. See "The American constitutional tradition revisited: Preliminary observations on state constitution-making in the Nineteenth Century West 25 *Rutgers LJ* 945 947–948 (1994). In one of the few comparative analyses of subnational constitutions Elmer E Cornwell Jr., compared the American, Canadian and Australian experiences with inclusion of legislative detail in their state constitutions. See "The American constitutional tradition: Its impact and development" in *The constitutional convention as an amending device* 1 14–19 (Hall *et al* eds 1981).

> "*Integrative federalism* refers to a constitutional order that strives at unity in diversity among previously independent or confederally related component entities. The goal of establishing an effective central government with direct operation on the people inside its sphere of powers is pursued under respect of the powers of the component entities, at least to the extent that the use by the latter of these powers does not revert into divisiveness . . .
>
> *Devolutionary federalism*, on the contrary, refers to a constitutional order that redistributes the powers of a previously unitary State among its component entities; these entities obtain an autonomous status within their fields of responsibility. The principal concern is to organize diversity in unity."[52]

Whether a federal system's origins are integrative or devolutionary can affect such issues as whether the states' constitutions primarily limit or grant power,[53] and whether pre-existing state constitutions served as models or provided experience for drafting the national constitution[54] or for other, more recently admitted or created states.[55] This process of modeling, or copying state constitutional provisions from others is one of the most significant, and upon reflection, understandable features of the evolution of American state constitutions. Willard Hurst explained: "There was a sort of *stare decisis* about this making of constitutions; it was altogether natural in a country in which men moved about readily, taking with them the learning and institutions of their former homes."[56] There is even evidence that the initiative and referendum provisions added to the Oregon Constitution in 1902 were based on an idea of direct democracy reflected in the constitutions of the cantons of Switzerland.[57]

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52 Lenaerts *supra* fn 5 206 (emphasis omitted).

53 See *id* 238 see also Antieau, *States' rights under federal constitutions* 1–5 (1984); *supra* fn 48 and accompanying text.

54 See eg Williams "Experience must be our only guide: The state constitutional experience of the framers of the federal constitution" 15 *Hastings Const LQ* 403 403–404 (1988).

55 Several years before he gained his place in history with his controversial economic analysis of the American federal constitution Charles A Beard wrote an article analysing the 1908 Oklahoma Constitution. He concluded that despite widespread criticism, the Oklahoma Constitution was not "a radical departure from American principles and practice". He stated: "The American people are not given to sailing the ship of state by the stars or to deducing rules of law from abstract notions; and every important clause of the Oklahoma constitution has been tried out in the experience of one or more of the older commonwealths." Beard "The Constitution of Oklahoma" 24 *Pol Sci Q* 95 114 (1909); see also Fritz "More than 'shreds and patches': California's first Bill of Rights" 17 *Hastings Const LQ* 13 16–18 (1989) (detailing serious consideration in choosing and rejecting models during the "comparative analysis of state constitutions within the convention".).

56 Hurst, *The growth of American law: The law makers* 224–225 (1950) (emphasis omitted). See generally Tarr "Models and fashions in state constitutionalism" 1998 *Wis L Rev* 729 (1998) (discussing the practice of states to borrow from other sources when creating their constitution). James Dealey made an interesting observation about the reciprocal modeling of provisions from the first American state constitutions to the federal Constitution and then back again: "On the other hand, it might be said in behalf of the theory of the imitation of the national constitution by the states, that in so far as certain features found in the constitutions of the states under the confederation were selected for insertion in the national constitution, these, so to speak, became *standardized*, thus forming natural patterns for later imitation." *Growth of American State Constitutions* 10 (1915) (emphasis omitted).

57 See Schuman "The origin of State constitutional direct democracy: William Simon "U'Ren and 'The Oregon System'" 67 *Temp LR* 947 950 (1994).

These few general questions, I hope, illustrate the nature of the research agenda I am proposing. I know from my work on American state constitutions, and from my limited travel and contacts abroad, that there are a number of scholars and practitioners in the world who have done work on, and who are interested in, these kinds of questions. The material is, however, scattered, only available in a variety of languages, and not centrally collected. I hope to establish a comparative dialogue on these and similar questions, leading to a better understanding of subnational constitutions, constitution-making, and constitutional law in all federal systems.

This article has sought to provide a partial model for an evolving research agenda by outlining the research to date and suggests a series of questions that may lead to a greater understanding of subnational constitutions in all federal systems. It will now make a start on that research agenda by reporting on the interesting unfolding processes of subnational constitution-making in South Africa.

3 PROVINCIAL CONSTITUTIONS IN SOUTH AFRICA

Federalism, as a structural model of government, has not been widely (or very successfully) used in Africa.[58] In the South African constitutional negotiations, the adoption of a federal model was controversial and far from a foregone conclusion.[59] A federal compromise was struck, however, providing South Africa with a very new constitutional structure. In the words of Dawid van Wyk, describing the interim constitution:

> "First, instead of four provinces and ten nominally independent or self-governing 'homelands', South Africa has nine new provinces, each with an elected provincial legislature and a provincial executive of national unity. The pattern is virtually the same as that of the national government. Secondly, a provincial legislature enjoys wider legislative powers than the erstwhile provincial councils, and is entitled to enact its own provincial Constitution."[60]

Therefore, it is clear that South Africa's federalism is a *devolutionary* federalism, in the words of Koen Lenaerts, where power has been devolved from "a previously unitary State [to] . . . component entities".[61]

South Africa's new constitution, which replaced the interim constitution,[62] was adopted by the Constitutional Assembly on May 8 1996. It contains an entire chapter, chapter 6, concerning the government structure and competency of the provincial governments. To this extent, the new South African constitution serves *both* as a national and a provincial constitution. It is, therefore, much less

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58 See Negash *Eritrea and Ethiopia The federal experience* (1997) 195; Jinadu "The constitutional situation of the Nigerian states" 12 *Publius: The J of Federalism*, Winter 1982 155 158; Haile "The new Ethiopian Constitution: Its impact upon unity human rights and development" 20 *Suffolk Transnat'l L Rev* 1 (1996).

59 See Watts "Is the new Constitution federal or unitary?" *in Birth of a Constitution* 75 (Villiers ed 1994). For excellent coverage of the process of forming the constitution of South Africa see Van Wyk "Introduction to the South African Constitution" in *Rights and constitutionalism: The new South African legal order* 131 (Van Wyk *et al* eds 1996). See generally Sunstein "Federalism in South Africa? Notes from the American experience" 8 *Am UJ Int'l L and Pol'y* 421 (1993).

60 Van Wyk *supra* fn 59 165.

61 Lenaerts *supra* fn 52 and accompanying text.

62 See generally *Birth of a constitution* 50 (De Villers ed 1994); *South Africa's crisis of constitutional democracy: Can the US Constitution help?* (Licht and De Villers eds 1994).

"incomplete"[63] than the American and some other federal constitutions. Interestingly, however, section 142 of the constitution authorised the provincial legislature to adopt or amend a provincial constitution by a two-thirds vote of its members. Such a provincial constitution, according to section 143, had to be consistent with the national constitution but could provide for "provincial legislative or executive structures and procedures that differ from those provided for in this chapter". Thus, the provincial legislature could, through the adoption of a provincial constitution, vary some of the mandated provincial structures. This is an interesting approach, with the national constitution serving as a "default" provincial constitution, but subject to local variations. This approach had also been taken in the interim constitution, in section 160.[64]

There have now been enough decisions handed down by the Constitutional Court about South Africa's federal structure and the provincial constitutions to provide the beginnings of a jurisprudence of South African subnational constitutional law. Under the interim constitution the Constitutional Court was created and given authority to review and approve both the new national constitution as well as the provincial constitutions.[65] This is a process referred to as certification.[66] The court's opinions provide a wealth of information about the new federal arrangements generally and about provincial constitutions specifically.[67]

The only two provinces to date that have exercised their provincial constitution making authority are, first KwaZulu/Natal under the interim constitution in March, 1996, and Western Cape Province under the new 1996 constitution in February, 1997. Neither of these provinces was controlled by the African National Congress, and therefore their constitution-making efforts could be seen as a form of opposition national politics. Subnational constitution-making can, as was demonstrated in the United States particularly during the Civil War, but also as part of Jacksonian Democracy, and the Populist and Progressive eras, reflect elements of national politics.[68]

When the proposed national constitution for South Africa was submitted to the Constitutional Court for approval, the court accepted written submissions on its validity, and heard nine days of oral argument before ruling on September 6, 1996, that the proposed constitution could not be certified.[69] The court's opinion began with an exhaustive review of the historical and political context of the proposed new constitution.[70] The court noted:

> "It is true we ultimately come to the conclusion that the NT [new text] cannot be certified as it stands because there are several respects in which there has been noncompliance with the CPs [constitutional principles]. But one must focus on the wood, not the trees. The NT represents a monumental achievement. Constitution

63 See *supra* fn 31–32 and accompanying text.

64 See Basson *South Africa's interim Constitution: Text and notes* (1994) 214.

65 See O'Malley "The Constitutional Court" in *South Africa: Designing new political institutions* 75 80 (Faure and Lane eds 1996).

66 *Ibid.*

67 The opinions of the Constitutional Court are available on-line from the University of Witwatersrand at (visited 1999-03-08) http://www.law.wits.ac.za/judgements/cert.html.

68 See Williams *State constitutional law: cases and materials* (2 1993) 19–51; Tarr *Understanding state constitutions* (1998) 94.

69 See *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) (visited 1999-03-08) http://www.law.wits.ac.za/judgements/cert.html.

70 5–31.

> making is a difficult task. Drafting a constitution for South Africa, with its many unique features, is all the more difficult. Having in addition to measure up to a set of predetermined requirements greatly complicates the exercise. Yet, in general and in respect of the overwhelming majority of its provisions, the CA [constitutional assembly] has attained that goal."[71]

With that note of optimism, the court went on to list the specific areas in which the proposed new constitution failed to measure up to the earlier-negotiated constitutional principles. One major area of shortcoming had to do with the new national constitution's treatment of provinces.[72]

One of the most important of the Constitutional Principles agreed to with the Interim Constitution was CP XVIII.2:

> "The powers and functions of the provinces defined in the Constitution, including the competence [of] a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution."[73]

The court noted that this provision was added relatively late in the negotiating process to "encourage political formations which had refused to participate in the transition process to change their minds and to support the transition to a new political order".[74] The court rejected the contention, however, that because of its special history this particular constitutional principle should be given more importance than others.[75]

One section of the court's opinion dealt specifically with the power of provinces to adopt constitutions.[76] The Court noted that CP XVIII.2 was the only one to mention provincial constitutions, and that the new proposed national constitution could not provide "substantially less than or substantially inferior" power to a province to adopt a constitution than that provided in the Interim Constitution.[77] There was an interesting disagreement between those objecting to the newly proposed constitution and those supporting it. The objectors argued that the power of a provincial legislature to adopt a constitution had to be compared specifically between the Interim Constitution and the proposed new national constitution. The supporters of the proposed new national constitution, by contrast, argued that the power to adopt a provincial constitution was simply one of the matters to be taken into consideration under the constitutional principle, "but that there is no requirement that such power should itself be not substantially less than or inferior to that which provinces enjoy under the IC".[78] The court, however, found that it was not necessary to resolve this interesting disagreement, "for we are satisfied that the power of a provincial legislature to adopt a constitution for its province is substantially the same as the existing power under the IC".[79] The court reached this conclusion by comparing section 160 of the Interim Constitution to clauses 142 and 143 of the proposed new

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71 31 (footnotes omitted).
72 306–353.
73 *Id* (quoting CP XVIII.2).
74 *Ibid.*
75 307.
76 342–353.
77 342.
78 343.
79 344.

national constitution. The court noted that the two provisions were not different in substance, and that basically they both provided that a provincial constitution could not be inconsistent with the national constitution except for the possibility of different legislative and executive structures and procedures, and the institution, role, authority and status of a traditional monarch.[80] Quoting from its decision declining to certify the provincial constitution of KwaZulu/Natal, rendered on the same day, the court noted, "whatever meaning is ascribed to 'structures and procedures' they do not relate to the fundamental nature and substance of the democratic state created by the interim Constitution nor to the substance of the legislature or executive powers of the national Parliament or Government or those of the provinces".[81]

The court made an important statement with respect to the *nature* of subnational constitutions in the unique context of South African constitutional federalism:

> "In the result, what is contemplated by NT 142 and 143 is not a provincial constitution suitable to an independent or confederal state but one dealing with the governance of a province whose powers are derived from the NT."[82]

Thus, the court clearly reaffirmed the *devolutionary* status of South African federalism.

Interestingly, the proposed new national constitution contained a "transitional arrangement" in section 13 of Schedule 6 providing that a "provincial constitution passed before the new Constitution took effect must comply with Section 143 of the new Constitution".[83] An objection was made that this provision retroactively diminished a province's ability to adopt its own constitution, thereby violating the constitutional principle that the new national constitution could not diminish a province's power to adopt a constitution. The court rejected this argument concluding that the constitutional principles did not require "existing provincial laws (or a provincial constitution) to be protected against the supremacy provision" in the new constitution.[84]

Therefore, the Constitutional Court concluded that the proposed new national constitution's provisions for the adoption of provincial constitutions were acceptable, and that this particular issue would not be one of those that would provide the basis on which it disapproved the proposed national constitution. On a number of other grounds, however, some of them having to do with other forms of provincial powers, as well as a number of other issues, the Constitutional Court declined to certify the proposed new national constitution and sent it back to the Constitutional Assembly. The Constitutional Assembly reconvened and adopted amendments to the new constitution not only responding to the grounds the court had stated for its refusal to certify the constitution, but it also adopted a number of other amendments. In October of 1996, this revised new constitution was adopted by the Constitutional Assembly and transmitted back to the Constitutional Court. After three more days of oral argument in November of 1996, the court rendered its decision, approving the new constitution for

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80 347.

81 349 (quoting from *In re: Certification of the Constitution of the Province of KwaZulu-Natal, 1996* 1996 11 BCLR 1419 (CC) (visited 1999-03-08) <http://www.law.wits.ac.za/judgements/kznc.html>).

82 350.

83 351.

84 *Ibid.*

South Africa on December 4 1996.[85] The court concluded that its general concerns about the powers and functions of provinces had been met by the amendments, and it approved those new provisions of the constitution.[86] Specifically, with respect to provincial constitutions, the court concluded that the relevant provisions remained unchanged, and therefore, its earlier approval of the provisions for provincial constitutions would stand.[87]

The Constitutional Court decisions concerning certification of the national constitution, therefore, provide the beginnings of a jurisprudence of provincial constitutionalism in South Africa. It is a small, but nevertheless important, beginning. The court has also rendered three important decisions specifically concerning the certification of provincial constitutions themselves.[88] These add much more content to the developing jurisprudence of South African provincial constitutions.

During the interim period, prior to adoption of the new constitution, the only province that took advantage of its state constitution-making authority under section 160 of the Interim Constitution was KwaZulu/Natal.[89] The provincial legislature engaged in a process of debate, negotiation, and constitution drafting.[90] This process took place in February and March, 1996, after which the draft constitution was adopted by a unanimous vote.[91]

A commentator reviewing this provincial constitution predicted:

> "The provincial constitution negotiated by KwaZulu/Natal's provincial legislators, and adopted by all parties, is a stunning breakthrough. The ANC and the IFP have put their signatures to what amounts to a peace agreement. It is also an agreement that – provided it is carried through under the national constitution currently being negotiated – answers Chief Buthelezi's major concerns about provincial autonomy (or at least answers them sufficiently) and the need for international mediation.
>
> . . .
>
> In one sense, what is remarkable about this constitution is its unremarkability. The division of authority and function between central and provincial government is typical of any decentralized political system such as Canada's or India's. Gone are the quasi-confederal proposals for a provincial militia. KwaZulu/Natal becomes a province once again, not a kingdom.

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85 See *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* (visited 1999-03-08) <http://www.law.wits.ac.za/judgements/cert2.html>.

86 145–99.

87 199.

88 *Certification of the Constitution of the Province of Kwazulu-Natal, 1996* (*supra*) (visited 1999-03-08) http://www.law.wits.ac.za/judgements/kznc/html; *In re: Certification of the Constitution of the Western Cape 1997* 1997 9 BCLR 1167 (CC) (visited 1999-03-08) http://www.law.wits.ac.za/judgements/wccert.html; *In re: Certification of the Amended Text of the Constitution of the Western Cape 1997* 1997 12 BCLR 1653 (CC) (visited 1999-03-08) http://www.law.wits.ac.za/judgements/certwp2.html.

89 See also Linscott "A Stunning Breakthrough" 8 *Frontiers of Freedom* 2 (South African Institute of Race Relations Second Quarter 1996).

90 Meeting between author and members of the KwaZulu/Natal Provincial Parliament Constitution Drafting Committee, Rutgers University, Camden, New Jersey, September, 1996.

91 See 3 Republic of South Africa 1st KwaZulu-Natal Provincial Legislature: Deb. and Proc. 3d Sess. 1996. Professor George Devenish, an advisor in the drafting of the provincial constitution, provided an excellent analysis in "The making and significance of the draft Kwazulu-Natal Constitution" 9 *Yearbook African Law* 3 (1995).

> In fact the constitution could – given acceptance by the Constitutional Assembly of the principle of strong provincial government – become a model for all nine provinces."[92]

This turned out to be an overly optimistic prediction.

As noted earlier, according to the terms of the Interim Constitution, a provincial constitution could not take effect until the Constitutional Court had certified that it complied with the requirements of the national constitution. Therefore, the draft constitution of KwaZulu/Natal was submitted to the Constitutional Court. On the same day that it declined to certify the proposed new national constitution, the court also refused to certify the draft constitution of KwaZulu/Natal.[93]

In this case, the Constitutional Court found that "there are fundamental respects in which the provincial Constitution is fatally flawed".[94] First, the court explained the certification process for provincial constitutions provided in section 160(4) of the Interim Constitution, referring to this as "a unique feature of the constitution making procedures adopted in this country".[95] The court concluded that under this certification procedure it had only two options.[96] First, it could certify that none of the provisions of the provincial constitution were inconsistent with the Interim Constitution or the constitutional principles, thereby approving the provincial constitution.[97] If it was unable to reach this first conclusion, its only alternative was to deny certification to the provincial constitution as a whole.[98] The court noted that "[i]n the latter case, the constitution has to be reconsidered and a new or amended constitution has to be passed by the provincial legislature, if it still wishes to pass a constitution for the province".[99] The court noted the fact that the provincial constitution was adopted unanimously would not affect its review.[100] The court set forth the following test for evaluation of legislative powers contained in provincial constitutions:

> "Certification requires a two step approach in regard to such provisions. The first is an inquiry as to whether the interim Constitution or a Constitutional Principle deals, expressly or impliedly, with the power in question and how it deals with it. The second is the determination whether the provision in a provincial constitution is inconsistent with such comparable provision or any other relevant provisions in the interim Constitution or Constitutional Principles."[101]

The Constitutional Court concluded that the draft of the KwaZulu/Natal Constitution purported to usurp a number of national powers.[102] Specifically, the court

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92 Linscott *supra* fn 89 2–3.

93 See *Certification of the Constitution of the Province of KwaZulu-Natal, 1996 supra* (visited 1999-03-08) http://www.law.wits.ac.za/judgements/kznc.html [hereinafter *Certification of KwaZulu-Natal*].

94 13.

95 10. S 160(4) of the Interim Constitution provides: "The text of a provincial constitution passed by a provincial legislature or any provision thereof shall be of no force or effect unless the Constitutional Court has certified that none of its provisions is inconsistent with a provision referred to in subs (3) subject to the proviso to that subsection."

96 10.

97 *Ibid.*

98 *Ibid.*

99 *Ibid.* See also *Certification of the Constitution of the Western Cape* 1997 *supra* 3 19 (visited 1999-03-08) <http://www.law.wits.ac.za/judgements/wccert.html> (using the standard under s 144(2)(b) of the new national Constitution).

100 See *Certification of KwaZulu-Natal supra* fn 93 12.

101 8.

102 14.

stated that "[i]t is clearly beyond the capacity of a provincial legislature to pass constitutional provisions concerning the status of a province within the Republic. After all, the provinces are the recipients and not the source of power".[103] Quoting from one of its earlier decisions, the court stated:

> Unlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states. They were created by the Constitution and have only those powers that are specifically conferred on them under the Constitution.[104]

One of the most interesting elements of the court's decision dealt with Chapter 3 of proposed KwaZulu/Natal Constitution, the Bill of Rights. The court concluded that "[t]here can in principle be no objection to a province embodying a bill of rights in its constitution".[105] The court stated that most constitutions had bills of rights, and that the Interim Constitution "neither prescribes nor proscribes any form or structure or content for such [provincial] constitution".[106] It noted that the only restriction on a provincial bill of rights would be the requirement that it could not be inconsistent with the national constitution.[107] The court reserved for another day the question of whether such inconsistency would arise if national legislation seemed to "cover the field" that a provincial bill of rights provision purported also to cover, citing the example of Australia.[108] It concluded that just because the interim national constitution contained a Bill of Rights that would not make a bill of rights in a provincial constitution "inconsistent with the interim Constitution or the Constitutional Principles", without more.[109] The court went on to note that a provincial constitutional bill of rights could not operate with respect to matters over which the provincial legislature or executive did not have power.[110] Finally, the court made the following important pronouncement:

> "A provincial bill of rights could (in respect of matters falling within the province's powers) place greater limitations on the province's powers or confer greater rights on individuals than does the interim Constitution, and it could even confer rights on individuals which do not exist in the interim Constitution. An important question is whether such provisions would be 'inconsistent with' ('onbestaanbaar met') the provisions of the interim Constitution."[111]

The court stated that such greater rights were possible even within a circumstance where both the national and provincial bill of rights covered the topic. "They are not inconsistent when it is possible to obey each without disobeying either. There is no principial [sic] or practical reason why such provisions cannot operate together harmoniously in the same field."[112] The Constitutional Court

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103 *Ibid.*

104 *Ibid* (quoting *In re: The National Education Policy Bill No 83 of 1995* 1996 4 BCLR 518 (CC) 23 (visited 1999-03-08) <http://www.law.wits.ac.za/judgements/natled.html>).

105 17.

106 *Ibid.*

107 *Ibid.*

108 *Ibid* (quoting Blackshield *et al Australian constitutional law theory* 473 (1996) (quotations omitted)).

109 *Certification of KwaZulu-Natal supra* fn 93 17.

110 19.

111 23.

112 24 (footnotes omitted).

cited the well-known late Justice William J Brennan, Jr, of the United States Supreme Court in support of these important rights propositions.[113]

Despite this general endorsement of a provincial bill of rights, the court concluded that the KwaZulu/Natal Constitution's Bill of Rights "is deeply flawed . . . and will have to be thoroughly redrafted should the KZN Legislature still wish to embody a bill of rights in a provincial constitution".[114]

The court found a number of other problems with the draft provincial constitution, including an invalid attempt to create a provincial constitutional court.[115] "The interim Constitution nowhere confers any power on a province to establish courts of law . . ."[116] The resulting constitutional inability of the provinces to establish a dual system of provincial courts may, of course, have substantial implications for judicial enforcement of independent subnational constitutional rights guarantees. A dual system of state courts, however, is not common in federal systems other than the United States, and is therefore not a necessary condition for subnational constitutional rights enforcement beyond the national minimum standards.

The court went on to evaluate the "consistency clauses" contained in the draft KwaZulu/Natal Provincial Constitution. These clauses provided "that certain of its provisions are of no force or effect if inconsistent with the interim Constitution or the Constitutional Principles".[117] The supporters of the provincial constitution had argued that these clauses had the legal effect of avoiding any inconsistency between the provincial constitution and the interim national constitution and constitutional principles. The court concluded that the effect of these clauses would be to "immunise the provisions of that Constitution from the obligatory discipline of the constitutional certification process".[118] The court noted that to permit such a device as a set of consistency clauses would be, in effect, to postpone the required certification process to a set of future case-by-case evaluations of the provincial constitution's provisions as alleged inconsistencies were raised.[119] On these grounds, the court concluded that such use of inconsistency clauses "is patently at variance with the certification process" and that such clauses "are bad and cannot be certified".[120]

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113 *Ibid* fn 13 (citing William J Brennan Jr "The Bill of Rights and the States: The revival of state constitutions as guardians of individual rights" 61 *NYU L Rev* 535 (1986)). This comparative subnational constitutional law focus the court used fits with the recent observation by Robert Schapiro: "At the same time that we are looking inward to state constitutions we are also looking outward to the growth of constitutionalism in the international realm. Federalism has been said to be the great contribution of the United States to political theory. So too a theory of state constitutions in our federalist system may contribute to the ongoing international discussions about extending the rule of law into an ethnically and culturally pluralistic world." "Identity and interpretation in state constitutional law" 84 *Va L Rev* 389 457 (1998). See generally Webb "The Constitutional Court of South Africa: rights interpretation and comparative constitutional law" 1 *U Pa J Const L* 205 (1998); Choudhry "Globalization in search of justification: Toward a theory of comparative constitutional interpretation" 74 *Ind LJ* 819 (1999).

114 *Certification of KwaZulu-Natal supra* fn 93 31.

115 33.

116 33.

117 36.

118 *Ibid.*

119 *Ibid.*

120 37.

Finally, the court dealt with another device in the provincial constitution – "suspensive conditions". These provisions "suspend the coming into operation of substantial portions of the provincial Constitution until a later date or on certain conditions".[121] The court concluded that the use of this device would prevent it from performing its certification function until the suspended provisions came into operation. While noting that it was possible that under some circumstances the effectiveness of a provincial constitutional provision could be suspended until some future date, the court generally rejected the use of this device. The court noted that the certification process required it to approve of the "text" of a provincial constitution, and suspended provisions constituted a part of that text.

> "The text of the provincial Constitution is to be evaluated and certified as an integrated whole, because the meaning and effect of one particular clause can be crucially dependent on that of another. If certain clauses of the text come into operation after others, then the fact that certain clauses are inoperative for a period of time may well influence the effect and meaning of those parts of the text which do come into operation immediately upon certification in the absence of the suspended clauses.
>
> The device of suspension in effect requires the Constitutional Court to do two exercises in the certification process. It must satisfy itself not only that the text is certifiable as it stands when it comes into operation immediately upon certification (i.e. without the suspended clauses), but also that it is certifiable if the suspended clauses come into operation."[122]

The court concluded that although it was conceivable that such an operation could be performed, it was unnecessary to attempt it in this case because the suspended conditions were otherwise "objectionable and inconsistent with the provisions of the interim Constitution".[123] It concluded that the text of a provincial constitution that is presented to the Constitutional Court for certification must be "a constitutional text that has been adopted".[124]

The court reiterated its view that the proposed provincial constitution was "fatally flawed".[125] It concluded its opinion by noting that it had not treated every objection that had been made to the proposed provincial constitution and that therefore there might be other flaws. It cautioned:

> "It should therefore not be seen as definitive, either in regard to the three categories we have identified or in other respects. Should the KZN Legislature decide to adopt a new or amended provincial constitution, and in the interest of avoiding disputes over the future certification of a replacement, account will no doubt be taken of the detailed objections lodged this time and on which we pass no judgment now."[126]

The unanimous adoption of the KwaZulu/Natal provincial constitution reflected an important, and hard-fought compromise among the competing national political parties within the province. This "peace" may be, in the long run, much more important than a valid provincial constitution. The fact that, after the

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121 39.
122 42–43.
123 43.
124 46. The court characterised the submitted provincial constitution as "inchoate and lacking in finality. The request that the text be certified before a final decision has been taken on these material provisions is premature and on this ground alone the Constitution cannot be certified". *Ibid.*
125 47.
126 *Ibid.*

Constitutional Court declined to certify the KwaZulu/Natal provincial constitution, the provincial parliament did not, and does not appear likely to return to its constitution-making efforts may be explained on this basis. The draft constitution itself represented the underlying political compromise that became reality long before the draft was invalidated, and this has been the reality that has continued after the court refused to approve the provincial constitution.

The only other South African province to have engaged in a process of constitution-making is Western Cape Province. The Provincial Parliament debated, drafted, and approved its provincial constitution on February 18 1997,[127] and submitted it to the Constitutional Court for certification.[128] The Western Cape constitution does not contain a bill of rights.[129] After hearing two days of oral

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127 *Debates of Legislature of The Province of the Western Cape (Hansard)-Fourth Session*-First Legislature of the Province of The Western Cape 1997-02-18 21 24 and 1997-03-18–19 286–336. The Premier of Western Cape Province introduced the draft constitution as follows: "The fact that a constitution is a supreme law of a state implies that all other laws are subordinate to it. The question arises what the relationship between the national constitution and the provincial constitution is in a federal type of system. It is clear, both in the case of the German basic law and the South African Constitution of 1993 and 1996, that the national constitution is supreme. It thus also covers provincial constitutions.
However, a constitution is not merely a legal document which makes formal arrangements. It is intimately related to the political realities of the day and therefore has a specifically political character. Given the nature of a constitution, it is clear that at least the following elements must be present in it: the geographical description of the relevant state or province, a description of the organs of state and the rules of the game within which it has to function and the position of the individual in relation to the state.
. . . .
One of the exclusive functions allocated to the provinces is to pass their own constitutions, whereby, *inter alia*, provision can be made for unique needs and circumstances, as is clearly evident from the reference to a traditional monarch in s 143(1) of the national Constitution. I do not think that applies to the Western Cape.
With the adoption of a provincial constitution the Western Cape can create the constitutional space for the national Constitution and a gap is specifically created. Can we fill this gap that is created in this way and in this way contribute in a constructive way to the concretisation or practical implementation of the national Constitution?
Where the national Constitution lays a basis for the political constitutional order, the Western Cape Constitution provides the detail which completes the constitutional picture in order to promote, *inter alia*, the values in s 1 and ch 3 of the national Constitution.
CONSTITUTION-WRITING PROCESS
The process of the writing of the Western Cape Constitution began as long ago as July 1996 and made provision, *inter alia*, for extended political participation. Visits were paid to the most far-flung corners of the province to hear what the people had to say. The product we have today takes due cognisance of the contributions of the public. The wide interest aroused by this process is evident from the extensive verbal and written inputs commenting on the draft text of December 1996.
We have taken due cognisance of the guidelines laid down in the Constitutional Court for the contents of a provincial constitution in the various certification pronouncements, and have tried to draw up this provincial constitution within those guidelines" 285–288.

128 *Certification of the Constitution of the Western Cape, 1997 supra* (visited 1999-03-08) <http://www.law.wits.ac.za/judgements/wccert.html>.

129 One of the parliamentary members explained this as follows: "Consideration was given to incorporating human rights. The Kwa/Zulu-Natal ruling gives the provinces the right to draw up human rights and incorporate them, because ch 3 of the national Constitution was not intended to deal with fundamental rights 'completely, exhaustively and exclusively'.

continued on next page

argument in May, 1997, the court issued its opinion on September 2 1997, declining to certify the provincial constitution.[130] The court noted that its duty was to withhold certification unless "the whole text complie[d] with section 143".[131] Thus, this certification process took place under the newly approved national Constitution of South Africa, rather than the interim Constitution under which the KwaZulu/Natal certification process took place. The court noted, however, that "[o]ur conclusion was that the provisions relating to the constitution-making powers of provinces under the two respective national constitutions were essentially the same".[132]

The court applied the central features of its decisions in both the certification of the national constitution and the decision denying certification to the KwaZulu/Natal provincial constitution. These cases, together with the decision on the Western Cape Provincial Constitution reflect the continuing development of a body of legal doctrine applicable to provincial constitutions.

However, it is problematic that the human rights are interwoven and that one influences the other. Therefore it can be problematic to provide just one human right, since this could disturb the network. No human rights in the provincial Constitution may deal with an act which does not fall within the powers of the province, so that it does not in that way arrogate to itself powers which it does not possess, because that would be unconstitutional.

Therefore the decision was taken rather than to end up on the labyrinth of provincial human rights, to draw up a set of guiding principles whereby the province sought to be governed. In clause 82 it is clearly stated that these guiding provincial policy principles are not enforceable, but guided the Western Cape Government in the drafting and implementation of laws.

Of particular importance in this regard is that the frail elderly persons are protected in terms of clause 81 of the provincial Constitution. Nowhere is this aspect incorporated in the national Constitution."

Supra fn 127 307–308.

130 There were a variety of challenges made to the provincial constitution:

This week, the African National Congress, Provincial Affairs and Constitutional Development Minister Mohammed Valli Moosa and central government opposed the certification of the provincial constitution by the Constitutional Court.

If their objections are successful the court will throw out the constitution as it did with the KwaZulu Natal constitution.

Mr. Moosa challenged the provincial constitution for allowing the Western Cape to have its own electoral system which differed from the national one.

Mr. Moosa said the constituency-based electoral system flew in the face of the national constitution and was unconstitutional.

He said provincial constitutions could not prescribe an "electoral system" as it was not a "provincial legislative or executive structure or procedure" as set out in the national constitution.

"An electoral system relates to the fundamental nature of and substance of the democratic state created by the national constitution and to the substance of the legislative power of the national parliament and not provincial legislature", he argued.

Mr. Moosa also objected to the text in the provincial constitution that said the "legislative and executive powers and functions of the Western Cape emanate exclusively from the national constitution".

He said legislative and executive powers and functions of the provinces not only came from the national constitution, but also from laws passed by the national parliament.

William-Mervin Gumede "The big story: It's Constitution crunch time: Valli Moosa in challenge to Western Cape government" *Cape Town Argus* 1997-04-23.

131 3 (quoting NC 144(2)(b)).

132 6.

In the Western Cape decision, the court reiterated its view that "[t]he provinces remain creatures of the NC [National Constitution] and cannot, through their provincial constitution-making power, alter their character or their relationship with the other levels of government".[133] Referring to the national constitution, the court observed:

> "It is clear from these provisions in chapter 6 that it is not necessary for any province to enact a constitution. Chapter 6 provides a complete blueprint for the regulation of government within provinces which provides adequately for the establishment and functioning of provincial legislatures and executives. Provinces which have not adopted provincial constitutions are governed by the provisions of chapter 6. Nevertheless, NC 142–145 (read with NC 104(1)(a)) expressly provide that provinces do have the power to make their own constitutions and that, although the general rule is that the provisions of such constitutions may not be inconsistent with the NC, they may provide for legislative or executive structures and procedures that are different from those provided for in chapter 6."[134]

In an important conclusion, the court noted from reading the National Constitutional provisions that "where a province wishes to provide for different structures or procedures, it must do so *in its constitution*".[135] On this basis, later in its opinion, the court rejected the provincial constitution's clause purporting to authorize an electoral system, different from that provided in the National Constitution, to be established by legislation. While not concluding that this necessarily constituted "structures or procedures" that could only be dealt with in a provincial constitution, the court noted that the effect of such a clause was to leave the electoral system "inchoate and therefore not certifiable".[136]

Next, the court confronted the objection to the provincial constitution based on the fact that it restated provisions that were contained in the National Constitution. Distinguishing its conclusion in the KwaZulu/Natal case, the court concluded that the provisions in the Western Cape Provincial Constitution "that are repeated relate to matters which directly affect governance within the province, that is, the provincial legislature and the members of the provincial executive or legislature".[137]

The court rejected challenges to the provincial constitution based on its authorization of provisional symbols and honours, concluding that this does not impinge on any of the constitutional competencies of either the national or local governments.[138] Similarly, it rejected a challenge to the provincial constitution's

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133 8.

134 15. The court emphasised that this provision did not authorize provincial constitutions to define *powers* of the provinces. "Those powers are exhaustively provided for in the NC. The phrase is concerned only with the form, composition and organisation of a province's institutions ('structures') and the manner in which they exercise their powers ('procedures'). This is reaffirmed by NC 143(2)(b)." (16.)

135 19. The court noted that this requirement meant that any provincial decision to have different structures and procedures would be subject to the special voting requirements for the adoption of a provincial constitution (two-thirds majority of the provincial legislature) and to the certification requirement by the Constitutional Court (*id*).

136 50.

137 23. The court went on to say that it "would indeed have been difficult for the WCC [Western Cape Constitution] to be coherent and comprehensible without the repetition of those NC provisions which form the matrix for the related provisions of the WCC. We can find no fault with such provisions". *Id*. This conclusion raises the question of whether future provincial constitutions will need to include such provisions.

138 See 35.

use of the term "Provincial Parliament" as somehow carrying with it a national connotation. The Court concluded that "it does not fall within our jurisdiction under NC 144 to withhold certification because a provision in a provincial constitution is inappropriate. The sole criterion for this Court is compliance with the relevant provisions of the NC".[139]

The Western Cape Provincial Constitution included a set of special procedures for its amendment that were like those provided in the national constitution (s 74). The court observed that the national constitution:

> "does not provide for special procedures for the amendment of provincial constitutions but only establishes a special majority for such amendment. In our view, the addition of special procedures to the requirement of special majorities falls within the province's constitution-making power and does not give rise to an inconsistency with the NC".[140]

This concept of a "province's constitution-making power" was supplemented in the next paragraph of the court's opinion. Commenting upon an objection to the provincial constitution that had actually been abandoned, the court stated:

> "WCC 12 provides for the signing, safekeeping, publication and commencement of the provincial constitution. It repeats the provisions of NC 145, save that it requires additional publication of the provincial constitution in the official gazette of the province. In our view, it falls *impliedly* within the province's constitution-making power under NC 104(1)(a) to do this and it does not amount to an inconsistency with the NC."[141]

This concept of a "province's constitution-making power" as including *implied* powers raises an interesting question for the future as to what other possible powers might be implied as a province engages in adopting a constitution.

The court concluded that the provincial constitutional provision stating that the Provincial Parliament would consist of forty-two members was valid because, despite the National Constitution's (s 105(2)) directive that a provincial legislature have between thirty and eighty members, as determined by a formula in national legislation, the number of parliamentary members was "clearly a part or aspect of a legislative structure or procedure, in respect of which NC 143(1)(a) permits a provincial constitution to provide something different".[142]

The court concluded its decision on a rather positive note, stating that even though "we have concluded that the WCC cannot be certified as it stands, it should be emphasized that we withhold certification on limited grounds of inconsistency only".[143]

After the Constitutional Court's decision declining to certify the provincial constitution of Western Cape Province, dated September 2 1997, the Provincial Parliament reconvened in less than one week, and on September 11 1997, adopted an amended text of its provincial constitution. It then resubmitted this text for certification to the Constitutional Court. There was no objection raised to such certification. After hearing oral argument on November 18 1997, the Constitutional Court issued a decision certifying the provincial constitution of

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139 39.
140 40.
141 41 (emphasis added).
142 51.
143 86.

Western Cape Province.[144] In this decision the Constitutional Court characterised its earlier decision declining to certify the provincial constitution as based on "a limited number of provisions of the constitutional text".[145]

4 CONCLUSION

These decisions of the Constitutional Court have begun to delineate both the procedures for certification, and the requirements for the content, of the provincial constitutions. The opinions have outlined for scholars, governmental officials, and future provincial constitutional drafters the beginning of a jurisprudence of subnational constitutional law in South Africa. The justices of the United States Supreme Court have been referred to as serving, through their decisions on the American constitution, as "teachers in a vital national seminar".[146] The South African Constitution, which explicitly places the Constitutional Court in a central role in the evolution of the country's constitutional federalism, obviously contemplates the Constitutional Court justices as "teachers in a vital national seminar". The first several chapters of the story of subnational constitutions within South African constitutional federalism have now been written.

APPENDIX A[147]

1. What are the principles and traditions underlying constituent state constitutions in various federal systems?
2. What are the purposes which constituent state constitutions are designed to serve?
3. How do constituent state constitutions serve those principles – that is to say, through what structures, processes, functions and relationships?
4. What are the policy and operational implications of particular constituent state constitutions?
5. What is the contemporary and future significance of constituent state constitutions and constitution making, given the present and likely future condition of the federal systems in which they function?

> *Law . . . is a stage for the display of verbal skill, linguistic virtuosity, and persuasive argument in which words take on a seriousness virtually unparalleled in any other domain of human experience.*
>
> *Austin Sarat and Thomas R Kearns* The rhetoric of law 2.

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144 *Certification of the Amended Text of the Constitution of the Western Cape, 1997 supra* (visited 1999-03-08) <http://www.law.wits.ac.za/judgements/certwp2.html>.

145 1. For analysis of the Western Cape Constitution, as well as its text and the Constitutional Court decisions on it, see also Brand "The Western Cape provincial Constitution: Comments, text, and judgements" (Konrad Adenauer Foundation Occasional Papers, July, 1999).

146 Rostow "The democratic character of judicial review" 66 *Harv L Rev* 193 208 (1952).

147 See Elazar *supra* fn 11 1–2.

Die effek van kinderregte op die privaatregtelike ouer-kind verhouding

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SUMMARY

The impact of children's rights on the private law parent-child relationship

The landmark ruling of the Appellate Division in *Fletcher v Fletcher* 1948 1 SA 130 (A) represents a milestone in the development of the parent-child relationship. Seen against the historical background, it represents the first recognition of the child as role-player in family matters upon divorce. The idea of children's rights represents a further milestone in the development of the parent-child relationship. The granting of children's rights in the Bill of Rights and of fundamental rights in general cuts to the core of the traditional South African legal position on the parent-child relationship. Children's rights confer a status on the child that is clearly in conflict with the private-law status of the child as an immature and dependent person.

The provisions of the Bill of Rights challenge the dichotomy between private law and public law. The public law status of the child as bearer of fundamental rights cannot be isolated from the private-law status of the child. The recognition of children's rights undoubtedly has practical implications for the parent-child relationship in private law. An underlying requirement for an appreciation of the nature and extent of these implications is an ideological and emotional acceptance of the idea of children's rights.

1 INLEIDING

In 1948 bevind die appèlhof in *Fletcher v Fletcher*[1] dat die beste belang van die kind die oorheersende oorweging in die verlening van 'n bewaringsbevel by egskeiding is. Bykans vyf dekades later word die maatstaf van die beste belang van die kind as deurslaggewende oorweging in elke aangeleentheid wat die kind raak grondwetlik in die Handves van Regte[2] verorden.

Die tydperk van byna vyftig jaar tussen die twee datums kan beskryf word as 'n nuwe era in die groter geheel van ontwikkelings in die ouer-kind verhouding. Daar moes gedurende hierdie tydperk gepoog word om 'n balans te vind tussen die beginsels van die Romeins-Hollandse reg[3] aan die een kant en sosiale en morele

1 1948 1 SA 130 (A).

2 Grondwet van die Republiek van Suid-Afrika 108 van 1996 a 28(2).

3 Die tradisionele uitgangspunt in die Romeins-Hollandse reg was die voorkeur wat aan 'n vader se reg op bewaring verleen is waar die partye afsonderlik gewoon het maar daar nog geen egskeiding was nie. Daar kon slegs in uitsonderlike omstandighede op hierdie reg inbreuk gemaak word. Waar die huwelik deur egskeiding ontbind is, is bewaring aan die onskuldige party verleen. Die belang van 'n kind het 'n heeltemal ondergeskikte rol in die verlening van so 'n bevel gespeel: Hahlo en Kahn *The Union of South Africa* (1960) 368; Sornarajh "Parental custody: the

vervolg op volgende bladsy

oorwegings ter regverdiging van die maatstaf aan die ander kant. Daar was pogings deur die regbank[4] en in akademiese literatuur[5] om inhoud aan die maatstaf te verleen. Selfs statutêre verordening[6] van die begrip het egter geen groter helderheid gebring nie. Op 'n meer subtiele vlak moes daar ook regverdiging gevind word vir die gebruik van die beste belang as maatstaf in geval van inmenging met ouerlike gesag en gesinsverhoudings.

Die erkenning van kinderregte in die Suid-Afrikaanse reg verteenwoordig 'n verdere mylpaal in die ontwikkeling van die ouer-kind verhouding. Ratifikasie[7] van die Verenigde Nasies se Konvensie op die Regte van die Kind 1989 (hierna die 1989 Konvensie) plaas Suid-Afrika midde-in volkeregtelike strominge oor die aard, inhoud, implementering en beskerming van kinderregte. Die verlening van kinderregte in die Handves van Regte[8] en van fundamentele regte in die algemeen dring deur tot die kern van die ouer-kind verhouding soos tradisioneel in die Suid-Afrikaanse reg gesien. Knelpunte oor die implementering van die beste belang van die kind kort na die *Fletcher*-beslissing vervaag teenoor die moontlike implikasies waarmee nou rekening gehou moet word.

Kinderregte is op die oog af strydig met die gemeenregtelike benadering wat steun aan die uitoefening van ouerlike gesag in omvattende vorm verleen. Kinderregte verteenwoordig op die oog af, naas die maatstaf van die beste belang van die kind, 'n verdere beperking op die uitoefening van ouerlike gesag. Kinderregte verleen 'n status aan 'n kind[9] wat skynbaar strydig met die privaatregtelike status van 'n kind as onvolwasse en hulpelose persoon is.

Die erkenning van kinderregte is verder kontroversieel omdat dit sosiale strukture en diepgewortelde sosiale benaderings oor die ouer-kind verhouding en die kind as voorwerp van versorging betrek. Kinderregte skep die persepsie dat ouerlike gesag en gesinswaardes ondermyn word en dat die staat sy rol as beskermer van 'n kind abdikeer ten gunste van onbeperkte vryhede aan 'n kind. Die erkenning van kinderregte bevraagteken die bekende en die tradisionele en verleen 'n nuwe juridiese en sosiale dimensie aan die ouer-kind verhouding. Die implikasies van die erkenning van kinderregte kring uit na die gesinslewe en die rol van die staat in gesinsverhoudings.

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recent trends" 1973 *SALJ* 131 133–137 vir 'n oorsig van relevante regspraak. In *V v V* 1998 4 SA 169 (K) toon regter Foxcroft dat hy deeglik van die historiese ontwikkeling bewus is met die volgende opmerking (177): "It was inevitable that this view of the superior rights of guardianship and custody of the father during the marriage should affect the Court's approach to guardianship and custody on termination of marriage . . . Before the best interests of a child took their proper place, Courts were often influenced by the moral question of the guilt or innocence of the spouses. It was only in 1948 that the Appellate Division in *Fletcher v Fletcher* 1948 1 SA 130 (A) placed at the pinnacle of its consideration the 'paramount or best interests rule'."

4 Sien bv Erasmus *et al Lee and Honoré Family, things and succession* (1983) 133 en gesag daar aangehaal; *McCall v McCall* 1994 3 SA 201 (K) 204.

5 Sien by Schäfer "Joint custody" 1987 *SALJ* 149 153–154; Heaton "Some general remarks on the concept interests of the child" 1990 *THRHR* 95–99; Clark "Custody: the best interests of the child" 1992 *SALJ* 391 394–395; Bonthuys "Of biological bonds, new fathers and the best interests of children" 1997 *SAJHR* 622 623–624, 636–637.

6 Wet op Huweliksaangeleenthede 37 van 1953 a 5(1); Wet op Egskeiding 70 van 1979 a 6 om maar enkele voorbeelde te noem.

7 1995-06-16.

8 Grondwet a 28 en a 7–39 in die algemeen.

9 "Kind" dui hier op 'n persoon wat nog nie een-en-twintigjarige ouderdom bereik het nie.

Die doel van hierdie artikel is gevolglik om te bepaal wat die effek van die erkenning van kinderregte op die ouer-kind verhouding in die privaatreg is. Hierdie bespreking vind plaas teen die agtergrond van ouerlike gesag wat regshistories sterk fundeer is en die substantiewe privaatreg wat nie die kind as draer van regte binne gesinsverband erken nie.

2 KINDERREGTE

Vir doeleindes van die bespreking word dit as gegewe aanvaar dat kinderregte 'n verskyningsvorm van fundamentele menseregte is. Die aanvaarding van hierdie vertrekpunt is van deurslaggewende belang in die ontwikkeling van 'n gebalanseerde teorie oor kinderregte. Kinderregte het 'n eiesoortige aard en die onderliggende teorieë illustreer dat die inhoud daarvan veel wyer as die tradisionele terminologie van regte en verpligtinge strek.[10] Kinderregte beteken gevolglik nie absolute vryhede aan 'n kind nie en daarmee word vrese besweer dat ouerlike gesag deur die erkenning van kinderregte ondermyn sal word. 'n Gebalanseerde teorie het nie die oogmerk om 'n kind aan 'n volwassene gelyk te stel nie maar verleen die reg aan 'n kind om homself te wees. Op hierdie wyse word 'n kind met regte beklee gedurende die tydperk van kinderjare en word volledig daarmee rekening gehou dat verskillende regte gedurende verskillende lewensfases ter sprake kan kom.

Die eksponente[11] van teorieë oor kinderregte bespreek hul teorieë ooreenkomstig die wisselende fases van afhanklikheid en ontwikkelende vermoëns van 'n kind. Dit is aspekte wat dienooreenkomstig verskillende handelinge van ouers vereis en in die uiteensetting van kinderregte word deurentyd na die rol van ouers en van die staat verwys. Op hierdie wyse besweer die teoretiese uitgangspunt die vrese dat die erkenning van kinderregte die gesin sal laat verbrokkel. Ouers beklee juis 'n primêre rol omdat die ouer-kind verhouding die kleinste konsentriese sirkel verteenwoordig waar kinders bewus gemaak kan word van hul status as draers van fundamentele regte. Teoreties dui dit op 'n model van ouerlike gesag waar die klem op ouerlike verantwoordelikhede val en ouers slegs oor regte beskik ten einde daardie verantwoordelikhede na te kom. Ouerlike gesag kan wissel van besluitneming namens 'n kind tot by die blote verlening van advies – in ooreenstemming met die wisselende behoeftes en aansprake van 'n kind. In hierdie opsig beklee die staat 'n sekondêre rol. Die beteken dat die staat vanuit 'n beleidsoogpunt en by wyse van wetgewing die nodige raamwerk behoort te skep waardeur ouers in staat gestel sal word om hul rol te vervul.

Die staat se rol as 'n derde party by die ouer-kind verhouding word teoreties op 'n tweërlei wyse geregverdig. In die eerste plek is daar 'n direkte verhouding tussen die kind en die staat omdat die kind oor fundamentele regte beskik. Tweedens verrig die staat as oppervoog van 'n kind 'n toesighoudende funksie en moet dit toesien dat die beste belang van die kind die deurslaggewende oorweging is in alle aangeleenthede wat so 'n kind raak.

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10 Sien bv Eekelaar "The importance of thinking that children have rights" in Alston *et al* (reds) *Children, rights and the law* (1992) 221–235; Eekelaar "Why children? Why rights" in Alston and Brennan (reds) *The UN Children's Convention and Australia* (1991) 20–23. Freeman *The rights and wrongs of children* (1983) 40–54; Hafen "Children's liberation and the new egalitarianism: some reservations about abandoning youth to their 'rights'" 1976 *Brigham Young Univ LR* 1976 630–650; Wald "Children's rights" 1979 *Univ of California Davis LR* 255–270.

11 Freeman 40–54; Eekelaar "The emergence of children's rights" 1986 *Oxford J of Legal Studies* 161–173; Hafen 1976 *Brigham Young Univ LR* 630–650; Wald 1979 *Univ of California Davis LR* 255–270.

3 DIE OUER-KIND VERHOUDING IN DIE PRIVAATREG

Terwyl die teorie oor kinderregte 'n model van ouerlike gesag voorhou wat vir deelnemende besluitneming voorsiening maak, word die ouer-kind verhouding in die privaatreg as paternalisties van aard beskou. Hierdie vorm van ouerlike gesag kan verklaar word aan die hand van 'n historiese ontwikkelingsgang wat sy ontstaansbron in die absolute gesagsbevoegdhede van die Romeinse *paterfamilias* gehad het. Vaderlike gesag het wel afgewater tot ouerlike gesag met 'n tempering in die omvang en inhoud van ouerlike gesag. Hierdie veranderings was die resultaat van godsdienstige, morele en sosiale oorwegings en nie 'n direkte gevolg van 'n verhoogde status waarmee 'n kind beklee is nie. Dit verklaar waarom *Fletcher v Fletcher*[12] in die betrokke tydsgewrig so 'n belangrike beslissing was. Gesien teen die historiese agtergrond was dit die eerste keer wat die appèlhof die status van 'n kind as rolspeler binne gesinsverband by egskeiding erken het. In hierdie geval is die beste belang van die kind bo gemeenregtelike oorwegings soos vaderskap of die skuld of onskuld van gades by egskeiding verhef.

Die maatstaf van die beste belang van die kind het steeds nie veel daartoe bygedra dat die kind in die algemeen as 'n gesinslid met onafhanklike belange erken word nie. Hierdie toedrag van sake kan aan die volgende faktore toegeskryf word:

(a) Die inherente vaagheid van die beste belang leen hom daartoe dat persone in gesagsposisies oor kinders self kan besluit wat in die beste belang van 'n kind is en so inhoud aan die begrip verleen.

(b) Respek vir ouerlike gesag en gesinsoutonomie dra by tot die veronderstelling dat ouers die beste in staat is om binne gesinsverband te oordeel wat in hul kind se beste belang is. Die verklaar byvoorbeeld waarom ouers se bevoegdheid om hul kind se vriendekring te bepaal nie bevraagteken word nie en 'n derde se inbreukmaking op hierdie bevoegdheid as 'n *iniuria* teen die ouer beskou word.[13]

(c) Die status van 'n kind as 'n hulpelose en afhanklike persoon wat te onvolwasse is om self besluite te neem, regverdig besluitneming deur volwassenes soos ouers of die staat.

Bogenoemde regverdig 'n gevolgtrekking dat daar sedert die *Fletcher*-beslissing in 'n beperkte mate bewys van regsontwikkeling[14] is wat daarop dui dat die uitoefening van ouerlike gesag 'n besluitnemingsproses of 'n belange-afweging tussen ouer en kind behels. Trouens, die ouer-kind verhouding in die privaatreg word as so eendimensioneel beskou dat selfs wetgewing wat handelingsbevoegdheid aan 'n kind verleen as geïsoleerde publiekregtelike maatreëls aanvaar word. Daar word geen oorweging geskenk aan die moontlike impak van sodanige wetgewing op die ouer-kind verhouding nie.[15] 'n Voorbeeld is aborsiewetgewing in Amerika wat hewige

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12 1948 1 SA 130 (A).

13 Sien bv *Meyer v Van Niekerk* 1976 1 SA 252 (T); *Coetzee v Meintjies* 1976 1 SA 257 (T); *Gordon v Barnard* 1977 1 SA 887 (K); *H v I* 1985 3 SA 237 (K); *L v H* 1992 2 SA 594 (OK).

14 Die Wet op Bemiddeling in Sekere Egskeidingsaangeleenthede 24 van 1987 en die beslissing in *McCall v McCall* 1994 3 SA 201 (K) verdien wel vermelding vir die wyse waarop daar na die belange van 'n kind as individu omgesien word. Vgl ook *B v S* 1995 3 SA 571 (A) waar *obiter* na toegang as die reg van 'n kind verwys is en *V v V* 1998 4 SA 169 (K) waar kinderregte vermeld is met verwysing na a 28 van die Grondwet en internasionale Konvensies.

15 Bv die Wet op Testamente 7 van 1953 a 4; Verdedigingswet 44 van 1957 a 3(1)(b); Wet op Wapens en Ammunisie 75 van 1969 a 37(1); Kieswet 202 van 1993 a 15(1); Drankwet 27 van 1989 a 45(1)(a); Wet op Kindersorg 74 van 1983 a 39 wat handelingsbevoegdheid aan 'n kind ten opsigte van sekere regshandelinge verleen voor meerderjarigheidsouderdom. Daar word nêrens aandag geskenk aan die vraag of ouers in die uitoefening van ouerlike gesag 'n vetoreg het nie.

debatte ontketen het oor die aard van die belange-afweging wat tussen ouers, die kind en die staat moet plaasvind. Hierdie kwessie het selfs tot regspraak aanleiding gegee.[16] Tog is daar geen sprake van vergelykbare debatsvoering oor aborsie binne die ouer-kind verhouding in die Suid-Afrikaanse reg nie.[17]

4 DIE VERHOOGDE PUBLIEKREGTELIKE STATUS VAN 'N KIND

Die ouer-kind verhouding het onteenseglik 'n publiekregtelike faset bygekry met die erkenning van kinderregte in die Handves van Regte[18] en die ratifikasie van die Verenigde Nasies se Konvensie op die Regte van die Kind 1989 (hierna die 1989-Konvensie). Die aspekte van die Handves van Regte wat implikasies vir die ouer-kind verhouding inhou, is die volgende:

(a) Die kind word as draer van fundamentele regte erken en kan ook die regte afdwing sonder dat enige kwalifikasie ten opsigte van verskyningsbevoegdheid bygevoeg word. Hierdie posisie is in teenstelling met die status van 'n kind in die privaatreg wat geen of beperkte bevoegdhede het tensy handelings- of verskyningsbevoegdheid deur ouerlike bystand of toestemming verleen word of kragtens wetgewing gemagtig word.

(b) Die inhoud van die regte wat in artikel 28 van die Handves van Regte aan 'n kind verleen word, verteenwoordig in die breë die teenkant van ouers se gemeenregtelike sorgplig. Die moontlikheid van horisontale werking van die Handves van Regte[19] bring mee dat hierdie regte nie net teenoor die staat nie maar ook teenoor ouers afgedwing kan word.

(c) Die feit dat 'n kind in die algemeen ook draer van fundamentele regte is, tesame met die moontlike horisontale werking van die Handves van Regte, raak ook die ouer-kind verhouding. Dit beteken in beginsel dat 'n kind enige van die fundamentele regte teenoor ouers kan afdwing as 'n metode om byvoorbeeld die uitoefening van ouerlike gesag te bevraagteken.

(d) Die Handves van Regte dui nie die reg op gesinslewe of die reg op uitoefening van ouerlike gesag as fundamentele regte aan nie. Dit beteken dat 'n kind se regte op outonomie ingevolge die Handves van Regte los van gesinsverband en die uitoefening van ouerlike gesag bestaan. Hierdie posisie is in teenstelling met die ouer-kind verhouding in die privaatreg waar die uitoefening van ouerlike gesag en die handelingsbevoegdheid van 'n kind onlosmaaklik aan mekaar gekoppel is. Hierdie posisie dui ook op 'n totale miskenning van die aanvaarde teorie onderliggend aan kinderregte.

(e) Die feit dat 'n kind as individu, ook binne gesinsverband, oor fundamentele regte beskik, verleen 'n status aan die kind wat aan die privaatreg onbekend is. Die maatstaf van die beste belang om beskermende optrede teenoor die kind in die privaatreg te regverdig, is die naaste vergelykbare situasie waar daar van afsonderlike belange van 'n kind kennis geneem word.

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16 *Planned Parenthood v Danforth* 428 US 52 (1976); *Belotti v Baird* 443 US 622 (1979).

17 Wet op Keuse oor die Beëindiging van Swangerskap 92 van 1996 wat in beginsel aan 'n swanger minderjarige dogter tot op twintig weke die geleentheid bied om sonder ouerlike kennis of toestemming 'n wettige aborsie te ondergaan.

18 A 28.

19 A 8(2).

Die bepalings in die Handves van Regte bring mee dat die onderskeid tussen die privaatreg en die publiekreg moeilik gehandhaaf sal word. Die Handves van Regte veronderstel 'n gelyke verdeling van mag tussen ouers, kind en die staat tensy 'n beperking geregverdig word. Die beklemtoning van ouers se besluitnemingsbevoegdhede in die privaatreg sal aangepas moet word ten einde in gepaste gevalle aan 'n kind die geleenthede te bied om ook inspraak in besluitneming te hê. Die verhoogde publiekregtelike status van 'n kind as draer van fundamentele regte kan nie geïsoleer word van 'n kind se privaatregtelike status nie. Onderliggend aan hierdie implikasies bestaan die teorie van kinderregte wat die juridiese regverdigingsgrond bied vir aanpassings wat gemaak sal moet word.

Die volgende struikelblokke word egter voorsien alvorens veranderings in regsdenke en formele aanpassings sal plaasvind:

(a) Die onderskeid tussen die privaatreg en die publiekreg in die Suid-Afrikaanse reg word nog in 'n baie groot mate gehandhaaf. Daar is 'n persepsie dat kinderregte tipies deel van die publiekreg vorm en nie eintlik die uitoefening van ouerlike gesag sal raak nie. Ouerlike gesag val weer tradisioneel binne die kader van die privaatreg. Wat egter uit die oog verloor word, is dat die ratifikasie van die 1989-Konvensie vereis dat die geheel van die Suid-Afrikaanse reg teen die inhoud van die Konvensie opgeweeg moet word. Die 1989-Konvensie word as die volledigste dokument gesien wat inhoud aan kinderregte verleen en is die simbool van die status wat aan 'n kind ingevolge elke lidland se nasionale reg verleen behoort te word, ongeag daarvan of publiekreg of privaatreg ter sprake is.

(b) Die fokus wat in die bespreking van kinderregte op artikel 28 van die Handves val, skep die indruk dat dit die somtotaal van regte is wat ter sprake is. Solank as wat kinderregte as regte op beskerming geïnterpreteer word, sal dit met gemak binne die ouer-kind verhouding in die privaatreg geakkommodeer kan word juis omdat hierdie verhouding paternalisties van aard is. 'n Simplistiese gelykstelling van kinderregte as regte op beskerming skep op die oog af die indruk dat die ouer-kind verhouding nie betekenisvol sal verander nie.

(c) Indien artikel 28 van die Handves van Regte met die inhoud van die 1989-Konvensie vergelyk word, blyk dit dat eersgenoemde in belangrike opsigte te kort skiet. Die 1989-Konvensie het 'n duidelike tweeledige benadering ten opsigte van die posisie van die kind in die algemeen en die posisie van die kind binne die gesin.[20] Hierdie tweeledigheid ontbreek in artikel 28 van die Handves van Regte omdat daar op geen wyse erkenning verleen word aan die rol van ouers, die belang van die gesin of die posisie van 'n kind binne gesinsverband nie. Ook is die betrokkenheid van die staat beperk tot beskermende optrede teenoor die kind. Dit is in teenstelling met die 1989-Konvensie waar die staat daartoe verbind word om ook rekening te hou met die kind as draer van regte. Die reg van die kind om sy eie wense uit te spreek,[21] as sterkste verskyningsvorm van die reg op outonomie, kom

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20 Die kind word as draer van fundamentele regte erken en het ingevolge a 12 van die 1989-Konvensie die reg om sy eie mening uit te spreek oor sake wat hom raak. Aan die ander kant is daar meerdere bepalings in die 1989-Konvensie wat dui op die belang van die gesin wat primêr vir die versorging van die kind verantwoordelik is. Dit is ook binne gesinsverband dat 'n balans tussen 'n kind se reg op beskerming en reg op outonomie gevind behoort te word.

21 1989-Konvensie a 12; Lücher-Babel "The right of the child to express views and to be heard: an attempt to interpret Article 12 of the UN Convention on the Rights of the Child: 1995 *The Int J of Children's Rights* 391–404.

nie in artikel 28 van die Handves van Regte voor nie. In hierdie opsig ontbreek dit artikel 28 van die Handves van Regte oor een van die kernbepalings van die 1989-Konvensie.[22]

(d) Die versuim om die teoretiese onderbou van kinderregte uit te lig, bring mee dat die ideologie onderliggend aan die idee van kinderregte nog nie na behore in die Suid-Afrikaanse reg gepropageer is en uitgebou word nie. Hierdie versuim verklaar waarom kinderregte tot regte op beskerming beperk word en daar geen verwysing na die rol van ouers of die gesin in die Handves van Regte is nie. Selfs die beste belang wat as maatstaf verskans is, word as 'n belangrike waarde voorgehou maar sonder om erkenning daaraan te verleen dat dit ook as maatstaf van interpretasie in die erkenning van regte op outonomie kan dien.

Dit sou wat bogenoemde struikelblokke betref van groot waarde wees om na ander jurisdiksies te verwys waar werkbare oplossings gevind is. In hierdie opsig kan Australië en Skotland as voorbeelde voorgehou word waar die effek van kinderregte op die ouer-kind verhouding reeds in 'n groot mate deurworstel is. Dit is egter ook op 'n diepliggende vlak dat 'n verwysing na die Australiese en Skotse reg geregverdig kan word. 'n Geforseerde leer- en groeiproses moet in 'n kort tydperk plaasvind ten einde 'n soortgelyke fase van ideologiese denke oor kinderregte soortgelyk aan hierdie twee jurisdiksies te betree. Die verandering in regsdenke oor kinders en hul regte wat plaasgevind het in die tydperk tussen die Verenigde Nasies se Deklarasie oor die Regte van die Kind 1959 en voorstelle dat 'n Konvensie eerder aanvaar moet word, getuig van 'n groeiproses waardeur die nasionale reg moes gaan.[23] Gedurende hierdie tydperk is teorieë oor kinderregte verfyn en het die beskikbare literatuur oor teorieë merkwaardig uitgebrei. Australië en Skotland was te alle tye deel van die internasionale gemeenskap wat kon leer uit hierdie ontwikkelings en hul eie nasionale reg daaraan kon opweeg. Die voordeel vanuit Suid-Afrika se oogpunt is dat daar by wyse van regsvergelyking veel te leer is uit die ontwikkelings wat in die Australiese en Skotse reg gevolg is.

4 1 Praktiese implikasies van kinderregte op die ouer-kind verhouding

In die lig van die voorafgaande uiteensetting word voorsien dat die erkenning van kinderregte die volgende praktiese implikasies vir die ouer-kind verhouding in die Suid-Afrikaanse privaatreg inhou:

(a) Die meerderjarigheidsouderdom sal vanaf een-en-twintigjarige ouderdom na agtienjarige ouderdom verlaag moet word. Hierdie verandering sal in ooreenstemming met die definisie van 'n kind in die 1989-Konvensie[24] en die Handves van Regte[25] wees en sal ook klop met die wye spektrum van bevoegdhede wat reeds aan persone vanaf agtienjarige ouderdom in die Suid-Afrikaanse reg verleen word.[26]

(b) 'n Statutêre omskrywing is nodig om uitdrukking aan die verskuiwing in magsbalans in die ouer-kind verhouding te verleen. Daar word rekening gehou met die feit dat dit nie vir die reg moontlik is om volledig toesig te hou oor die wyse

22 Die ander drie kernbeginsels van die 1989-Konvensie is die beste belang van die kind as deurslaggewende oorweging (a 3); die verbod op diskiminasie (a 2); en die reg op lewe (a 6).
23 Van Bueren *The International law on the rights of the child* (1995) 11–14; Verhellen *Convention on the Rights of the Child* (1994) 63–67.
24 VN Konvensie op die Regte van die Kind 1989 a 1.
25 A 28(3).
26 Sien bv vn 15.

waarop die ouer-kind verhouding in 'n huisgesin funksioneer nie. Tog kan 'n statutêre raamwerk soortgelyk aan die Skotse reg betekenisvol daartoe bydra dat 'n ouerskapstyl ontwikkel wat met die idee van kinderregte versoen kan word. Die omskrywing van ouerlike verantwoordelikhede in die Children (Scotland) Act 1995[27] dien reeds met die eerste oogopslag as teenvoeter vir die idee dat ouers net oor regte beskik. 'n Soortgelyke bepaling behoort statutêr in die Suid-Afrikaanse reg verorden te word, veral omdat die bestaande vertrekpunt ten opsigte van ouerlike gesag in konflik met die erkenning van kinderregte is. Daar kan egter nie wegbeweeg word van die idee dat ouers ook oor regte beskik nie. Ook in hierdie opsig kan die Children (Scotland) Act 1995[28] as voorbeeld voorgehou word. Artikel 2 erken ouerlike regte maar net in die mate waartoe dit nodig is om ouerlike verantwoordelikhede na te kom.

(c) 'n Kind se reg op deelname aan besluitneming behoort uitgebou en bevorder te word. Hierdie reg beteken nie dat 'n kind se wense sonder meer geïmplementeer moet word nie maar dat 'n proses van konsultasie en deelname aan besluitneming in die ouer-kind verhouding aangemoedig moet word. Erkenning van die reg op deelname behels die volgende twee fasette.

(i) 'n Statutêre bepaling is nodig wat die effek sal hê dat ouers in die nakoming van ouerlike verantwoordelikhede en in die uitoefening van ouerlike regte 'n kind se reg op deelname aan besluitneming sal erken. Ook hier kan die Children (Scotland) Act 1995 as voorbeeld voorgehou word. Artikel 6(1) vereis dat 'n persoon in die neem van 'n belangrike besluit so ver as wat prakties moontlik is oorweging aan die mening van 'n kind sal skenk.[29] Saam met hierdie bepaling word daar gesteun op 'n vermoede dat 'n kind van twaalf

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27 A 1. Dit is veral a 5 en 18 van die VN Konvensie op die Regte van die Kind 1989 wat 'n invloed gehad het op die formulering van ouerlike verantwoordelikhede. Volgens a 1(1) behels ouerlike verantwoordelikhede die volgende:
"(a) [T]o safeguard and promote the child's health, development and welfare;
(b) to provide in a manner appropriate to the stage of development of the child, direction and guidance to the child;
(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
(d) to act as the child's legal representative."

28 Children (Scotland) Act 1995 a 2(1) lui soos volg:
"[A] parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right–
(a) to have the child live with them or otherwise to regulate the child's residence;
(b) to control, direct or guide, in a manner approriate to the stage of development of the child, the child's upbringing;
(c) if the child is not living with them, to maintain personal relations and direct contact with the child on a regular basis; and
(d) to act as the child's legal representative."
Dit is in die nakoming van ouerlike verantwoordelikhede en in die uitoefening van ouerlike regte wat daar op 'n betekenisvolle wyse aan 'n kind se reg op deelname aan die besluitnemingsproses erkenning verleen word. Die Children (Scotland) Act 1995 vereis van 'n persoon om in die neem van 'n belangrike besluit so ver as wat prakties moontlik is oorweging aan die mening van 'n kind te skenk.

29 Children (Scotland) Act 1995. Die Skotse Regskommissie *Report on Family Law* No 135 (1992) 18–19 het erken dat 'n bepaling soos hierdie vaag en onafdwingbaar is. Nogtans is dit 'n bepaling wat 'n kind as 'n persoon in eie reg erken met 'n mening wat respek en oorweging verdien. Die bepaling sal ook ouerlike gedrag beïnvloed. Sien ook Fortin *Children's rights and the developing law* (1998) 71–72.

jaar of ouer oor die vermoë beskik om 'n mening uit te spreek. So 'n statutêre bepaling in navolging van die Children Scotland Act 1995 sal simbolies tot die verhoogde status van 'n kind binne gesinsverband bydra. Prakties gesproke, sal die bepaling ook die oorgang na die tweede model van ouerlike gesag aanmoedig. 'n Statutêre bepaling van hierdie aard gee gevolg aan 'n kind se legitieme verwagting dat 'n reg op deelname erken sal word. Die vermoede van deelname wat aan 'n ouderdomsgrens gekoppel word, hou die voordeel in dat die bewyslas verskuif word na diegene wat 'n kind van besluitneming wil uitsluit.[30]

(ii) Die kultuur van deelname aan besluitneming binne huishoudings wat hierbo voorsien word, behoort ook deel van die regsproses te wees. Die Wysigingswet op Kindersorg[31] maak vir 'n kind se reg op regsverteenwoordiging voorsiening en die betrokkenheid van die gesinsadvokaat[32] bied ook die geleentheid aan 'n kind om aan die regsproses deel te neem. Daar bestaan ook 'n aantal uitsonderingsgevalle waar 'n kind (as minderjarige) in eie naam regsverrigtinge kan inisieer.[33] Die grootste persentasie kinders word andersins by litigasie betrek as gevolg van staatsinmenging in die ouer-kind verhouding.[34] 'n Kind se reg op regsverteenwoordiging behoort egter as vertrekpunt erken en geïmplementeer te word. Die verlening van sodanige reg erken op 'n liberale wyse dat 'n kind oor die vermoë beskik om in gepaste omstandighede verantwoordelikheid vir sy eie besluite te neem, selfs al sou dit beteken dat daar teen ouers gelitigeer word.[35]

5 GEVOLGTREKKING

In Australië en Skotland het die implementering van kinderregte met 'n verandering in terminologie gepaard gegaan ten einde die verskuiwing in magsbalans binne ouer-kind verhouding weer te gee. Die Australiese model dien by uitstek as voorbeeld van die tipe navorsing wat vereis word om gevolg aan kinderregte te verleen. Skotland

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30 Fortin (vn 29) 72.

31 Wysigingswet op Kindersorg 96 van 1996 a 2.

32 Wet op Bemiddeling in Sekere Egskeidingsaangeleenthede 24 van 1987.

33 'n Minderjarige is in die volgende gevalle ten volle verskyningsbevoeg: indien die minderjarige ingevolge die Wet op die Meerderjarigheidsouderdom 57 van 1972 'n aansoek bring om meerderjarig verklaar te word; indien hy in die onderhoudshof vir die onderhoud van sy buite-egtelike kind aangespreek word (*Govender v Amurthan* 1979 3 SA 358 (N)); indien daar by die hooggeregshof om vervangende toestemming aansoek gedoen word in die geval van huweliksluiting (*B v B* 1964 1 SA 717 (T)); indien 'n geskil oor die uitslag van 'n provinsiale, raads- of parlementêre verkiesing ontstaan waarby die minderjarige 'n kandidaat was en in daardie hoedanigheid by die geskil betrokke is (*Olufsen v Klisser* 1959 3 SA 351 (N)). Sien in die algemeen Van der Vyver en Joubert *Persone- en Familiereg* (1991) 175–176.

34 Bv die Wet op Huweliksaangeleenthede 37 van 1953; die Wet op Egskeiding 70 van 1979; die Wet op Kindersorg 74 van 1983; die Huwelikswet 25 van 1961; die Wet op Natuurlike Vaders van Buite-egtelike Kinders 86 van 1997; die Wet op Voorkoming van Gesinsgeweld 133 van 1993.

35 Vergelyk bv die Wetsonwerp op Gesinsgeweld W 75–98 wat ingevolge a 1(ii) 'n applikant definieer as "enige persoon, met inbegrip van 'n kind". A 4(5) verleen ook aan 'n kind die bevoegdheid om sonder die bystand van 'n ouer, voog of enige ander persoon by die hof om 'n beskermingsbevel aansoek te doen. Hierdie voorbeeld van verskyningsbevoegheid behoort in die algemeen aan 'n kind verleen te word, tesame met die uitbreiding van die gesinsadvokaat se jurisdiksie om bystand te verleen in ooreenstemming met 'n kind se ouderdom, begrip en volwassenheid.

kan in die besonder voorgehou word vir die wyse waarop daar in wetgewing gevolg gegee word aan 'n kind se afhanklikheid maar ook die ontwikkelende vermoëns wat tydens kinderjare ter sprake is. Die idee van menswaardigheid wat in die inheemse reg gestalte kry, asook die idee dat regte en verpligting in noue verband met mekaar staan, kan ook as belangrike waardes in hierdie konteks voorgehou word. Die inhoud van die Suid-Afrikaanse Regskommissie[36] se eerste werksdokument as deel van die hersiening van die reg rakende kinders dui daarop dat daar reeds kennis van hierdie regsvergelykende lesse geneem word. Daar is weinig twyfel daaroor dat die ouer-kind verhouding in die privaatreg in 'n drukgang van verandering is en dat die idee van kinderregte geen geringe rol gespeel het om hierdie proses van verandering van stapel te stuur nie. Die werksaamhede van die Suid-Afrikaanse Regskommissie dui die rigting aan waarin beweeg moet word.

Kinderregte is kontroversieel omdat dit bekende juridiese en sosiale oorwegings ten diepste raak. Dit skep spanning tussen bemagtiging en beskerming, dit impliseer veranderings aan 'n aanvaarde regskultuur en dit gryp in die lewens van ouers en kinders in. Die uitdaging in hierdie verband word miskien die beste in die volgende woorde opgesom:[37]

> "The problem lies in incorporating the wishes and feelings of the child into decision making, without sacrificing any aspect of the child's welfare, or imposing inappropriate burdens of responsibility on the child. The extent to which adults are willing, or able, to do this depends not just on an intellectual acceptance of the ideological concept of children's rights, but on an emotional acceptance of the benefits of listening to children and allowing them to participate in plans for their future. This requires a change in culture, as well as a change in ideology . . . It is the functional shift in attitude which is required, as well as the ideological acceptance of a concept of children's rights, which together provide the necessary climate of change."

The public's confidence in the judicial authority is the most precious asset that this branch possesses. It is also among the most precious assets of the nation. The confidence that the judging is done fairly, neutrally, while treating each side equally, and without any hint of personal stake in the outcome: confidence in the high moral standard of judging. De Balzac's expression is well known: "Lack of confidence in the judiciary is the beginning of the end of society." The judge has neither sword nor purse. All he has is the public's confidence in him.

Public confidence is not a given. Its existence cannot be taken for granted. The public's confidence is a fluid matter. It must be nurtured. It is easier to damage it than to guard it . . . Every judge should act as though the public's confidence in the entire judicial system depended on the exercise of his balancing.

Justice Aharon Barak, President of the Supreme Court of Israel "The role of the Supreme Court in a democracy" 1999 Israeli Law Review 1 9.

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36 SA Regskommissie *The review of the Child Care Act* Issue Paper13 Project 110 1998 131–151.
37 Timms *Children's representation. A practitioner's guide* (1995) 39–40.

Indigenous law, public policy and narrative in the courts*

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OPSOMMING

Inheemse reg, openbare beleid en vertellings in die howe

Beleidsoorwegings speel 'n belangrike rol in die ontwikkeling van die inheemse reg. Openbare beleid en verwante begrippe is vir die eerste maal in die Suid-Afrikaanse regsgeskiedenis in weersinsklousules ("repugnancy clauses") gebruik om te bepaal of die inheemse reg van toepassing is al dan nie. Die weersinsklousule vorm vandag nog deel van die Suid-Afrikaanse wetgewing.

Alhoewel die weersinsklousule steeds as 'n koloniale oorblyfsel beskou word, kan openbare beleid, as instrument in regterlike regskepping, nogtans 'n heilsame uitwerking op die ontwikkeling van die inheemse reg hê. Wanneer 'n hof 'n beslissing maak wat op beleidsoorwegings berus, moet die gemeenskap se oortuigings van wat geregtigheid vereis in ag geneem word. Dit is egter moeilik om die fundamentele waardes van wat geregtigheid en orde vereis in 'n multikulturele gemeenskap waar regspluralisme heers, te bepaal.

Openbare beleid word tans binne 'n Westerse idioom geïnterpreteer en onderskryf Westerse waardes wat verskil van die fundamentele waardes wat die inheemse reg onderlê. Hierdie hoofsaaklik Westerse diskoers kan betwis word deur die stories van mense wat volgens die inheemse reg lewe. Alhoewel stories meer as mondelinge kommunikasie behels, is dit die mondelinge kommunikasie, of vertellings van diegene wat voor 'n hof verskyn, wat die grondslag behoort te vorm van 'n ondersoek na die ware lewende inheemse reg. Dit is slegs teen die agtergrond van die inheemse gemeenskap se stories dat hulle fundamentele waardes bepaal kan word.

Dit blyk dat die howe al hoe meer erkening verleen aan die multikulturele aard van die Suid-Afrikaanse gemeenskap. Die rede vir hierdie klemverskuiwing is dat die openbare beleid, in die lig van die waardes van gelykheid en verdraagsaamheid van diversiteit wat in die Grondwet verskans is, meer inskiklik geword het teenoor waardes wat anders is as die bekende Westerse waardes. By nadere ondersoek van onlangse hofbeslissings blyk dit egter dat daar nie noodwendig 'n wesenlike verandering in ons howe se houding ten opsigte van "ander" waardes is nie. Dit kom eerder neer op 'n verdraagsaamheid teenoor waardes wat in werklikheid steeds beskou word teen die openbare beleid te wees.

Die taak van die howe moet wees om die inheemse reg in lyn met die kommunitariese ideale van Afrika te hervorm – nie om dit aan te pas om Westerse reg te word nie; en ook nie, in 'n konflikteregsituasie, om die toepassing van die inheemse reg te vermy ten gunste van die Westerse reg nie. As openbare beleid so gekonseptualiseer word dat dit inheemse waardes insluit, sal die hervorming van die inheemse reg 'n geheel en al ander rigting inslaan. Ons howe moet van gedifferensieerde oorwegings van openbare beleid gebruik maak om op hoogte te bly van die gemeenskap se persepsies van wat regverdig en moreel is. Stories en

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vertellings moet die rigtingwysers wees van veranderende sosiale waardes en moet die grondslag vorm van gedifferensieerde oorwegings van openbare beleid. As die howe nie reageer op die multikulturele aard van die Suid-Afrikaanse gemeenskap nie, sal die reg die relevansie en kreatiwiteit verloor wat noodsaaklik is om legitimiteit en effektiwiteit in die navolging van geregtigheid te behou.

1 INTRODUCTION

Policy considerations play an important role in legal development. Our courts are expected to make fundamental policy decisions and to weigh up conflicting interests, not only as guardians of the Bill of Rights but also in the process of developing the common law and adapting it to the changing needs of society.[1] In this way public policy, as a mechanism in judicial law-making, also impacts on indigenous law, which has now, since the adoption of the Constitution,[2] assumed its rightful place as an integral part of the general body of South African law.

Yet policy considerations have always played an important part in the application, development and continued existence of indigenous law. Historically it was the introduction of repugnancy clauses which initiated the use of public policy, and related notions such as justice, morality, equity, good conscience, order, humanity and natural justice, as criteria to determine the applicability of indigenous law.[3] By the middle of the nineteenth century, the colonial administrators all aspired to "civilise" the indigenous population and to eradicate their "barbarous" laws and customs[4] by, for example, applying the repugnancy clause strictly. More than fifty years later, the Black Administration Act 38 of 1927, which consolidated colonial legislation, recognised indigenous law, subject to the proviso that it did not conflict with principles of natural justice and public policy.

Today the use of a repugnancy clause has been abandoned by most African countries.[5] By contrast, roughly a century and a half after its first introduction into South Africa, it still forms part of the legislation of this country and of other countries making up the South African Law Association.[6] The repugnancy clause is

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1 See Corbett "Aspects of the role of public policy in the evolution of our common law" 1987 *SALJ* 52 54 65 68. In *Amod v Multilateral Vehicle Accident Fund* 1997 12 BCLR 1716 (D) 1722I–J 1723H–J the court held that the interpretation clause (s 39 of the Constitution) does not give the courts the general power to develop the common law to the extent of altering it. This is in contrast with the general attitude of the High Court in this regard. See Clark and Kerr "Dependant's action for loss of support: Are women married by Islamic rites victims of unfair discrimination?" 1999 *SALJ* 20.

2 The Constitution of the Republic of South Africa Act 108 of 1996.

3 See generally Van Niekerk *A comparative study of the application of indigenous law in the administration of criminal justice in Southern Africa* unpublished LLM dissertation, Unisa (1986) 61–64.

4 See Allott "Aboriginal rights and wrongs: The Mabo land case" 1993 *Law and Justice* 84 87 who explains the dualistic purpose of the colonial powers in their African expansion thus: "Humanitarian, altruistic and civilising purposes were also often put forward as justifications for such expansions and occupation . . . For many of the colonisers who waged war on the indigenes before seizing their territories and exploiting their resources, these justifications were no more than a cynical cover for enrichment. But at the same time one must recognise the less self-regarding and genuine desire of many to bring civilisation and enlightenment, as they saw them, to the benighted."

5 See Bennett *A sourcebook of African customary law for Southern Africa* (1991) 130–131.

6 These are Lesotho, Botswana and Swaziland (Namibia and Zimbabwe). The term was coined by Schreiner J in *Annah Lokudzinga Mathenjwa* 1970–1976 SLR 25 29H.

presently contained in section 1(1) of the Law of Evidence Amendment Act 45 of 1988. Its application is further secured by section 211(3) of the Constitution, which instructs the courts to apply indigenous law, subject to the Constitution and to *existing legislation,* thus subject also to the repugnancy clause in the Law of Evidence Amendment Act.

Policy considerations accordingly permeate all decisions of the ordinary courts on indigenous law. There are broadly three sets of circumstances where this is readily apparent in practice. In the first place, the general rule contained in section 1 of the Law of Evidence Amendment Act which regulates the application of indigenous law, incorporates policy considerations to determine the validity of indigenous law. Thus a court has to consider public policy each time it is concerned with indigenous law. Secondly, the repugnancy proviso is used as a limitation on the application of indigenous law where there is a conflict between it and Western law, and indirectly where there is a conflict between it and the Constitution. And thirdly, policy considerations are relied upon where indigenous law is no longer in step with changing circumstances and must be adapted to accommodate new situations.

Even though the repugnancy clause has the reputation of being a colonial relic, public policy could, as a tool in judicial law-making, have a salutary effect on the development of indigenous law. The cardinal condition, however, is that public policy should be taken to include the communitarian ideals of indigenous Africa. Should it be employed, as in the past, to impose Western values on the indigenous legal order, or to avoid the application of indigenous law, the use of the clause might lead to the stagnation and eventual disappearance of a system of law by which millions of South Africans live.

The content of public policy is determined by the fundamental values of justice and order[7] which should direct the development of both substantive and procedural law. Those values, however, vary in different societies and at different times in accordance with social organisation and beliefs.[8] In making a policy decision, a judge is required to balance two sets of competing interests. The balance which is eventually struck should accord with society's notions of what justice demands.[9] Both competing interests are usually worthy and desirable. In consequence, Mr Justice Goldstone, using the familiar equine analogy,[10] once said about public policy that "frequently . . . this high horse [of public policy] attempts to stampede in

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7 See eg *Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 188H.

8 See Bennett and Feldman *Reconstructing reality in the courtroom* (1981) 19–21. See also Cotterrell "Legality and political legitimacy in the sociology of Max Weber" in Sugarman *Legality ideology and the state* (1983) 87 88. Although he acknowledges the changeable nature of values or conceptions of justice and order, he is not discussing a heterogeneous society and consequently does not reflect upon the idea that there may be conflicting conceptions of the values of justice and order within the same society. This is the case in South Africa and this is the very reason why the legitimacy of the legal system as a whole is still questioned, despite the fact that a legitimate government is in power. See also Basson and Viljoen *Suid-Afrikaanse staatsreg* (1988) 227 228 on the role of societal values in the formation of law.

9 Corbett 68.

10 See *Mabaso v Nel's Melkery (Pty) Ltd* 1979 4 SA 358 (W) 362A–C; see also the much-quoted passage of Burroughs in *Richardson v Mellish* (1824) 2 Bing 229 252 where he compared public policy to an "unruly horse, and when once you get astride it you never know where it will carry you". He continued to say that it "is never argued at all but when other points fail". See also *Driefontein Consolidated Mines Ltd v Jansen* (1901) 17 TLR 604 605 in which public policy was likened to "a high horse, difficult to ride once you have mounted it".

opposite directions at one and the same time". The problem facing South African courts is how to determine which interests comply with our society's notions of what justice demands.

Although one may accept that even in a multicultural society there is a common nucleus of core values which are shared by the community as a whole, it should be remembered that different cultures have different conceptions of these basic values and their role in legal, political and social ordering. In short, conceptions of justice differ. In this country the largest numeric divide is between what may broadly be termed a Western or European culture and an indigenous African culture – thus a Western legal order and an indigenous legal order. In Western law, the modern, liberal perceptions of justice focus on individual freedom and equality and the interests of the individual take precedence over the common good.[11] This is in stark contrast with the most important fundamental principle of indigenous law, namely harmony of the collectivity, in which the collective good takes precedence over individual claims.[12] It is evident that our courts are burdened with a difficult problem when they have to establish the content of legal ideology in a community where such diverse values underscore a plurality of legal systems.

It is generally accepted that in order to be just and in accordance with public policy, law should comply with society's notions of fairness, reasonableness, generality, equality and certainty.[13] These criteria constitute part of an integrated system of values which forms the starting point for legal reasoning in Western law. But these values should be conceptualised anew when one deals with the law and institutions of other cultures. For example, the conceptualisation of indigenous law will vary, depending on the value system employed in evaluating that law. Numerous cases involving indigenous law are disposed of in motion proceedings. Consequently the discourse on indigenous law, customs and institutions in our courts has until now been dominated by the perceptions of counsel – Westerners with little training in indigenous law and even less knowledge of the indigenous value systems which underpin that law.

This predominantly Western discourse can be challenged, first and foremost, by the narratives of people who live by indigenous law. Although narratives involve more than mere oral communications, it is the verbal communications of the people who appear before a court that should form the starting point of an enquiry into the true, living, indigenous law. It is only against the backdrop of a society's narratives that its basic values can be determined. But then the society whose laws, institutions or procedures are appraised should be afforded the opportunity to speak for their law and to enlighten the courts on the values which underlie that law. This is, of course, not possible in motion proceedings.

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11 Rawls *A theory of justice* (1992) 504–512; see also Van der Westhuizen "Opmerkings in verband met regsnorme, legitimiteit en samelewing" unpublished paper read at a Colloquium luridicum on "Regsfilosofie en samelewing" held at the University of the Orange Free State September 1987 5, Van der Vyver "Reg(ter) en geregtigheid" 1975 *De Jure* 8–12, Du Plessis *Die juridiese relevansie van Christelike geregtigheid* unpublished LLD thesis PU (1978) 820ff.

12 It should be borne in mind that the collectivity cannot be seen as an entity separate from its component members. Therefore, it is also not quite correct to speak of the absolute primacy of the collectivity over the individual good.

13 See Hahlo and Kahn *The South African legal system and its background* (1973) 31–35; see also Hutchison, Van Heerden, Visser and Van der Merwe *Wille's Principles of South African law* (1991) 13–16.

The current discourse can also be challenged by counsel who are properly trained in indigenous law. It is fortunate that the introduction of the new LLB degree in South Africa has forced law faculties, or at least the law faculty of the University of South Africa, to reconsider the importance of training in indigenous law. At the University of South Africa indigenous law ranks with other compulsory courses regarded as important foundations of the study of law. But as far as legal education is concerned, a basic knowledge of substantive indigenous law is not enough. It is also important to have a sound foundation in the philosophical and historical underpinnings of that law. Although indigenous legal history and philosophy are slowly being introduced into compulsory courses such as the Origin and Foundations of South African Law and Introduction to Legal Philosophy, they still play only a peripheral role even in these courses.

In this contribution I wish to investigate the attitudes of South African courts towards the values which underpin the laws and institutions of cultures other than the Western. It seems that the emphasis has certainly shifted from the Western principles of public policy to the values entrenched in the Constitution. The courts are increasingly acknowledging the multicultural nature of South African society. They are no longer willing to find the cultural institutions of other communities to be in conflict with Western perceptions of what is moral or in the public interest. The reason for this shift is that, because of the ideals of equality and tolerance of diversity, and the recognition of the plural nature of the South African society, entrenched in the Constitution, public policy has become more accommodating of values other than the known Western ones. However, an analysis of the more recent cases shows that this has not invariably involved any substantial change in our courts' attitude towards such "other" values; what has emerged is a mere tolerance of those values which are, in truth, still regarded as against public policy.

2 THE RELATIVITY OF THE CONCEPT OF PUBLIC POLICY

Policy considerations have been defined as the "substantive reasons for judgments reflecting values accepted by society".[14] These values comprise either moral or ethical values which are worthy in themselves, or desirable goals of collective societal welfare, or both. Because public policy reflects the *mores* and fundamental assumptions of the community, and because these are not static concepts, it is only natural that the notions of public policy may change from one era to the next and differ from one location to the other.[15]

Presently, the most fundamental of these values are entrenched in the Constitution and our courts are directed to have regard to them in applying all law. In *S v Acheson*[16] it was said that a constitution is a "mirror reflecting the national soul . . . [and] the articulation of the values bonding its people". However, values are culturally acquired and it is evident that this dictum does not necessarily hold true for a multicultural society. In fact, I have to agree with the view[17] that our

14 Van Aswegen "Policy considerations in the law of delict" 1993 *THRHR* 174.

15 Corbett 64 65; see also Also *Standard Bank v Wilkinson* 1993 3 SA 822 (C) 827G–H.

16 1991 2 SA 805 (Nm HC) 813A–B. See also *Du Plessis v De Klerk* 1996 3 SA 850 (CC) where the court refers to a German case in which it was stated: "In order to determine what is required by social norms such as 'good morals', one has to consider first the ensemble of value concepts that a nation has developed at a certain point in its intellectual history and laid down in its constitution."

17 Thomas and Tladi "Legal pluralism or a new repugnancy clause" 1999 *CILSA* 360.

"Constitution is Eurocentric, the product of liberal, social democratic values in which the individual takes pole position" and that its interpretation by the courts likewise reflects Western values. This is not to say that the promulgation of the Constitution necessarily sounded the death knell of the indigenous legal order. If the values entrenched in the Constitution were to be interpreted against an indigenous African backdrop when the laws and institutions of that community arise for consideration, exciting new avenues for the development of indigenous law might be revealed, in keeping not only with the underlying values of the indigenous community, but also with the Constitution.

Our courts have on numerous occasions referred to the fact that public policy is not a static concept, but changes from time to time and place to place.[18] Moreover, they have been prepared to determine public policy with reference to, for example, a specific business community.[19] Yet the courts have seldom taken note of the possibility that at the same time and in the same place public policy in respect of the same social institution, such as marriage, may differ from one society to the next.

In a heterogenous society where there is legal pluralism, the conflict between Western and indigenous value systems is most apparent in the practical administration of justice. But judges should take cognisance of fundamental indigenous assumptions and juridical convictions and be alive to the fact that different policy considerations apply in the different communities in this country. Admittedly, it is a difficult task for the judiciary to re-think and adapt the concept of justice and fair hearing with which they are familiar so that the concept will be acceptable to a section of the community with whose culture they are not familiar.[20] In this regard, narratives should play a pivotal role as the underlying means of achieving justice.

The criteria which our courts employ to determine the content of public policy all seem to be directed at homogeneous communities. The possibility of diverse, and possibly conflicting, values and norms in a single multicultural society is generally not addressed.[21] The criteria in question are the *boni mores*; the norms of conduct

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18 In *Zimnat Insurance Co Ltd v Chawanda* 1991 2 SA 825 (ZSC) 832C–E it was said that the development of law in accordance with changing societal values does not necessarily come at the cost of legal stability and legal certainty; that law is a living force which must accommodate change; and that it must be adaptable to changing economic and social norms and values and to the altering views of justice. If law does not respond to societal needs and is not founded on "human necessities and experience of the actual affairs of men rather than on philosophical notions, it will one day be cast off by the people because it will cease to serve any useful purpose". In this case the full bench of the Zimbabwe Supreme Court refused to follow the South African example of denying the indigenous-law marriage legal validity.

19 In *Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 188A–189H the court indicated that public policy does not exist *in vacuo,* and that "the morals of the market place, or the business ethics of a certain section of the community where the norm (public policy) is to be applied, are of major importance in its determination".

20 See Aguda "The judiciary in a developing country" in Marasinghe and Conklin (eds) *Essays on Third World perspectives in jurisprudence* (1984) 162.

21 See eg *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 593G–H where the Appellate Division remarked that policy considerations differ from one community to the next, and that in this country the courts should heed the juridical convictions in South Africa and nowhere else, but gave no thought to the possibility that there may be different societies within the same community. See also *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593 in which the court stated that "the public policy with which [the Natal Legislature] was concerned was that which had reference to the interests of the country for which it was responsible".

required by society; the legal convictions of the community; the general sense of justice and order of the community; the common values and norms of the community, and so on. The concept of public harm,[22] or its opposite, public interest, is also employed. But conceptions of *boni mores* and public harm, or what is in public interest, differ; as do the norms of conduct and the legal convictions, or sense of justice, of various societies.

In *Olsen v Standaloft*[23] the Zimbabwean Supreme Court took a relativist view of public policy. The court remarked that considerations of public policy as they impinge upon the notion of marriage in the Western, as opposed to the traditional or indigenous, sector of society were considered relevant. This was so because the contract before it was concerned with persons of a section of the community whose fundamental assumptions were Western. Chief Justice Fieldsend pointed out that in a plural community there would always be the possibility of a conflict between perceptions of what is against public policy.

In a minority decision Mr Justice Baron underscored this view and said the following[24]:

> "[W]ho are the public with whose welfare we are concerned? . . . [I]s the Court entitled to have regard to the culture and traditions of [one] group in considering the question of potential harm? Or is the correct approach to consider the potential harm to the society as a whole, but taking into account that that society is not homogeneous?". . . [T]he problem [does not] appear to have been addressed in South Africa . . . [T]he reason there was perhaps that the culture and traditions of the majority of the population were not regarded as relevant."

3 POLICY CONSIDERATIONS AND NARRATIVE IN THE COURTS

Former Chief Justice Corbett[25] once remarked that the judge becomes the "living voice of the people" and that he "must interpret society itself". But it is not always possible for a judge who does not necessarily share the same set of norms, assumptions and experiences as the community whose legal rule or institution is under scrutiny, to "interpret society itself". Not, that is, unless he or she indeed happens to be a member of that society, or has the benefit of the narratives of the people who live by that law. The jural postulates or underlying values of a legal system should direct a court in legal development. And knowledge of such underlying values could make an important difference in the outcome of a case. This much was evidenced in a number of cases to which I shall now refer very briefly.

The first decided case is in *Bangindawo v Head of the Nyanda Regional Authority; Hlantlalala v Head of the Western Tembuland Regional Authority.*[26] In this case certain indigenous justice procedures were examined in the light of the Constitution. There was a conflict between the values entrenched in the Constitution and the values which underlie indigenous dispute resolution. The court had to make a policy

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22 In *Standard Bank v Wilkinson* 827A–B the court stated that the concept of public harm is paramount and on 828F–G that public harm is that which is "inimical to the interest of the community as a whole, having regard to the *mores* of the times".

23 1983 2 SA 668 (ZSC) 676H. At 677A–C the judge stated that "what was not contrary to public policy in one section of society might offend against the fundamental assumptions of another section and have to be struck down as contrary to public policy in that section".

24 678H–679A–C.

25 Corbett 67; See also *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 593G–H.

26 1998 2 SA 262 (Tk).

decision whether certain sections of the Transkeian Regional Authority Court Act 13 of 1982 were unconstitutional on the grounds that they violated the right to a fair trial and to legal representation; that they did not comply with the requirements of an independent and impartial judiciary; and that they created a system of unequal justice.

The justice procedures in the Regional Authority Courts were challenged as being fundamentally unfair because the presiding officers are untrained in law and perform their duties without the assistance of legal materials such as statutes, law reports and text books; because they have executive functions and are therefore not impartial; because a truncated procedure is followed which does not provide for certain rights which are available in Western procedures and because legal representation is prohibited. Interestingly and not unexpectedly, Mr Justice Madlanga did not confine himself to Western norms in evaluating the indigenous procedures. Nor was his lordship willing, however, to accept that indigenous dispute resolution procedures were unconditionally suited to the Regional Authority Courts, given that these courts are creatures of statute and embody features of Western courts too.

The judge pointed out that although the presiding officials in the Regional Authority Courts are fully acquainted with the indigenous law of their district, the prohibition of legal representation could not be justified in terms of the Constitution's limitation clause. The reason was that these courts have to apply both common law and indigenous law, and that they have an increased jurisdiction equal to that of magistrates' courts. The advantages of an absence of legal representation were thus outweighed by the disadvantages.[27] His lordship consequently ordered that the prohibition against legal representation in the Regional Authority Courts Act be struck down.

With regard to the lack of legal training of presiding officials, it was concluded that the absence of such training was compensated for by the fact that the people who appeared before the courts were known to them; that their own language was spoken and that there was consequently no danger of an incorrect interpretation of what was said in court. In other words, the presiding officials are part of the community whose law and underlying values have to be interpreted and applied and they have the additional advantage of the narratives of the people whose interests are at stake. While this holds true where indigenous law is applied by presiding officials who are familiar with that system, the narratives of those who appear before the Regional Authority Courts can hardly compensate for the presiding officials' lack of knowledge of Western law.

In an evaluation of the simplified non-technical indigenous procedure, the judge in the *Bangindawo* case pointed out that it made no sense to list the elaborate facilities in the Western procedural system which are absent in the traditional courts – that would amount to comparing apples with pears. The absence of a highly technical procedure has the advantage that the real substance of the dispute receives attention.[28] With regard to judicial impartiality and independence, his lordship likewise refused to enforce the Western notions of the tribunal's independence from the executive and from the parties. He remarked that the imposition of the Western conception of judicial impartiality and independence would "strike at the heart of the African legal system . . . [and amount to] the abhorrent subjection of African matters to [a] 'public policy' . . . [which does] *not necessarily accord with the public policy of the Africans*".[29]

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27 275G–277J.
28 279H–280A.
29 273B–E. My emphasis.

South African judges should be sensitive to the diverse values of the different cultures which comprise the South African community. Unfortunately this has not been the case up to now. The reason is probably that in order for a judge to "interpret society" she has to draw upon certain narrative frameworks,[30] the social setting of which, in this country, is Western. Until now a judge has had to rely on knowledge obtained at Western-oriented or Western-biased South African universities and on experience gained in practising Western common law in Western courts. In short, she has had to rely on rule-centred scientific interpretations of indigenous laws and institutions which have become the stock stories dominating discourse about indigenous law, but which do not reflect the African reality. It is true that as an educated, responsible and enlightened member of society, she should draw on such contact with and insight into her fellow humans as her professional career has given her, and also on her ongoing perceptions of the attitudes of the community around her.[31] But if her education has been limited to Western common law, and her contact with indigenous African law has been limited to the cases that have come before the ordinary courts, cases presented by legal counsel who are as a rule not members of the indigenous section of the community, then there is a strong possibility that her perceptions of the indigenous community and its value systems may be distorted. Might such a judge have come to a different conclusion had she, rather than Mr Justice Madlanga, presided in the *Bangindawu* case? One may accept that the current discourse on indigenous law is on the whole far removed from what constitutes indigenous African law and the jural postulates which underpin that law. That is the very reason why it is critically important that the narratives of those who live by indigenous law should direct the courts in policy decisions.

The second case to which I wish to refer is *Ryland v Edros*.[32] Here the court stated that public policy is essentially a question of fact, and that it is not usually determined by evidence before the court, but that it is regarded as so notorious that judicial notice may be taken of it. However, this is not as simple as it seems. In order to take judicial notice of a community's sense of justice, a certain knowledge of its culture and world-view is necessary. To date our courts have not found it necessary to pay attention to the narratives of members of a community in order to ascertain their policy towards their laws and institutions. The reason for this is simply that very few courts have adopted a differentiated concept of public policy; perceptions of public policy have been directed by Western values.

In the third case, *Mthembu v Letsela*,[33] the court was called upon to declare the indigenous-law rule of male primogeniture repugnant to public policy and the principles of natural justice. It seems that the court took a relativist approach to public policy when it remarked that it would be paternalistic towards many indigenous people to apply Western norms to a rule of indigenous law which is still adhered to and applied by many people.[34] Yet the court did not give effect to this

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30 Jackson *Law, fact and narrative coherence* (1988) 94 points out that legal reasoning necessarily draws upon narrative frameworks which has a social origin, whether in a society as a whole or in certain groups within a society.

31 See Corbett 70.

32 1997 2 SA 690 (C) 704C–D.

33 *Mthembu v Letsela* was the subject of two High Court decisions. In the first of these, *Mthembu v Letsela* 1997 2 SA 936 (T), there was a material dispute of fact and the application was postponed for the hearing of oral evidence. The second hearing was reported in *Mthembu v Letsela* 1998 2 SA 675 (T).

34 According to Bennett "The equality clause and customary law" 1994 *SAJHR* 122 130 the courts' hesitance to invoke the repugnancy clause thusfar may be ascribed either to a general reluctance

continued on next page

relativist approach by enquiring what the indigenous or African public policy was with regard to the rule in question. In this case, which was incidentally dealt with in motion proceedings, the narratives of the people concerned might have helped to determine the indigenous public policy towards the rule of male primogeniture.

For instance, among some indigenous people the rule of male primogeniture comprises succession to the status of the deceased by his eldest male descendant, but does not necessarily include any rights to his property.[35] How the estate should be divided is determined at a family meeting about three weeks after the burial of the deceased. Devolution normally benefits all the members of the family. This is but one example of how values and perceptions of what is in the interest of the community may change from time to time. Traditionally, the oldest male stepped into the place of the deceased. Universal succession took place and he was responsible for administering the property for the benefit of the family as a whole. Through distorted perceptions, this concept of communal inheritance and ownership by the family has come to be regarded as the individual inheritance and ownership of the deceased's property by the oldest male. It seems that among the people referred to above, individual members of the family inherit. Perhaps indigenous values have changed with regard to the principle of male primogeniture. It is by way of narratives, the cultural communications of community values, that these values are transmitted and determined. Even if the basic underlying values have not changed in this instance, it may be that changed circumstances now demand the development of the rule. So, while it is commendable in principle that the court in *Mthembu v Letsela*[36] did not want to declare the rule of male primogeniture against public policy, it should rather have been established whether the community in which the rule applied still considered that rule, in its unaltered form, to be in its own interest.

Any call for the development of law by reference to policy considerations should be treated with great circumspection. It is of little consequence whether or not a court declares a rule to be against public policy. What is cardinal is whether the conclusion is reached with reference to community values in respect of the rule in question. If the values of the community are disregarded, indigenous law will stagnate. The main consideration should be how to develop a legal rule so that it remains in harmony with the underlying values of indigenous law as well as with the Constitution. But then these values should be established with reference to the narratives of the very people who live by indigenous law rather than with reference to existing written materials and the stock stories of indigenous law only.

Unfortunately, in *Mthembu v Letsela*[37] the court rejected the idea that indigenous law can be developed only with the benefit of the views of the community which

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to keep indigenous law in step with changing social norms, or a general reluctance to apply unfamiliar laws. "Public policy" and "natural justice" as contained in the repugnancy proviso are but expressions of fundamental human rights and could as such be used as independent and subsidiary criteria to determine the possible application of indigenous law. However, see the South African Law Commission's Discussion Paper 76 *The Harmonisation of the Common Law and the Indigenous Law: Conflicts of Law* (1998) 40, where it is stated that the courts' hesitance to invoke the repugnancy clause was due to the courts' realisation that the full exploitation of the concept of repugnancy would have invalidated large areas of indigenous law.

35 Maithufi "The constitutionality of the rule of male primogeniture in customary law of intestate succession. *Mthembu v Letsela* 1997 2 SA 935 (T)" 1998 *THRHR* 142 147.

36 See Van Niekerk "Indigenous law and narrative: rethinking methodology" 1999 *CILSA* 208 218ff for a discussion of *Mthembu v Letsela* from a narrative perspective.

37 1998 2 SA 675 (T) 685E–G.

lives according to that law. In this case, and in another recent case before the Zimbabwean Supreme Court,[38] the court called upon the legislature to reform the indigenous law of succession. In view of the non-specialised character of indigenous law, and consequently of the many different aspects of that law and culture which are interwoven with the principle of male primogeniture, this is understandable. But the Amendment of Customary Law of Succession Bill,[39] which, should it become law, will amend the indigenous law of succession to conform more to Western law and the principles underlying the Constitution, cannot possibly be consonant with indigenous public opinion. In the memorandum on the objects of the bill, it is stated that it was drafted as a matter of great urgency, after consultation with traditional and religious leaders and the rural women's movement; all this within less than a year. The question is whether it is at all possible, in such a short time, to determine what indigenous communities consider to be in their best interest in this regard. Further, was it as a result of consultation with the interest groups mentioned that the relevant rules of indigenous law were replaced by rules of Western law? While gender equality may be achieved when this bill becomes law, it may prove difficult to reconcile it with the underlying communitarian ideals of indigenous family law which focus on the preservation and continued existence of the group.

4 POLICY CONSIDERATIONS AND THE CHOICE OF LAW

Conflict with public order is one of the indications militating against the application of foreign law, even if such foreign law is the chosen system in a conflict-of-laws situation. The rule that a foreign norm must be tested against the principles of public policy is of universal application. Similarly, in the internal conflict of laws, public policy is utilised to determine the applicability of indigenous law.[40] However, this does not mean that the repugnancy clause should be construed as a choice-of-law rule, as has happened in the past.[41]

It has been emphasised[42] that a court should decide whether the *outcome* of the application of a foreign rule is against the principles of public policy, not whether *the rule itself* is desirable or moral. This would mean that in the sphere of private international law, policy considerations should be limited to desirable goals of collective societal welfare and that values of ethics and morality which are valuable in themselves, should not be considered. The same should apply to the internal conflict of laws. The narratives of the community concerned should indicate whether that community considers the outcome of a rule to be in its interest. In an internal conflict-of-laws situation, Western law and indigenous law, underscored by their different values, are potentially applicable. This diversity in values of what is ethical and moral makes it all the more difficult to test the actual rules, divorced from their cultural context and outcomes, against policy considerations.[43]

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38 See the discussion by Robb and Cassette of the unreported case of *Magaya v Magaya* (ZSC) in "Customary law of primogeniture upheld in Zimbabwe" October 1999 *De Rebus* 44–45.

39 B108–198.

40 The *lobolo* custom is expressly excluded from the scrutiny of the repugnancy proviso. See generally Olivier "The judicial application of African customary law" in Sanders (ed) *The internal conflict of laws in South Africa* (1990) 189, Olivier "Application of customary law" 1994 *LAWSA* 41.

41 Bennett 130.

42 Kahn-Freund *General problems of private international law* (1976) 282 283.

43 According to Bennett 132, the Law of Evidence Amendment Act instructs a court to test an indigenous law rule in the abstract and not in the particular context of the case before the court.

It should be noted that while the principles and techniques of private international law are useful in the process of an internal choice of laws, they are not to be treated as one.[44] Although indigenous law and foreign law are grouped together in the Law of Evidence Amendment Act of 1988,[45] it was clearly not the intention of the legislature that indigenous law should be treated as foreign law.[46] The rationale behind grouping indigenous law and foreign law in the same proposition seems to be the fact that for both, related guidelines are laid down in a conflict-of-laws situation – even if these guidelines as contained in section 1 of the Act do not, and should not, have the same consequences for internal and external conflict rules.

Public policy should not be used to avoid the application of indigenous law. At present, Western principles are regarded as universally applicable and are therefore employed to limit the application of indigenous law. Once a court has, in terms of internal conflict-of-laws rules, decided which system of law is most closely connected to the facts, it should have regard to the principles of public policy (in the cultural context of the chosen or designated legal system) and then finally to section 39(2) of the Constitution (the interpretation clause) to determine whether the chosen system should be applied as it is, or whether it should be adapted or altered. A court should not, as is the case where foreign law is the designated system, automatically apply South African law when the indigenous law is found to be against public policy.

What happens where there is a conflict between public policy and the values which underlie the Constitution? Obviously, the Constitution, being the supreme law, will prevail.[47] In *Ryland v Edros*[48] the court held that two important values which underlie the Constitution are equality and tolerance of diversity, which includes recognition and accommodation of the plural nature of our society. Thus the court held that

> "it is quite inimical to all the values of the new South Africa for one group to impose its values on another and . . . the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it".[49]

In the light of these values, the court found that a contract arising from a potentially polygynous marriage, which is in fact monogamous, is not against public policy and will not detrimentally affect the interest of society. However, the court also made it clear that the same would not apply to marriages which were in fact polygynous.[50] Yet earlier on[51] the court held that, were it not for the new Constitution, "it would be difficult to find that there has been such a change in the general sense of justice

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44 Bennett *The application of African customary law in Southern Africa* (1985) 105–109.

45 S 1 of this Act determines: "Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice . . ."

46 That is clear from the words of the South African Law Commission *Evidence* Report Project 1986-10-06 11: "Customary law is not foreign law in the same sense as, for example, French law is . . . [t]o the Blacks it is incomprehensible and even humiliating that their law is regarded as foreign law . . ."

47 See *Ryland v Edros* 705C–D.

48 707B–C D–E 708–J 709A–B.

49 707F–H.

50 709C–E.

51 704C–D.

of the community as to justify a refusal to follow the *Ismail* decision . . ." in which a potentially polygynous marriage was declared to be against public policy. This serves to underline the point that in reality there has been no mind shift regarding public policy. It seems that by "the community at large" is still meant the "Western" section of the South African community. After all, the true "community at large" cannot possibly regard polygynous, or potentially polygynous, marriages as against public policy, because the majority of South African marriages (both indigenous and Muslim) are potentially polygynous.

Recently, in *Amod v Multilateral Motor Vehicle Accident Fund,*[52] the Supreme Court of Appeal once again had to make a policy decision regarding potentially polygynous marriages. In this case the court decided that Mrs Amod, who was married in accordance with Islamic rites, could claim damages for the loss of support resulting from her husband's death. It followed the test laid down earlier in *Santam Bpk v Henery*,[53] namely that a claim for damages for the loss of support should succeed if it is established that the deceased had a legally enforceable duty to support, worthy of protection by the law. Whether such a duty is worthy of protection by the law should be determined in accordance with the *boni mores* of the community.

Although Mrs Amod's marriage had not been registered as a civil marriage in terms of the Marriage Act 25 of 1961, the court in *Amod* found that her right to support was worthy of protection in the light of the prevailing ethos of tolerance, pluralism and religious freedom. This ethos first showed itself in 1989 in the South African Law Commission's Report on Group and Human Rights and it had been already firmly established in 1993 when the appellant's husband was killed. The court made it clear that it did not have to rely on the Constitution to come to this conclusion, because the present ethos is

> "substantially different from the ethos which informed the determination of the *boni mores* of the community . . . [in] the cases which decided that 'potentially polygamous' marriages which did not accord with the assumptions of the culturally and politically dominant establishment of the time did not deserve the protection of the law . . . ".[54]

The court nevertheless emphasised that Mrs Amod's marriage was in fact monogamous, and consequently that there was no doubt that the *boni mores* of the community would not militate against a duty of support arising from such a marriage which was, but for the underlying faith, the same as a civil or Christian marriage. Although the court indicated that the values of one section of the South African community should not be imposed an another, it expressly left open the question of *de facto* polygynous marriages.[55]

5 CONCLUSION

Public policy mirrors a community's sense of justice. At present it is framed within a Western idiom. It underscores the Western values of individual freedom and equality as they are reflected in the modern liberal perceptions of justice. These Western values are characteristically specialised and focused on individualism, legalism and intellectualism.[56] Yet these values differ fundamentally from the most

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52 1999 4 SA 1319 (SCA).
53 1999 3 SA 421 (SCA) 429C–D 430D–I.
54 1328D–E.
55 1330B–C.
56 See Van Niekerk "A common law for Southern Africa: Roman law or indigenous African law?" 1998 *CILSA* 162ff for a discussion of jural postulates in Western and indigenous law.

basic precepts which underpin the non-specialised indigenous legal system. Western individualism contrasts with the communitarian African ideals of collectivism or the preservation of group solidarity. Western legalism is based on the separation of law and other norms[57] and encompasses the ordering of social relations in accordance with general rules of law which are not necessarily consonant with moral and social values and purposes. This implies the separation of law from the living world. By contrast, indigenous law, which is by nature non-specialised, is closely connected to other non-legal norms. Western intellectualism, which encompasses thematisation, conceptualisation and abstraction in legal reasoning,[58] is likewise not compatible with the non-specialised indigenous legal reasoning which focuses on the visible, tangible and sensory world and which is characterised by a lack of differentiation, classification and conceptualism.

Focusing on the narratives of the indigenous community reveals the inadequacy of the current conceptualisation of public policy. The task of decision makers should be to reform indigenous law in line with the communitarian ideals of Africa, not to adapt it to become Western law, or, in a conflict-of-laws situation, to avoid its application in favour of Western law. If public policy is conceptualised to include indigenous African values, the reform of indigenous law will take a radically different direction. Our courts should rely on the narratives of the people who live by indigenous law when that law has to be applied, altered or adapted. It simply makes no sense to rely on Western values as guidelines for the development of indigenous law. The courts should, therefore, employ differentiated considerations of public policy in order to keep the law abreast of indigenous people's perceptions of what is just and moral. And narratives should serve as an indication of the changing societal values which form the foundation of such differentiated considerations of public policy.

In the prevailing spirit of tolerance, pluralism and religious freedom, our courts should not cling blindly to current stock stories of indigenous law. It has been said[59] that mainstream legal scholarship is the scholarship "we already know how to read", and that proposals for change are normative and framed in the discourse that the courts know. The public policy argued before our courts is the policy the courts know, based on the unchallenged and biased Western values to which they are accustomed. If the courts rely exclusively on the dominant discourse on indigenous law, they may underwrite the continued application of indigenous legal rules which in effect no longer apply in indigenous society, and they may, by doing so, stultify the development of that law. The courts should establish whether the indigenous community indeed regards a particular legal rule or institution as still forming part of its law. It is only through the narratives of the people who live by a law that the community's perceptions of that law can be determined.

In making policy decisions, our courts should be responsive to the multicultural character of our society. If they are not, our law will risk losing the adaptability, relevance and creativity which it requires to retain its legitimacy and effectiveness in pursuing justice in our plural society.

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57 See Wieacker "Foundations of European legal culture" 1990 *American J of Comparative Law* 23–25.

58 See Wieacker 25–27; see also Berman "The origins of Western legal science" in Smith and Weisstub *The Western idea of law* (1982) 403ff.

59 Adams "The normative and the narrative" in Heinzelman and Weisman (eds) *Representing women, law, literature and feminism* (1994) 47–48.

Boedelsamesmelting as instrument by boedelbeplanning

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SUMMARY

Massing as an estate planning instrument

This contribution involves a basic analysis of the testamentary massing of estates as an estate planning tool and the implementation of massing as a possible "estate pegging" mechanism for purposes of avoiding or minimalising liability for estate duty. The decision of the Income Tax Special Court in *ITC* 1387, 46 SATC, which seemingly casts substantial doubt on the merits of massing as an effective estate planning instrument, is analysed and evaluated. It is submitted that the submissions of the respective parties led the court to findings regarding massing and adiation which may be open to censure. It is submitted that, notwithstanding the adverse effect the decision in question may have in particular instances of massing, massing may still serve a useful purpose if appropriately applied within certain parameters and with due regard to the circumstances in each individual case. At this juncture, two separate stages in the process of the testamentary planning of estates where massing is employed as an estate planning tool are identified, namely the drafting stage and the evaluation stage. It is suggested that the will should provide for appropriate alternatives to massing in order to afford the survivor the opportunity of evaluating and considering various options when called upon to exercise an election at the death of the first-dying.

1 INLEIDING

Boedelsamesmelting as regsfiguur in sy statutêre vorm ingevolge artikel 37 van die Boedelwet,[1] word in hierdie bydrae as instrument by boedelbeplanning onder die vergrootglas geplaas teen die agtergrond van die onsekerheid rondom die aanwendingsmoontlikhede daarvan wat deur bepaalde uitsprake van die Inkomstebelasting Spesiale Hof geskep is.[2] Die vertrekpunt is dat sinvolle strategiese boedelbeplanning 'n holistiese benadering vereis in teenstelling met gefragmenteerde boedelbeplanningsmetodieke wat tot gevolg het dat boedelsamesmelting as 'n "instrument" te midde van vele ander instrumente in die proses van boedelbeplanning gesien word. So vorm boedelsamesmelting 'n onderafdeling van die *mortis causa*-aspek van boedelbeplanning, wat in teenstelling met die *inter vivos*-aspek nie onmiddellik implementeringsgevolge oplewer nie, aangesien daar aanvanklik slegs 'n gesamentlike en/of wederkerige testament opgestel en verly moet word.

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1 66 van 1965.

2 *ITC* 1387 1984 207 46 SATC; Fredman "Massing of estates and estate duty" 1979 *MBL* 109–100; Abrie ea *Boedels: Beplanning en bereddering* (1991) 97.

Boedelsamesmelting word in hierdie bydrae as 'n instrument by boedelbeplanning in die omvattende sin van die begrip "boedelbeplanning" ondersoek, sonder om dit tot aspekte van belastingbeplanning te beperk. Daar word ter oorweging gegee dat so 'n benadering bevorderliker vir 'n behoorlike wetenskaplike bewerking van die onderwerp is, omdat 'n bloot "fiskale" benadering daartoe kan lei dat belangrike aspekte van strategiese boedelbeplanning agterweë gelaat word.

By die ondersoek na boedelsamesmelting kan twee afsonderlike stadiums onderskei word. Eerstens is daar die *opstelstadium,* wanneer die gesamentlike testament ná oorweging van die faktore wat in paragraaf 5 hieronder bespreek word, tot stand gekom het en boedelsamesmelting dan 'n eerste alternatief van verskeie alternatiewe in die testament word. Die tweede stadium, wat jare vanaf die opstelstadium kan wees en nadat allerlei gebeurlikhede plaasgevind het wat tydens die opstelstadium moontlik nie voorsien is nie, is die *evaluasiestadium.* Die evaluasiestadium is die tydstip na die dood van die eerssterwende waartydens die langslewende die alternatiewe wat die testament hom/haar bied (waaronder dan boedelsamesmelting), moet oorweeg. Die langslewende evalueer boedelsamesmelting as 'n alternatief en indien hy/sy die alternatief van boedelsamesmelting as keuse neem, adieer hy/sy.

Daar word nou voortgegaan om boedelsamesmelting as regsfiguur en die regsgevolge wat dit meebring, asook bepaalde aspekte van boedelbeplanning, te ontleed. Daarna word die faktore wat die boedelbeplanner by die opstel- en die evaluasiestadium in aanmerking moet neem, bespreek.

2 DEFINIËRING

2 1 Boedelsamesmelting as regsfiguur

Die oogmerk van hierdie bydrae is nie om die wortels van boedelsamesmelting akademies-polemies na te speur nie, maar om die regsfiguur vanuit 'n praktyksoogpunt binne die konteks van strategiese boedelbeplanning te ontleed.[3] Die voertuig waarmee aan boedelsamesmelting gestalte gegee word, is 'n gesamentlike en/of wederkerige testament van twee of meer testeerbevoegde persone.

Die begrippe "gesamentlike testament" en "wederkerige testament" word allereers ontleed:

(i) 'n Gesamentlike testament[4] is 'n testament waarin twee of meer testamente van verskillende persone in 'n enkele dokument vervat is.

(ii) 'n Wederkerige testament[5] is ook 'n "gesamentlike" testament, maar word onderskei van die gesamentlike testament deurdat die testateurs wat hulle onderskeie

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3 Sien in die algemeen Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1992) 408 ev; Wiechers en Vorster *Boedelbereddering* (1996) 53 ev; Corbett ea *The law of succession in South Africa* (1980) 14 ev; Bouwer *Die beredderingsproses van bestorwe boedels* (1978) 469; Wiechers *Testamente: 'n kortbegrip* (1988) 82–83.

4 Van der Merwe en Rowland *Erfreg* 418 ev; Wiechers *Testamente* 82–83; Fredman 1979 *MBL* 109–110; Urquhart en Davis *Estate planning* (1991) 55–136; Abrie ea *Boedels* 42–97; Erasmus en De Waal *The South African law of succession* (1989) 120; Meyerowitz *The law and practice of administration of estates* (1989) 23 41; Bouwer *Beredderingsproses* 465; Noel-Barham en Summers (red) *Fairbairn's Handbook for executors and administrators* (1980) 117.

5 Van der Merwe en Rowland *Erfreg* 418 ev; Wiechers *Testamente* 82–83; Fredman 1979 *MBL* 109–110; Urquhart en Davis *Estate planning* 135–136; Abrie ea *Boedels* 42–97; Erasmus en De Waal *Succession* 120; Meyerowitz *Administration of estates* 23 41; Bouwer *Beredderingsproses* 465.

testamente in die een dokument saamvoeg, oor en weer, dit wil sê wederkerig bepaalde voordele aan mekaar bemaak. Die beginsel dat sowel die gesamentlike as die wederkerige testamente van verskillende persone as die afsonderlike testamente van elke individuele testateur beskou moet word, moet deurentyd in gedagte gehou word. Dit word by die evaluasiestadium van boedelsamesmelting van pertinente belang wanneer die langslewende die keuse om te adieer of te repudieer, moet uitoefen. Dit is verder belangrik om hier steeds in gedagte te hou dat enige van die testateurs sy/haar deel van die gesamentlike en/of wederkerige testament te enige tyd en sonder die medewete van die ander testateurs (selfs na die eerssterwende se oorlye) kan wysig of herroep.[6] Die langslewende kan in so 'n geval nog steeds 'n voordeel ingevolge die gesamentlike en/of wederkerige testament van sy/haar medetestateur/s ontvang, tensy daar 'n bepaling tot die teendeel in die vooroorlede medetestateur se wederkerige testament is.[7]

Indien die bepalings van die testament daarop dui dat dit nie die bedoeling van die testateurs was dat die langslewende van hulle dieselfde regte ten opsigte van die eerssterwende se bates moet verkry as wat eersgenoemde oor sy/haar eie bates het nie, of dat die begunstigdes van die eerssterwende nie dieselfde regte oor sy/haar bates moet verkry as wat hulle oor dié van die langslewende verkry nie, moet daaraan gevolg gegee word.

Die blote beliggaming van twee afsonderlike testamente in een dokument stel nog geensins boedelsamesmelting daar nie. Daar bestaan 'n gemeenregtelike vermoede teen boedelsamesmelting waarkragtens vermoed word dat die eerssterwende slegs oor sy/haar eie bates in 'n gesamentlike testament beskik het.[8]

'n Duidelike en ondubbelsinnige beskikking oor die gesamentlike eiendom van albei die testateurs word kragtens die vermoede vereis. 'n Duidelike bedoeling dat die testateurs hulle afsonderlike bates saamgesmelt of gekonsolideer het, sal *ex facie* die gesamentlike of wederkerige testament moet blyk.[9] Selfs die feit dat testateurs "ons eiendom" by "ons dood" bemaak, het op sigself geen ander betekenis as die meervoud van "ek" of "my" nie, dit wil sê woordvorms wat noodwendig volg waar meerdere testateurs in dieselfde dokument na hulself of hulle eiendom verwys.[10] Ondanks die vorm daarvan, is die vertolkingsbenadering by gesamentlike testamente steeds dat tensy die teendeel duidelik blyk, dit gelees word as die afsonderlike testamente van meerdere testateurs wat in een dokument beliggaam is en waarin elkeen oor sy eie bates beskik.[11]

Ten einde die aard en inhoud van boedelsamesmelting te kan begryp, is dit nodig om kortliks na die omskrywing daarvan te kyk. Die klassieke omskrywing van boedelsamesmelting word gevind in *Secretary South African Association v*

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6 Van der Merwe en Rowland *Erfreg* 419 ev; Wiechers *Testamente* 82–83; Fredman 1979 *MBL* 109–110; Urquhart en Davis *Estate planning* 135–136; Abrie ea *Boedels* 42–97; Erasmus en De Waal *Succession* 120; Meyerowitz *Administration of estates* 23 41; Bouwer *Beredderingsproses* 465.

7 *Ibid.*

8 Van der Merwe en Rowland *Erfreg* 420 ev 427; Erasmus en De Waal *Succession* 120; Isakow *The law of succession through the cases* (1985) 255; Wiechers en Vorster *Boedelbereddering* 56.

9 Bouwer *Beredderingsproses* 468.

10 *Ibid*; *Vaughan's Executrix v The Master* 1919 TPD 363; Wiechers en Vorster *Boedelbereddering* 56; Van der Merwe en Rowland *Erfreg* 419–420.

11 Bouwer *Beredderingsproses* 467–468; Wiechers en Vorster *Boedelbereddering* 56; Van der Merwe en Rowland *Erfreg* 419–420.

Mostert,[12] maar waar daar in hierdie bydrae daarna verwys word, is dit na aanleiding van artikel 37 van die Boedelwet, wat soos volg lui:[13]

> "Indien twee of meer persone in hul mutuele testament die hele of 'n bepaalde gedeelte van hulle gesamentlike boedel saamgevoeg het en beskik het oor die saamgevoegde boedel of oor enige gedeelte daarvan na die dood van die langslewende of oor lewendes of die plaasvind van 'n ander gebeurtenis na die dood van die eerssterwende, waarby aan die langslewende of oorlewendes 'n beperkte reg ten opsigte van enige goed in die saamgevoegde boedel toegeken word, dan het, by oorlye van die eerssterwende na die inwerkingtreding van hierdie Wet, aanvaarding deur die langslewende of oorlewendes tot gevolg dat die persone ten gunste van wie die beskikking gedoen is, ten opsigte van goed wat deel van die langslewende of oorlewendes se aandeel in die saamgevoegde boedel uitmaak, die regte verkry wat hulle regtens ingevolge die testament sou besit het as daardie goed aan die eerssterwende behoort het, en die eksekuteur stel sy distribusierekening dienooreenkomstig op."

2 1 1 Vereistes vir die toepassing van artikel 37 van die Boedelwet[14]

2 1 1 1 Dit moet 'n "mutuele" testament wees. Die vraag ontstaan of die vreemde term "mutuele" betrekking het op sowel 'n gesamentlike as 'n wederkerige testament. Van der Merwe en Rowland is van mening dat nie net 'n "wederkerige" testament met die begrip "mutuele" testament bedoel word nie, maar dat dit ook 'n gesamentlike testament omvat. Die Engelse teks van die Boedelwet wat die woord "mutual" gebruik, is deur die Staatspresident geteken. Die Engelse teks se term "joint estate", wat net op persone wat binne gemeenskap van goed getroud is van toepassing is, het sy oorsprong in artikel 115 van die vorige Boedelwet wat die voorganger van artikel 37 van die huidige Boedelwet is.

Hierdie artikel sal egter nie van toepassing wees op sogenaamde samesmelting in 'n huweliksvoorwaardekontrak of 'n testament van net een persoon nie.

Daar word ter oorweging gegee dat voormelde gevalle so seldsaam voorkom dat hulle vir doeleindes van boedelbeplanning buite rekening gelaat kan word.

2 1 1 2 Twee of meer persone moet partye by die gesamentlike en/of wederkerige testament wees. Sodanige persone hoef nie met mekaar getroud te wees nie. Die normale geval van boedelsamesmelting kom voor waar gades, hetsy binne, hetsy buite gemeenskap van goed getroud, hulle afsonderlike boedels in 'n gesamentlike testament konsolideer en die saamgevoegde boedel dan as 'n eenheid laat vererf.

2 1 1 3 'n Deel van die bates van elke erflater, of al hulle bates, moet in 'n eenheid saamgevoeg word en oor hierdie eenheid of gedeelte daarvan moet in 'n gesamentlike en/of wederkerige testament beskik word.

2 1 1 4 Hierdie beskikking moet op die een of ander tydstip, of by die plaasvind van een of ander gebeurtenis na die eerssterwende se dood, plaasvind.

2 1 1 5 Die eerssterwende erflater moes op of na 2 Oktober 1967 gesterf het.

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12 1869 Buchanan 2311; *Rosenberg v Dry's Executors* 1911 AD 679; *Receiver of Revenue Pretoria v CH Hancke* 1915 AD 64; Shrand *The making of a will including estate planning* (1981) 26; Bouwer *Beredderingsproses* 465.

13 A 115 van die Boedelwet 24 van 1913; Shrand *Making a will* 26; Bouwer *Beredderingsproses* 466; Stuart *Testamente en boedelbeplanning* 25.

14 Van der Merwe en Rowland *Erfreg* 439–440; Corbett ea *Succession* 456 ev; Shrand *Making a will* 26.

2 1 1 6 Die gesamentlike en/of wederkerige testament moet aan die langslewende 'n beperkte of tussentydse reg op sommige of al die bates in die saamgevoegde boedel toeken. Die persoon ten gunste van wie die beskikking gedoen is, verkry dus *strictu senso ex testamento* 'n gevestigde reg ten opsigte van die bates wat die eerssterwende tot die saamgesmelte boedel bygedra het, ondanks die feit dat sy regte vestig as gevolg van 'n *inter vivos*-handeling, naamlik adiasie.

2 1 1 7 Die langslewende moes geadieer het, aangesien repudiasie deur die langslewende nie boedelsamesmelting tot gevolg het nie.

2 1 2 Die regsbeginsels wat toepassing vind by die aanwending van boedelsamesmelting as regsfiguur, by gebrek aan uitdruklike statutêre bepalings tot die teendeel

2 1 2 1 Adiasie en repudiasie

Die keuse van adiasie[15] of aanvaarding van voordele en, waar toepaslik, verpligtinge wat aan 'n testamentêre bemaking gekoppel is (maw die regsgevolge wat deur adiasie teweeggebring word), word in geval van boedelsamesmelting teweeggebring nadat die eerssterwende deelgenoot aan 'n gesamentlike of 'n wederkerige testament die langslewende deelgenoot voor die keuse gestel het om sy of haar boedel in die geheel of gedeeltelik te laat saamsmelt.

Die teenkant van adiasie of aanvaarding is die repudiasie of weiering deur die langslewende om die voordele en die toepaslike gepaardgaande verpligtinge te aanvaar. In die geval van 'n samesmeltingstestament beteken dit dat boedelsamesmelting nie plaasvind nie en dat die langslewende sy of haar bates behou en enige voordeel wat hom of haar uit die testament sou toeval, verbeur.[16]

Die Meester van die Hooggeregshof vereis dat adiasie of repudiasie skriftelik moet geskied met die gevolg dat daar in die praktyk geen twyfel sal wees of 'n langslewende geadieer of gerepudieer het nie.[17] So sal daar byvoorbeeld op grond van hierdie praktyk nie geargumenteer kan word dat 'n langslewende wat die eksekuteurskap van die eerssterwende se boedel aanvaar het, daarmee meteens ook die bepalings van die testament waarin boedelsamesmelting gereël word, geadieer het nie.[18] Adiasie of repudiasie is finaal en onherroeplik[19] behalwe waar die langslewende in *bona fide* onkunde handel ten opsigte van sy regte en sy onkunde in die omstandighede verskoonbaar is.[20]

Adiasie of repudiasie moet binne 'n redelike tyd uitgeoefen word en die bevoordeelde kan deur die hof verplig word om sy keuse uit te oefen.[21] Die eksekuteur kan die strawwe soos bepaal in artikel 102(1)(iv) van die Boedelwet opgelê word indien nie voldoen word aan artikel 35(1) van die wet nie en vertragings sonder die

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15 Bouwer *Beredderingsproses* 468; Wiechers en Vorster *Boedelbereddering* 53 ev; Van der Merwe en Rowland *Erfreg* 408 ev; Noel-Barham en Summers *Handbook for executors and administrators* 117; Corbett ea *Succession* 454; Isakow *Succession*.

16 Isakow *Succession* 254; Corbett ea *Succession* 454; Noel-Barham en Summers *Handbook for executors and administrators* 117; Bouwer *Beredderingsproses* 469.

17 Wiechers en Vorster *Boedelbereddering* 63; R 50(2)(a) van die Registrasie van Aktes Wet 47 van 1937; Isakow *Succession* 254; Erasmus en De Waal *Succession* 12; Bouwer *Beredderingsproses* 471.

18 Corbett ea *Succession* 455; *Watson v Burchell* 1891 9 SC 2.

19 *Ibid.*

20 Corbett ea *Succession* 455; *Ex parte Nel* 1965 3 SA 197 (T); *Botha v Van der Vyver* 1908 SC 760; Isakow *Succession* 254.

21 Van der Merwe en Rowland *Erfreg* 414; Wiechers en Vorster *Boedelbereddering* 63.

Meester se skriftelike vooraf toestemming toelaat. Die bevoordeeldes ingevolge 'n testament waarin daar vir boedelsamesmelting as 'n eerste alternatief voorsiening gemaak word, het die reg om die langslewende te dwing om 'n keuse uit te oefen.[22]

Indien die langslewende na *dies cedit* maar voordat hy sy keuse uitgeoefen het, te sterwe sou kom, vorm die reg om sy keuse uit te oefen deel van sy boedel aangesien dit 'n integrerende deel van die bemaking aan hom uitmaak.[23] In die geval van insolvensie van die langslewende verkry sy kurator die reg om die keuse uit te oefen.[24]

2 2 Boedelbeplanning

2 2 1 Wat is boedelbeplanning?

In 'n voordrag by geleentheid van die Suid-Afrikaanse Regskonferensie[25] het DW Venter, nadat hy daarop gewys het dat daar nie in enige van die erkende verklarende woordeboeke in Suid-Afrika 'n omskrywing van "boedelbeplanning" te vinde is nie, die begrip soos volg gedefinieer:

> "Dit is die reëling van 'n persoon se finansiële sake om op die bes moontlike wyse in die behoeftes van sy eggenote en kinders te voorsien gedurende sy lewe en na sy afsterwe."[26]

In 'n referaat oor aspekte van boedelbelasting en inkomstebelasting op dieselfde konferensie, het B Wunsh daarop gewys dat die vermyding of minimalisering van inkomste- en boedelbelasting geensins die enigste of selfs die belangrikste oorweging is nie. Hy noem 'n hele aantal belangriker faktore, soos om seker te maak dat die boedelhouer genoegsame bronne gedurende sy leeftyd tot sy beskikking het, die vermyding van wrywing tussen die oorlewende afhanklikes, voorsiening vir die voortsetting van 'n sake-onderneming en behoorlike voorsiening vir 'n langslewende gade.[27]

Hoe dit ook al sy, daar is talle voorbeelde in die praktyk waar die skema van die boedelhouer hoofsaaklik slegs op een aspek fokus, naamlik die vermindering of vermyding van belasting. 'n Goeie voorbeeld van sulke skemas is die aanwending van boedelsamesmelting as 'n meganisme om boedelbelasting in die besonder te verminder of te vermy. Die oogmerk van hierdie bydrae is dan ook om hierdie verskynsel aan die hand van relevante regspraak en toepaslike norme krities-analities te ondersoek.

3 VERSKYNINGSVORME VAN BOEDELSAMESMELTING

Boedelsamesmelting kan op verskillende maniere ingeklee word. Dit hou verband met die aard van die verskillende regsfigure wat deur die testateurs in die gesamentlike en/of wederkerige testament aangewend word.[28] Regsfigure soos vruggebruik, *fideicommissum, fideicommissum residui*, boedelhouerskap, die trust *mortis causa*

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22 Van der Merwe en Rowland *Erfreg* 416 en die gesag daar aangehaal en bespreek.

23 Vir 'n bespreking oor wie in so 'n geval die keuse formeel moet uitoefen, sien Van der Merwe en Rowland *Erfreg* 415 ev.

24 Van der Merwe en Rowland *Erfreg* 416.

25 "Inleiding oor boedelbeplanning", konferensie georganiseer deur die Vereniging van Wetsgenootskappe van die Republiek van Suid-Afrika, Kaapstad, 1975-04-01–04.

26 Gebundelde (ongepubliseerde) referate 88.

27 *Idem* 171. 'n Dieptebeskouing oor boedelbeplanning val buite die bestek van hierdie studie. Vir 'n breedvoeriger bespreking van boedelbeplanning as wetenskap en professie sien Olivier en Van den Berg *Praktiese boedelbeplanning* (1991) 1–39 en die verskeidenheid bronne daar aangehaal.

28 Meyerowitz *Practice of administration of estates* 41 ev; Wiechers en Vorster *Boedelbereddering* 57 ev; Noel-Barham en Summers *Handbook for executors and administrators* 27.

en jaargelde is die gebruiklike vorme waarin die beperkte regte van die betrokke begunstigdes gegiet word.[29] Verder kan boedelsamesmelting aan voorwaardes onderworpe gestel word en kan daar ook vir gedeeltelike samesmelting voorsiening gemaak word.[30] 'n Voorbeeld van 'n ontbindend-voorwaardelike reëling sou wees dat die langslewende se voordele kragtens die samesmeltingstestament staak op datum van sy/haar hertroue of wanneer hy/sy buite die eg met 'n ander persoon 'n saamwoonverhouding sou aanknoop.[31]

'n Verdere variasie is waar boedelsamesmelting beperk word tot bepaalde gedeeltes van die testateurs se boedels.[32] Daar word aan die hand gedoen dat die gebruik van boedelsamesmelting inderdaad beperk behoort te word tot onroerende bates in boedels van klein en gemiddelde groottes, aangesien 'n beperking op die gebruik van roerende bates soos byvoorbeeld beleggings, in die praktyk tot nadeel van die langslewende kan strek. Inflasie kan byvoorbeeld geldwaardes sodanig erodeer dat dit vir die langslewende noodsaaklik mag word om ook toegang tot die kapitaal te hê.

4 DIE UITWERKING VAN BOEDELSAMESMELTING

Die uitwerking van adiasie en repudiasie deur die langslewende testateur waar die testateurs in 'n gesamentlike en/of wederkerige testament boedelsamesmelting as 'n alternatiewe bemakingsvoertuig daargestel het, word vervolgens aan die orde gestel. Die reg van die langslewende om sy gedeelte van die gesamentlike testament na oorlye van die eerssterwende te wysig, of te repudieer sonder om die bevoordelings uit die eerssterwende se boedel ingevolge die gesamentlike testament te ontvang, word deur adiasie van die boedelsamesmeltingsmodel beperk.[33]

Die langslewende kan nie regtens in 'n daaropvolgende testament beskik oor die bates wat by die samesmelting betrokke is op 'n wyse wat strydig is met die gesamentlike en/of wederkerige testament waarin die samesmelting bewerkstellig is nie.[34] Indien die langslewende dus sou adieer, behou hy net die reg om selfstandig oor daardie gedeelte van sy boedel te beskik wat na die dood van die eerssterwende opgebou word.[35]

Die testateurs wat boedelsamesmelting as bemakingsmodel kies, behoort dit as 'n alternatief teenoor ander modelle in die gesamentlike en/of wederkerige testament te gebruik sodat aan hulle werklike bedoeling gevolg gegee kan word in geval van 'n moontlike repudiasie deur die langslewende. Indien die langslewende sou repudieer, verkry die eerssterwende se begunstigdes by sy afsterwe onmiddellik gevestigde regte.[36] Indien die boedelsamesmeltingsbepalings so geformuleer is dat die totale bemaking in geval van 'n repudiasie sou misluk, sal die eerssterwende intestaat sterf.[37]

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29 Meyerowitz *Practice of administration of estates* 41 ev; Wiechers en Vorster *Boedelbereddering* 57 ev; Shrand *Making a will* 27; Stuart *Testamente* 27.
30 Corbett ea *Succession* 452.
31 *Ibid*; Isakow *Succession* 255.
32 Meyerowitz *Practice of administration of estates* 42.
33 Corbett ea *Succession* 456.
34 *Idem* 455.
35 *Ibid*.
36 Corbett ea *Succession* 454; *Estate Coaton v The Master* 1915 CPD 318.
37 *Ibid*.

Indien albei testateurs se gedeeltes van die gesamentlike of wederkerige testament voorwaardelik is in dié sin dat boedelsamesmelting net sal plaasvind indien hulle onderskeidelik die eerssterwende sou wees en daar geen alternatiewe beskikking is nie, word die langslewende se testament by die eerssterwende se dood kragteloos en sal eersgenoemde intestaat sterf.[38] Indien dit nie so voorwaardelik is nie, bly dit van krag tensy dit herroep of gewysig word.[39] Die vraag ontstaan nou wat die regte van die langslewende en die begunstigdes is ten opsigte van bates van die langslewende wat ná adiasie deel vorm van die saamgesmelte boedel. Die langslewende verkry dieselfde tussentydse reg na adiasie met betrekking tot sy bydrae tot die saamgesmelte boedel as wat hy ten opsigte van die eerssterwende se bydrae het.[40] Die bevoordeeldes het weer op hulle beurt dieselfde regte ten opsigte van die langslewende se bydrae tot die saamgesmelte boedel as wat hulle ten opsigte van die eerssterwende se bydrae verkry.[41]

Teen die agtergrond van hierdie kort oorsig oor die "meganisme" van boedelsamesmelting, word vervolgens aandag gegee aan die oorwegings wat die aanwending daarvan as *mortis causa*-boedelbeplanningsinstrument kan beïnvloed.

5 OORWEGINGS BY BOEDELBEPLANNING

Die bespreking wat hier volg, is gebaseer op die veronderstelling dat die boedelbeplanner reeds alle tersaaklike inligting van die boedelhouer bekom het, dit ontleed het, vasgestel het wat laasgenoemde met sy boedel wil doen en waarteen hy dit wil beskerm.[42] Die veronderstelling is verder dat boedelsamesmelting as 'n moontlike beplanningsinstrument in die bepaalde geval geïdentifiseer is. Die beplanner kan nou met inagneming van die faktore en oorwegings wat vervolgens bespreek word, 'n finale besluit neem oor die vraag of boedelsamesmelting in die betrokke omstandighede gepas is of nie.

Die toepaslikheid van boedelsamesmelting sal waarskynlik in 'n mate deur subjektiewe oorwegings aan die kant van die boedelbeplanner beïnvloed word. Terwyl met veranderlikes en onvoorsienbare toekomstige gebeurlikhede rekening gehou word, moet die beplanner ook die volgende faktore in gedagte hou en daar word ter oorweging gegee dat konserwatisme in die beplanningsproses 'n sleutelriglyn vir die beplanner behoort te wees.

5 1 Fiskale oorwegings

5 1 1 Geskenkebelasting

5 1 1 1 Ter inleiding

Die oorsaak van die teenswoordige versigtige gebruik van boedelsamesmelting as instrument by boedelbeplanning is die uitspraak van die Inkomstebelasting Spesiale Hof.[43] Hierdie uitspraak is vir boedelsamesmelting as instrument by boedelbeplanning enigsins ongelukkig.

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38 Corbett ea *Succession* 453 ev.
39 *Idem* 454 ev.
40 *Idem* 454; a 37 van die Boedelwet 66 van 1965.
41 Wiechers en Vorster *Boedelbereddering* 58; Noel-Barham en Summers *Handbook for executors and administrators* 117.
42 De Villiers "The approach to estate planning" 1981 *MBL* 41 ev.
43 Sien *ITC* 1387 1984 207 46 SATC 121; ook Urquhart en Davis *Estate planning* par 1414; Olivier en Van den Berg *Praktiese boedelbeplanning* 149 ev.

5 1 1 2 Die heffing van skenkingsbelasting word gereël deur Deel V van die Inkomstebelastingwet.[44] Benewens die reëling van belasting op geskenke in die algemeen kragtens artikel 54 van die wet, word daar aan die Kommissaris van Binnelandse Inkomste in artikel 58 'n diskresie verleen om 'n "beskikking oor eiendom" ook as 'n skenking te beskou. Die koers waarteen geskenkebelasting gehef word, is tans 25%, bereken op die netto belasbare bedrag.

Daar word vervolgens na die toepassing hiervan met betrekking tot boedelsamesmelting in die lig van artikel 58 van die Inkomstebelastingwet gekyk.

5 1 1 3 Die uitspraak van die Inkomstebelasting Spesiale Hof

Ten einde die slaggate met betrekking tot geskenkebelasting by die aanwending van boedelsamesmelting as tegniek by boedelbeplanning behoorlik te begryp, is dit nodig om die Inkomstebelasting Spesiale Hofbeslissing 1378[45] te ontleed.

Die appellant en sy vader, wat reeds bejaard was, het 'n gesamentlike testament verly ingevolge waarvan hulle hulle afsonderlike boedels, met die uitsondering van sommige bates, saamgevoeg het. Hierdie saamgesmelte boedel is aan drie trusts bemaak, met die appellant en sy drie kinders as die begunstigdes. Daar is bepaal dat sekere jaargelde aan die langslewende betaal moet word, sonder om uitdruklik voor te skryf dat dit uit die saamgevoegde boedel betaal moet word. Die appellant se vader is daarna oorlede en eersgenoemde het die voordele ingevolge die gesamentlike testament geadieer. Die Kommissaris van Binnelandse Inkomste het die verskil tussen die totale waarde van die bates wat saamgevoeg is en die voordele wat die appellant ingevolge die testament toegeval het as 'n "skenking" ingevolge artikel 58 van die Inkomstebelastingwet beskou, en op hierdie waarde, wat R438 500 beloop het, geskenkebelasting ten bedrae van R82 815 gehef en dit tesame met opgehoopte rente van die appellant geëis.[46] Die appellant het teen die aanslag ten opsigte van geskenkebelasting beswaar gemaak en appèl aangeteken. Sy argument was dat daar geen skenking soos bedoel deur artikel 58 van die Inkomstebelastingwet was nie en dat "vererwing" ooreenkomstig artikel 37 van die Boedelwet plaasgevind het.[47] Hy het aangevoer dat artikel 58 nie toegepas kan word waar daar 'n boedelsamesmelting ooreenkomstig artikel 37 plaasgevind het nie. Hy het aangevoer dat 'n skenking kragtens artikel 58 van die Inkomstebelastingwet, saamgelees met die definisie van 'n skenking in artikel 55 van dieselfde wet, 'n kontraktuele of *quasi*-kontraktuele grondslag vereis aangesien 'n skenking *inter vivos* in wese 'n kontrak is wat kragtens 'n aanbod en 'n aanname tot stand kom.[48] Die appellant het gesteun op *Receiver of Revenue v Hancke*[49] waar beslis is dat die erfgename in 'n geval van boedelsamesmelting na adiasie lewering *ex testamento* vorder en nie uit hoofde van kontrak of *quasi*-kontrak nie, met die gevolg dat 'n oordrag volgens artikel 60(1) van Proklamasie 28[50] van hereregte vrygestel was.[51] In *Reek v Registrateur van Aktes Transvaal*[52] is

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44 Wet 58 van 1962 sg.

45 *ITC* 1387 1984 207 46 SATC 121 soos aangehaal in Urquhart en Davis *Estate planning* par 1414 ev.

46 Die Kommissaris het in hierdie opsig gefouteer: om die verskil tussen die *quid* en *quo* vir doeleindes van die toepassing van a 58 te bepaal, moet die waarde van die bates wat deur die eerssterwende tot die saamgesmelte boedel bygedra is, buite rekening gelaat word.

47 Urquhart en Davis *Estate planning* par 1414; Wiechers en Vorster *Boedelbereddering* 61 ev.

48 Urquhart en Davis *Estate planning* par 1416.

49 1915 AD 64.

50 28 van 1902.

51 Urquhart en Davis *Estate planning* par 1416.

52 1969 1 SA 589 (T).

daarop gewys dat die oorlewende in die geval van boedelsamesmelting 'n "erfgenaam" word kragtens die testament van die eerssterwende en dat daar eintlik net een effektiewe testament is, te wete dié van die eerssterwende wat by haar/sy dood in werking tree. Die appellant se saak het dus uitsluitlik berus op die submissie dat die erfgename die bates uit die appellant se boedel nie by wyse van 'n kontraktuele beskikking nie, maar wel by wyse van 'n testamentêre beskikking verkry het.[53]

Die Kommissaris van Binnelandse Inkomste het egter aangevoer dat by die toepassing van artikel 58 van die Inkomstebelastingwet op die onderhawige geval, die bevoordeeldes die bevoordeling kragtens die skenking inderdaad vóór die dood van die skenker ontvang het.[54]

Die hof het twee regsvrae onderskei, naamlik:[55]

(a) Kan 'n bemaking ingevolge 'n gesamentlike testament (wat boedelsamesmelting teweegbring) geag word 'n "skenking" ingevolge artikel 58 van die Inkomstebelastingwet te wees?

(b) Indien die antwoord op die voormelde regsvraag positief is, wie is die partye by sodanige skenking?

Die hof het vir doeleindes van die uitspraak aanvaar dat die bewoording van die betrokkede testament die beskikkings inderdaad binne die trefwydte van artikel 37 van die Boedelwet geplaas het.[56] Die hof het die appellant se argument verwerp dat die proses van boedelsamesmelting wat op adiasie volg nie 'n *inter vivos*-handeling was nie, maar uit 'n gesamentlike *testamentêre beskikking* voortgespruit het.[57] Die regter het opgemerk dat die adiasie-handeling gedurende *die leeftyd* (beklemtoning bygevoeg) van die langslewende plaasgevind het, met die gevolg dat die begunstigdes reeds gedurende laasgenoemde se lewe op sy eiendom geregtig word.[58]

Die hof merk voorts op dat die feit dat die "skenking" of beskikking nie direk van die appellant na die trust gaan nie, maar deur middel van die masjinerie van boedelsamesmelting, aan die betrokke beskikking die kleur van 'n testamentêre beskikking verleen.[59] 'n Beskikking sluit volgens die hof ook 'n testamentêre beskikking in.[60] Die hof verklaar dat die testamentêre beskikking die bemaking van eiendom na die dood van die testateur ten doel het, terwyl die boedelsamesmelting in die onderhawige geval beoog het dat die begunstigde "die langslewende se eiendom alreeds

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53 Die applellant se pleitbesorger kon in sy beredenering ook verwys het na *Estate Roadknight v Secretary for Inland Revenue* 1973 2 SA 339 (A). In hierdie saak, wat ook in 35 SATC 54 gerapporteer is, het 'n testateur sy eksekuteurs opgedra om aan sy neef 'n opsie te verleen om sekere onroerende eiendom van die boedel te koop. Die neef het die opsie uitgeoefen en die vraag voor die hof was of hereregte uit hoofde van die transaksie betaalbaar was. Die Kommissaris van Binnelandse Inkomste se argument was dat die neef die eiendom bekom het kragtens die koopooreenkoms wat tot stand gekom het toe hy die opsie uitgeoefen het en dat die eiendomsverkryging derhalwe nie op erfopvolging berus nie. Die hof het bevind dat die eiendom verkry is deur "testamentary succession" en dat geen hereregte gevolglik betaalbaar was nie.

54 Urquhart en Davis *Estate planning* par 1417.

55 *Idem* 1418.

56 *Idem* 1419.

57 *Ibid*.

58 *Ibid*.

59 *Ibid*.

60 Die hof baseer sy standpunt op oa *CIR v Estate Kirsch* 1951 3 SA 496 (A) wat volgens die hof (505H) regstreekse gesag bied vir die stelling dat 'n "beskikking" ook 'n testamentêre beskikking insluit.

voor sy dood verkry". Dit is volgens die hof analoog aan 'n skenking *inter vivos*.[61] Die bevinding was dus dat die adiasie deur die langslewende 'n beskikking ingevolge artikel 58 van die Inkomstebelastingwet daarstel en die vergoeding in die vorm van die jaargelde wat hy in ruil daarvoor verkry, is volgens die hof tereg deur die Kommissaris van Binnelandse Inkomste beskou as nie genoegsaam nie. Gevolglik is bevind dat die regte wat die appellant ten tye van adiasie verkry het, minder was as die regte waarvan hy afstand gedoen het. Die adiasie-handeling van die langslewende is dus 'n potensiële *inter vivos*-skenkingshandeling afhangende van die groottes van die *quid* en die *quo*.

5 1 1 4 'n Evaluering van die implikasies van *ITC* 1387 1984 207 46 SATC 121

(i) In die eerste plek moet daarop gewys word dat die feite van die geval ietwat buitengewoon is in dié opsig dat hulle aansienlik verskil van boedelsamesmeltingsituasies wat normaalweg in die praktyk voorkom. Dit is dus moeilik om die saak sonder meer of ongekwalifiseerd op "normale" boedelsamesmeltingsituasies toe te pas.[62]

(ii) Voorts was daar 'n aanmerklike verskil tussen die *quid* en die *quo*. In die lig van hierdie beslissing gaan die vraag oor hoe groot die verskil tussen die *quid* en die *quo* inderdaad moet wees alvorens die Kommissaris artikel 58 van die Inkomstebelastingwet gaan toepas, telkens opduik.[63]

(iii) Of 'n "beperkte" reg soos bepaal deur artikel 37 van die Boedelwet by adiasie deur die langslewende in die onderhawige geval gevestig het, is nie duidelik nie. Dit is ook nie duidelik of die betrokke trusts diskresionêre bevoegdhede aan die trustees toegeken het nie en of die begunstigdes gevestigde regte kragtens die trustakte ontvang het nie. Die antwoord op laasgenoemde onduidelikhede sou 'n berekening van die grootte van die skenkings in 'n belangrike mate beïnvloed.[64]

(iv) Die skenker was ook in 'n mate die begunstigde, aangesien die langslewende sowel 'n trustee as 'n begunstigde ingevolge die trusts was.[65]

(v) Die *quantum* van die skenking is nie geargumenteer nie en die Kommissaris van Binnelandse Inkomste se basis vir sy berekening blyk nie uit die verslag nie. Dit is belangrik in die geval van 'n trust waar die skenker en die begunstigde effektief dieselfde persone was.[66]

(vi) In die toekomstige navolging van hierdie beslissing sal die argument dat bevoordelings uit hoofde van boedelsamesmelting *ex testamento* bekom word en nie op grond van kontrak, *quasi*-kontrak of vanweë 'n *inter vivos*-beskikking nie, nie opgaan nie.[67]

(vii) Elke testament moet geskikte alternatiewe bepalings bevat om moontlike skenkingsbelastingimplikasies te ondervang. Sodanige alternatiewe kan ruimte en buigsaamheid skep by die oorweging tydens die evaluasiestadium of daar geadieer of gerepudieer moet word.[68]

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61 Urquhart en Davis *Estate planning* par 1419.
62 Sien bv *idem* 1420.
63 *Ibid.*
64 *Ibid.*
65 *Ibid.*
66 *Ibid.*
67 *Ibid.*
68 *Ibid.*

(viii) Urquhart[69] het dan ook tereg voorspel dat die toekomstige houding van die Kommissaris van Binnelandse Inkomste sal wees dat daar in soortgelyke gevalle weer geskenkebelasting gehef sal word.

(ix) Daar word ter oorweging gegee dat die partye se onderskeie lyne van betoog die hof tot uitsprake oor boedelsamesmelting en adiasie laat kom het wat bevraagteken kan word. Selfs al sou toegegee word dat artikel 58 van die Inkomstebelastingwet moontlik wyd genoeg bewoord is om in sekere gevalle ook bepaalde testamentêre bemakings as 'n "beskikking" ooreenkomstig die artikel te brandmerk, behoort die uitspraak nie as die laaste woord hieroor aanvaar te word nie en is dit jammer dat die appèl wat teen die uitspraak aangeteken is, nie voortgesit is nie.

Dit is wel so dat die bates van die langslewende deelgenoot aan 'n testament waarin boedelsamesmelting gereël word as deel van die saamgesmelte massa na die aangewese begunstigdes gaan terwyl die langslewende nog leef. Dit is ook so dat adiasie 'n regshandeling is wat deur 'n lewende persoon uitgevoer word. Die vererwing van 'n lewende persoon se bates deur middel van boedelsamesmelting is immers 'n erkende en gevestigde uitsondering op die grondreël van die erfreg dat 'n erflater dood moet wees alvorens erfopvolging kan plaasvind. Die feit dat die dood van 'n natuurlike persoon postulaat is vir die aanbreek van *dies cedit* en dat *dies cedit* in geval van boedelsamesmelting vir die begunstigdes (dus ook oor die bates van die langslewende) by die dood van die eerssterwende op grond van die adiasie deur die langslewende aanbreek, is gevestigde *erfregtelike* beginsels. Daar word ter oorweging gegee dat die regter in die onderhawige geval heeltemal te min waarde aan die erfregtelike grondslae van die eleksieleer en boedelsamesmelting geheg het.[70] Die feit dat adiasie by boedelsamesmelting deur 'n lewende persoon geskied, is nie genoegsame rede om dit as 'n skenking te raam nie. Daarom moet die volgende passasie uit die regter se *dictum*, met groot respek, ernstig bevraagteken word:

> "[D]ie feit dat die 'skenking' of beskikking nie direk van die appellant na die trust gaan nie maar deur middel van die gebruikmaking van die masjinerie van boedelsamesmelting verleen aan die betrokke eiendom die kleur van 'n testamentêre beskikking wat dit in werklikheid nie is nie."

Soos hierbo vermeld, het die beslissing van die appèlhof in die *Roadknight*-gewysde blykbaar die aandag van die appellant se pleitbesorger ontglip en kan daar dus slegs bespiegel word wat die Inkomstebelasting Spesiale Hof se houding sou gewees het indien daar ook op hierdie rigtinggewende beslissing gesteun was. Die moontlikheid dat 'n uiteindelike hoër beroep teen 'n toekomstige beslissing soortgelyk aan dié in Spesiale Inkomstebelastingsaak 1378[71] dalk uit die oogpunt van die appellant suksesvol mag wees, kan nie uitgesluit word nie.

5 1 1 5 Die Spesiale Inkomstebelastingsaak *ITC* 1448 1988 51 SATC 58

Op 30 November 1988 het Spesiale Inkomstebelastingsaak 1378[72] se rimpelende uitwerking in die Kaapse Inkomstebelasting Spesiale Hof voor regter Fagan verder

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69 *Ibid.*

70 Sien bv Van der Merwe en Rowland *Erfreg* 422 en die gesag (ook die gemeenregtelike gesag) daar aangehaal. Daar moet verder in gedagte gehou word dat die langslewende deelgenoot aan boedelsamesmelting as gevolg van sy/haar adiasie alle beskikkingsbevoegdheid oor sy/haar bates wat in die saamgesmelte boedel val verloor, en ook die bevoegdheid om die samesmeltingstestament te herroep of te wysig, finaal inboet. Hierdie toedrag van sake dui daarop dat die *causa* van die oorgang van die langslewende se bates *die testament* is.

71 *ITC* 1387 1984 207 46 SATC 121.

72 *Ibid.*

uitgekring toe Spesiale Inkomstebelastingsaak 1448[73] as toetssaak met die volgende feite voor die hof gedien het:

(i) 'n Egpaar wat buite gemeenskap van goed getroud was, het 'n gesamentlike testament verly. In die testament het hulle bepaal dat (behalwe vir 'n bedrag van R100 000 wat in die geval waar die man die eerssterwende sou wees direk aan die vrou moes toeval) hulle afsonderlike boedels saamgesmelt moes word en deur hulle eksekuteur in trust gehou moes word onderworpe aan 'n vruggebruik ten gunste van die langslewende. By die dood van die langslewende sou die trust beëindig word en die totale saamgesmelte boedel ten gunste van benoemde begunstigdes vererf. Die man was die eerssterwende. Sy boedel het by sy dood R1 284 878 beloop en die nagelate eggenote se boedel was R508 742,85 werd. Die langslewende het geadieer en na betaling van die legaat van R100 000 is die restant van die twee boedels dus saamgesmelt. Die Kommissaris van Binnelandse Inkomste het kragtens artikel 58 van die Inkomstebelastingwet geoordeel dat die langslewende deur middel van adiasie haar afsonderlike boedel aan die trust geskenk het en het geskenkebelasting op 'n bedrag van R293 623 gehef. Hierdie bedrag was die verskil tussen die bedrag van R508 742,85 en die waarde van die vruggebruik ter waarde van R215 119,85 wat op die waarde van slegs die langslewende se afsonderlike boedel bereken is. Die waarde van die langslewende eggenote se vruggebruik oor die totale saamgesmelte boedel het die bedrag van R711 324 beloop, in teenstelling met die waarde van haar afsonderlike boedel van R508 742,85 ten opsigte waarvan sy deur middel van haar adiasie afstand gedoen het, ten gunste van die trust ingevolge die bepalings van die gesamentlike testament.

(ii) Die appellant het beswaar gemaak teen die aanslag van die Kommissaris van Binnelandse Inkomste en na afwysing van die beswaar het sy teen die aanslag geappelleer. Sy het vir doeleindes van sy betoog aanvaar dat Spesiale Inkomstebelastingsaak 1378 korrek beslis is en dat 'n langslewende wat 'n boedelsamesmeltingstestament adieer, afstand doen van sy eiendom wat ingevolge die gesamentlike testament deel word van die gekonsolideerde massa, behoudens dat die langslewende in so 'n geval dan 'n *inter vivos*-skenking maak.[74] Daar is geargumenteer dat die uitwerking van die langslewende se adiasie-handeling was dat sy van haar afsonderlike boedel afstand gedoen het ten gunste van die trust wat ingevolge die testament geskep is, maar dat sy terselfdertyd op die voordele wat testamentêr aan haar bemaak is, geregtig geword het.[75]

Indien die langslewende nie geadieer het nie, sou sy slegs haar afsonderlike boedel behou het en geen voordeel (behalwe die legaat) kragtens die testament verkry het nie.[76] Haar teenprestasie, wat sy as gevolg van haar adiasie-handeling ontvang het, was 'n vruggebruik, nie alleen oor haar afsonderlike boedel nie, maar oor die totale saamgesmelte boedel.[77] Dit was gemeensaak dat die vruggebruik wat die langslewende oor die totale saamgesmelte boedel ontvang het in waarde substansieel meer was as die waarde van haar afsonderlike boedel waarvan sy afstand gedoen en tot die saamgesmelte boedel bygedra het. Die implikasie van die appellant se argument was dat aangesien sy in waarde meer ontvang het as dit waarvan sy afstand gedoen

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73 *ITC* 1448 1988 51 SATC 58 soos aangehaal in Anon 1989 *Income Tax Reporter* 200 ev.
74 *Idem* 202.
75 *Ibid.*
76 *Ibid.*
77 *Ibid.*

het, daar geen skenking was nie en die Kommissaris van Binnelandse Inkomste se aanslag met koste tersyde gestel moes word.[78]

(iii) Die Kommissaris van Binnelandse Inkomste se submissie was die volgende:

(a) Daar is geen appèl teen 'n beslissing van die Kommissaris van Binnelandse Inkomste ingevolge artikel 58 van die Inkomstebelastingwet nie. Hy voer aan dat dit appelleerbaar is as dit gaan oor die vraag of daar "enige teenprestasie" was, maar indien dit gaan oor die genoegsaamheid daarvan, is sy beslissing slegs hersienbaar en nie appelleerbaar nie. Die Kommissaris se oordeel is deurslaggewend en kan nie in appèl aangeveg word met betrekking tot die waarde van die eiendom waarvan afstand gedoen is die genoegsaamheid van die teenprestasie nie.[79]

(b) In die alternatief argumenteer die Kommissaris dat die appellant se adiasiehandeling binne die definisie van 'n "skenking" ingevolge artikel 55 van die Inkomstebelastingwet val, aangesien haar adiasie 'n gratis oormaking van haar eiendom daargestel het. Die waarde van die vruggebruik wat die langslewende eggenote in die onderhawige geval oor die eerssterwende se bydrae tot die saamgesmelte boedel ontvang het, het volgens die oordeel van die Kommissaris nie 'n voldoende "teenwaarde" vir die afstanddoening van die langslewende se boedel daargestel nie. Die waarde van die bates waarvan die langslewende afstand gedoen het, het die waarde van die vruggebruik oor die eerssterwende se bydrae tot die gekonsolideerde boedel oorskry en die verskil is geag 'n skenking te wees.[80]

(c) Die Kommissaris se verdere alternatiewe submissie was dat artikel 58 van die Inkomstebelastingwet vereis dat die teenprestasie vanaf die begunstigde moet kom, wat nie in die onderhawige geval gebeur het nie. Die Kommissaris het geargumenteer dat 'n element van wederkerigheid vereis word. Die teenprestasie waarna artikel 58 van die Inkomstebelastingwet verwys, hou in dat die teenprestasie van die begunstigde na die skenker moet gaan. Die langslewende eggenote het haar eiendom aan die trustees van die boedel geskenk en sy het geen teenprestasie van die trustees as sodanig ontvang nie, wat beteken dat die beskikking sonder teenwaarde was.[81]

(iv) Die uitspraak

Die appellant se argument, naamlik dat die teenprestasie wat die langslewende eggenote uit die saamgesmelte boedel ontvang het die waarde van die vruggebruik oor die totale saamgesmelte boedel is en nie net die van die vruggebruik oor die eerssterwende se gedeelte nie, is in appèl gehandhaaf.[82] Die hof het bevind dat die waarde van die vruggebruik oor die totale saamgesmelte boedel die waarde van die langslewende se boedel oorskry en daar was dus geen skenking of beskikking sonder voldoende teenwaarde nie.[83] Die hof bevind dat die woorde "volgens die Kommissaris se oordeel" in artikel 58 betrekking het op die aanwending van artikel 58 as sodanig en die argument van die Kommissaris van Binnelandse Inkomste soos uiteengesit in (a) hierbo, is verwerp.[84] Met betrekking tot die argument van die Kommissaris in (c) hierbo vermeld, het die hof bevind dat die vergoeding wat die skenker

78 *Ibid.*
79 *Ibid.*
80 *Ibid.*
81 *Idem* 202–204.
82 *Idem* 204.
83 *Idem* 205.
84 *Idem* 203–204

as teenprestasie toeval, nie ooreenkomstig artikel 58 tot die begunstigde as bron beperk is nie, maar dat die vergoeding van enige bron (van welke aard ook al) mag kom.[85]

5 1 1 6 Die tydstip en die berekening van die nettowaarde van 'n geskenk

Die tydstip waarop die waarde van 'n skenking bereken moet word, val saam met die adiasie van die langslewende.

Die billike markwaarde van "geskenkte" boedelgoedere word deur die vergoeding wat as teenprestasie verkry word, verminder en maak die netto-belasbare bedrag uit waarop geskenkebelasting dan betaalbaar sal wees.

5 1 1 7 Voorgestelde oplossing

Die boedelbeplanner moet toesien dat die testament sodanig ingeklee word, dat die bepaling met betrekking tot boedelsamesmelting voorskryf dat die begunstigde wat die *nudum dominium* of blote eiendomsreg van bates ontvang, in teenstelling met die beperkte reg daartoe wat die langslewende toeval, 'n verpligting ten gunste van die langslewende opdoen wat gelykstaande moet wees aan die netto-waarde van die langslewende se bydrae tot die samesmelting wat kragtens die testament na die aangewese begunstigdes moet gaan. Die langslewende bemaak vervolgens die vorderingsreg wat hy/sy teen die betrokke begunstigde kragtens die samesmeltingstestament verkry het, aan laasgenoemde.

5 1 2 Belasting op toegevoegde waarde (BTW)

Wanneer die boedeleienaar boedelsamesmelting as instrument in sy/haar boedelplan wil gebruik, moet die implikasies van die Wet op Belasting op Toegevoegde Waarde[86] in ag geneem word.[87]

Om die implikasies met betrekking tot BTW in die geval van boedelsamesmelting na te gaan, is dit eerstens nodig om te wys op enkele algemene aspekte by die bepaling van aanspreeklikheid vir BTW. Sodanige aanspreeklikheid is slegs ter sake waar die boedel as ondernemer kragtens artikel 23 van die Wet geregistreer was.[88] Indien wel, is die verdere vraag na die klassifikasie van die bates en in hierdie verband word drie verskillende kategorieë onderskei.[89]

Die eerste kategorie is bates wat deel gevorm het van die onderneming wat vir BTW geregistreer was.[90] Die tweede kategorie is die bates wat slegs gedeeltelik deel van die onderneming gevorm het.[91] Derdens is daar die bates wat nie deel gevorm het van die onderneming nie.[92] Die klassifikasie is dus deurslaggewend. Dit is ook belangrik om daarop te let dat kontantgeld in 'n boedel nie aan BTW onderworpe is nie.[93] Benewens die klassifikasie van die boedelbates, is dit verder nodig om vas te stel wat die verwantskap tussen die oorledene en 'n legataris of erfgenaam is, sodat die belasbaarheid van die toevalling aan die erfgenaam of legataris korrek bepaal kan word. Die definisie van die sogenaamde *verbonde persoon* is hier ter

85 *Idem* 204.
86 89 van 1991.
87 Arthur en Erasmus *VAT for lawyers: A guideline* (1991) 105 ev.
88 *RSA Gids vir ondernemers: Belasting op toegevoegde waarde* (1995) 6 ev.
89 Erasmus *VAT and deceased estates* 11 15.
90 *Idem* 13 18.
91 *Idem* 18.
92 *Idem* 12 17.
93 *Idem* 28.

sake.[94] Die idee van 'n verbonde persoon is gemik op die voorkoming van vermydingsmaatreëls teen BTW. Die toekenning van enige bate in die vorm van 'n legaat of erfenis uit 'n bestorwe boedel is 'n lewering van goedere of dienste, afhangende van die aard van die bates of die diens.[95] Enige toekenning deur die eksekuteur van enige goed of diens wat deel van 'n onderneming uitmaak, sal aan BTW onderworpe wees. Die koers waarteen BTW gehef word, sal afhang van die aard van die bates wat toegeken word[96] en die bedrag aan BTW betaalbaar sal afhang van die verhouding tussen die oorledene en 'n bepaalde erfgenaam of legataris.[97] In die geval van bates van 'n onderneming wat 'n lopende saak is of van bates wat afsonderlik van die onderneming as 'n aparte onderneming kan funksioneer, word die toekenning van bates geag 'n lewering vir doeleindes van BTW te wees. Dit sal lewering teen 'n nul-koers wees, mits die ontvanger van die toekenning as ondernemer geregistreer is[98] en ongeag die feit dat die bevoordeelde 'n verbonde persoon van die oorledene is.[99] As die ontvanger nie 'n geregistreerde ondernemer vir doeleindes van BTW is nie, sal die lewering van goed teen die standaardkoers vir BTW in aanmerking kom en in só 'n geval sal die vraag of die begunstigde 'n verbonde persoon is, die bedrag wat aan BTW betaalbaar is, beïnvloed.

Die erfgenaam of legataris sal nie vir 'n insetkrediet kwalifiseer nie, ongeag of hy/sy 'n geregistreerde ondernemer is al dan nie, indien hy/sy as ondernemer nie voornemens is om die betrokke goed te gebruik, te verbruik of te lewer vir die doel van 'n belasbare lewering van dienste of goedere nie.[100] Waar die erfgenaam of legataris nie geregtig is op 'n insetkredietaftrekking nie, word die lewering se waarde bereken op die ope markwaarde daarvan.[101] Waar die begunstigde wel geregtig mag wees om 'n insetkrediet te eis, sal die algemene reël, naamlik dat geen BTW betaalbaar is vir die lewering teen geen teenwaarde nie, toepassing vind.[102] Die standaardkoers word op die nul-waarde toegepas. Dit is belangrik om te beklemtoon dat enige aanspreeklikheid vir die uitsetbelasting dié van die boedel is.[103]

Waar die erfgenaam of legataris nie 'n verbonde persoon in verhouding tot die oorledene is nie, sal die bedrag betaalbaar aan BTW nul wees, tensy daar 'n bemakingsprys is en ongeag of dit teen die standaardkoers of teen die nul-koers bereken word.[104]

Die gemeenskaplike boedel van partye wat binne gemeenskap van goed getroud is en die gemeenskaplike boedel wat deur die eksekuteur beredder word, word as aparte persone, afsonderlik van die man en vrou en van die oorlede eggenoot en langslewende eggenoot, behandel.[105] Enige verdeling van die bates van die langslewende eggenoot is 'n lewering van of goedere of dienste vir doeleindes van BTW.[106]

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94 Erasmus "VAT and deceased estates" 1993 *De Rebus* 803 ev; a 1 van die Wet op Belasting op Toegevoegde Waarde.
95 Erasmus *VAT and deceased estates* 28.
96 *Idem* 29.
97 Eramus 1993 *De Rebus* 803 ev.
98 Erasmus *VAT and deceased estates* 31.
99 *Ibid.*
100 *Ibid.*
101 *Ibid.*
102 *Ibid.*
103 *Ibid.*
104 *Idem* 32.
105 *Idem* 33.
106 *Ibid.*

Die gemeenskaplike boedel wat deur die eksekuteur beredder word, is aanspreeklik vir die volle belastingpligtigheid ten opsigte van enige toedeling van 'n bate aan die langslewende, ondanks die feit dat die langslewende ooreenkomstig huweliksgoedereg 'n onverdeelde halwe aandeel in die gemeenskaplike boedel het.[107] Die toedeling van enige bate aan die langslewende gade is noodwendig 'n toedeling aan 'n verbonde persoon.[108]

As BTW dus op die bepaalde bate betaalbaar is, moet die betaalbare bedrag op die volle ope markwaarde van die bate bereken word op die basis dat die gemeenskaplike boedel as 'n aparte persoon, afsonderlik van die individuele gades, beskou word.[109]

In die geval waar twee persone wat binne gemeenskap van goed met mekaar getroud is hulle onverdeelde aandele in die gemeenskaplike boedel saamsmelt, word geen probleme vanuit 'n BTW-oogpunt ondervind nie aangesien dit bloot die idee bevestig dat die gemeenskaplike boedel van die gades as 'n aparte persoon beskou word. Boedelsamesmelting is in wese in ooreenstemming met hierdie siening.[110] Die belastingimplikasies met betrekking tot die lewering van 'n beperkte reg uit die saamgesmelte boedel aan die langslewende gade, soos byvoorbeeld 'n vruggebruik, hang af van die faktore soos reeds bespreek.[111]

By die oorweging van die implikasies met betrekking tot BTW in gevalle waar gades wat buite gemeenskap van goed getroud is hulle afsonderlike boedels saamsmelt,[112] is dit belangrik om op die volgende twee aspekte te let:

(i) Die inwerkingstelling van boedelsamesmelting deur die langslewende uit hoofde van laasgenoemde se adiasie, is 'n lewering deur die langslewende van bates vir doeleindes van BTW.

(ii) Die uitwerking van boedelsamesmelting ten opsigte van die eerssterwende se boedel is dat daar ook 'n lewering vir doeleindes van BTW plaasvind.

Met betrekking tot die lewering deur die langslewende van bates of dienste aan die saamgesmelte boedel, is dit belangrik om daarop te let dat die langslewende 'n beperkte reg as teenprestasie ontvang.[113] Die BTW-implikasie sal afhang van bepaalde faktore:[114]

(a) of die langslewende as ondernemer vir BTW-doeleindes geregistreer is;

(b) of die bepaalde bate wat gelewer word deel gevorm het van die onderneming van die langslewende; en

(c) die aard van die beperkte reg wat die langslewende uit die saamgesmelte boedel toeval.

Die koers waarteen BTW gehef word, sal dus afhang van die aard van die goedere of dienste wat gelewer word. Die bedrag aan BTW betaalbaar, sal verder beïnvloed word deur die aard van die beperkte reg wat die langslewende uit die saamgesmelte boedel ontvang, asook deur die verwantskap tussen die langslewende en die

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107 *Ibid.*
108 *Ibid.*
109 *Ibid.*
110 *Idem* 40.
111 *Supra* en sien ook *idem* 40.
112 *Ibid.*
113 *Idem* 41.
114 *Ibid.*

uiteindelike begunstigdes.[115] Die belastinggevolge van lewerings deur die oorlede gade se boedel hang af van dieselfde faktore as wat hierbo ten opsigte van die langslewende vermeld is.

5 1 3 Hereregte

Kragtens artikel 9(1)(e)(i) van die Hereregtewet,[116] is die verkryging van onroerende eiendom deur middel van 'n erflating van die betaling van hereregte vrygestel.[117] Die kwalifiserende bepaling in hierdie subartikel is egter dat die betrokke eiendom dié van die oorledene moes gewees het. Hierdie beperking is ingevoer deur artikel 1 (1)(a) van die Belastingwysigingswet,[118] wat op 21 Junie 1989 in werking getree het.[119] Die gevolg hiervan wat boedelsamesmelting betref, is dat die begunstigde wat die blooteiendomsreg verkry nie op hierdie hereregtevrystelling geregtig is met betrekking tot eiendom wat aan die langslewende behoort het nie. Die implikasies hiervan in geval van 'n boedelsamesmelting deur 'n egpaar wat binne gemeenskap van goed met mekaar getroud was en onroerende eiendom aan hulle kinders bemaak het onderworpe aan 'n vruggebruik deur die langslewende, sal soos volg wees:

Die verkryging van die vruggebruik oor die oorledene se gedeelte van die onroerende eiendom sal kragtens artikel 9(1)(e)(i) van die Hereregtewet, van die betaling van hereregte vrygestel wees. Daarbenewens sal die kinders ook van die betaling van hereregte vrygestel wees met betrekking tot die verkryging deur hulle van die blooteiendomsreg oor die oorledene se gedeelte van die eiendom.[120] Die erfgename sal egter met betrekking tot die gedeelte van die onroerende eiendom van die langslewende en wat deur laasgenoemde tot die samesmelting bygedra is, hereregte moet betaal omdat dit in die lig van die voormelde beperking nie onder artikel 9(1)(e)(i) van die Hereregtewet tuisgebring kan word nie.[121]

5 1 4 Inkomstebelasting

Die aanwending van boedelsamesmelting kan vir die langslewende of vir die uiteindelike begunstigdes (waar van toepassing) komplikasies met betrekking tot inkomstebelasting tydens hulle leeftyd meebring. Die boedelbeplanner moet derhalwe by die opstelstadium en by die evaluasiestadium sy advies met inagneming hiervan oorweeg. Hy sal byvoorbeeld nie inkomstegenererende bates aan 'n begunstigde wat reeds inkomstebelastingprobleme ondervind, laat toekom nie.

Ten slotte kan met verwysing na die belastingvermydingsbepaling opgemerk word dat die Kommissaris van Binnelandse Inkomste tot dusver nog nie artikel 103(1) van die Inkomstebelastingwet, op gevalle waar boedelsamesmelting as boedelbeplanningsinstrument aangewend is, toegepas het nie.

5 1 5 Boedelbelasting

Die belangrikste voordeel van boedelsamesmelting was voorheen die besparing van boedelbelasting. Hierdie voordeel is egter drasties ingekort nadat adiasie as 'n skenkingshandeling ooreenkomstig artikel 58 van die Inkomstebelastingwet geag is

115 *Ibid.*
116 40 van 1949 soos gewysig.
117 West *Artikels oor aktekantoorpraktyk vir prokureurs* (1995) 69.
118 69 van 1989.
119 West *Aktekantoorpraktyk* 69.
120 *Idem* 70.
121 *Ibid.*

en nadat die toepassing van artikel 4(m) van die Boedelbelastingwet,[122] eers met beperkte sukses vanaf 1 Maart 1987, en daarna met groter effek vanaf 1 Maart 1988, in samehang met artikel 4(q) van dieselfde wet ingekort is.[123] Die minimalisering of vermyding van boedelbelasting bly egter 'n belangrike oogmerk met boedelbeplanning en ongeag hierdie beperkings kan die tegniek van boedelsamesmelting nog steeds vir 'n boedeleienaar voordelig wees. Die vasstelling van die boedeleienaar se potensiële aanspreeklikheid by die aanvang van die beplanningsproses is uiters belangrik.[124]

Die uitwerking van boedelsamesmelting op die eiendom wat saamgesmelt word, is dat die langslewende net die reghebbende met betrekking tot 'n beperkte reg word en nie die volle *dominium* oor die saamgesmelte eiendom by sy of haar afsterwe het nie. Dit bring dan mee dat die beperkte reg, wat in waarde minder as die volle eiendomsreg is, 'n besparing met betrekking tot boedelbelasting tot gevolg het. Die omvang van die besparing aan boedelbelasting hang af van die tipe beperkte reg wat in die gesamentlike testament gekies is, dit wil sê 'n vruggebruik of 'n *fideicommissum* of 'n jaargeld, asook van die bepalings van die testament rakende die uiteindelike begunstigdes.

'n Fidusiêre belang wat die langslewende oor bepaalde eiendom mag hê (onmiddellik voor sy of haar dood), is boedelbelasbare eiendom in sy boedel.[125] Die besparing in boedelbelasting word bereken deur die verskil tussen die markwaarde van die volle eiendom en die gekapitaliseerde waarde van die fidusiêre belang te bepaal. Die besparing is die waarde van die boedelbelasting op sodanige verskil.

Die hoofonderskeid tussen 'n *fideicommissum* en 'n vruggebruik vir hierdie doeleindes is dat die waarde van 'n vruggebruik wat by die dood van die langslewende staak, nie die verskil in die waarde van die eiendom waarop die vruggebruik by die beëindiging daarvan gerus het en die waarde van die blooteiendomsreg van die eiendom soos op datum van die oorlye van die eerssterwende, mag oorskry nie.[126] Indien daar wel so 'n oorskryding is, sal die waarde van die oorskryding as 'n aftrekking vir boedelbelastingdoeleindes kwalifiseer.[127]

Ook jaargelde waarmee goed beswaar is, vorm ingevolge artikel 3(2)(b) van die Boedelbelastingwet deel van die jaargelder se belastingboedel. Jaargelde en vruggebruike ten gunste van die langslewende van twee eggenotes oor bates wat deur hulle in 'n gesamentlike testament saamgesmelt is, bring by die afsterwe van die langslewende die korting ingevolge artikel 4(m) van die Boedelbelastingwet in die spel. Die waarde van die beperkte reg ten gunste van die langslewende oor die bates wat deel van die boedel van die eerssterwende gevorm het en ingevolge die gesamentlike testament deur laasgenoemde tot die samesmelting bygedra is, kan as 'n korting in die belasbare boedel van die langslewende gade geëis word, mits 'n korting ingevolge artikel 4(q), gebaseer op die waarde van die betrokke beperkte reg wat die langslewende by die dood van die eerssterwende eggenoot toegeval het, nie alreeds ten opsigte van laasgenoemde se belasbare boedel by sy/haar dood geëis is nie.[128]

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122 45 van 1955 sg.

123 Abrie ea *Boedels* 84.

124 *Ibid*. Urquhart en Davis *Estate planning* par 407.

125 A 3(2)(a) van die Boedelbelastingwet.

126 Sien die tweede voorbehoudsbepaling tot a 5(1) van die Boedelbelastingwet.

127 Wiechers en Vorster *Boedelbereddering* 91–93.

128 A 4(m)(ii) van die Boedelbelastingwet. Die toevoeging van a 4(q) tot die Boedelbelastingwet in 1985 het vrae laat ontstaan oor die voortgesette toepassing en reikwydte van a 4(m). Vir 'n

vervolg op volgende bladsy

Daar word dus ter oorweging gegee dat die oorwoë aanwending van boedelsamesmelting in bepaalde gevalle steeds 'n effektiewe instrument kan wees om boedelbelasting op die boedel van 'n langslewende gade te verminder, mits sorg gedra word dat die gaping tussen die waarde van die bydrae van die langslewende tot die saamgesmelte boedel en die waarde van die beperkte reg wat hom/haar toeval nie van so 'n omvang is dat dit getref word deur die *ratio* van Spesiale Inkomstebelastingsaak 1378[129] nie.

Die moontlikheid dat adiasie kan lei tot die toepassing van artikel 3(4)(a) of (b) van die Boedelbelastingwet, saamgelees met artikel 3(3)(c), bestaan nie meer nie aangesien hierdie bepalings deur die Regswysigingswet 87 van 1988 geskrap is.[130]

Daar moet op gewys word dat waar geskenkebelasting kragtens artikel 58 van die Inkomstebelastingwet op grond van adiasie deur die langslewende betaalbaar is, dit onmiddellik na adiasie betaalbaar is. Boedelbelasting daarenteen is eers by die dood van 'n persoon betaalbaar. Daar kan 'n hele verskeidenheid veranderlikes intree vanaf die betaling van boedelbelasting by die uiteindelike dood van die eerssterwende en die betaling van geskenkebelasting by die dood van die langslewende, wat baie jare na die dood van die eerssterwende kan wees. Sulke veranderlikes, wat dikwels of meesal onvoorsienbaar is, kan 'n invloed hê op bedrae wat aan onderskeidelik geskenke en/of boedelbelasting betaalbaar is. Die betaling van geskenkebelasting plaas 'n onmiddellike las op die kontantvloei van die langslewende, maar die belastingkoerse kan verander, wat die betaling van geskenkebelasting in bepaalde gevalle voordeliger as die uiteindelike betaling van boedelbelasting kan maak. Bates wat die langslewende dan eerder in sy of haar boedel behou, kan moontlik ook vir 'n aftrekking kragtens een van die bepalings van artikel 4 van die Boedelbelastingwet kwalifiseer, wat boedelbelasting meer aanvaarbaar kan maak.

Die boedelbeplanner moet dus waar boedelsamesmelting as tegniek gebruik word, die testament sodanig opstel dat die langslewende by die evaluasiestadium (dws by die dood van die eerssterwende) die korrekte keuse kan uitoefen wat adiasie of repudiasie van die boedelsamesmeltingsmodel betref. Die testament sou byvoorbeeld daarvoor voorsiening kon maak dat bates wat in daardie stadium vir boedelbelastingaftrekkings kan kwalifiseer, in die geheel of gedeeltelik van die boedelsamesmelting uitgesluit word, of dat die langslewende 'n keuse het met betrekking tot die bates wat vanuit sy/haar boedel met bepaalde bates van die eerssterwende moet saamsmelt. Die beperking van boedelgroei in die boedel van die langslewende en die gepaardgaande vermindering van die langslewende se belasbare boedel deur die uitoefening van die keuse, is 'n groot voordeel van die tegniek van boedelsamesmelting wat tydens die evaluasiestadium deeglik oorweeg moet word met inagneming van toekomstige gebeurlikhede.

Die doel met die 1988-wysiging van artikel 4(m) van die Boedelbelastingwet is om die aftrekking kragtens hierdie artikel in die boedel van die langslewende gade weg te neem indien daar by die dood van die eerssterwende gade 'n korting kragtens artikel 4(q) ten opsigte van die eerssterwende gade se belasbare boedel geëis is. Die waarde van die oordrag van bates as gevolg van adiasie deur die langslewende sal dus tot gevolg hê dat die aftrekking kragtens artikel 4(q) met soveel van die boedel

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bespreking van hierdie problematiek sien die bespreking hieronder asook Wiechers en Vorster *Boedelbereddering* 109 ev; Anon 1989 *The Taxpayer* 229 ev; Anon 1988 *Income Tax Reporter* 9 ev; Meyerowitz *Administration of estates* par 28.22.

129 *ITC* 1387 1984 207 46 SATC 121.

130 A 9(1)(a) van die Regswysigingswet 87 van 1988.

wat kragtens die adiasiehandeling oorgedra is, verminder word. In so 'n geval sal boedelsamesmelting gekoppel met 'n vruggebruik ten gunste van die langslewende gade oor die saamgesmelte boedel die gevolg hê dat die toepassing van artikel 4(m) by die dood van die langslewende uitgesluit word tensy die langslewende se beskikking so groot was dat geen aftrekking kragtens artikel 4(q) in die eerssterwende se boedel toepassing vind nie.

Die 1987-wysigings van artikel 4(q) het twee voorbehoudsbepalings tot die artikel toegevoeg. Die eerste hiervan het ten doel om die ontduiking van boedelbelasting te voorkom waar voorgegee word dat die langslewende gade bevoordeel word terwyl in werklikheid 'n ander party, byvoorbeeld 'n kind, bevoordeel word. Die tweede voorbehoudsbepaling bepaal dat die aftrekking kragtens artikel 4(q) nie geëis mag word nie waar eiendom aan 'n trust bemaak word wat tot voordeel van 'n langslewende eggenoot deur die eerssterwende eggenoot opgerig is en die trustees van die trust diskresionêre bevoegdhede het om sodanige eiendom of die inkomste daaruit aan iemand anders as die langslewende uit te keer.[131]

Daar moet net weer beklemtoon word dat die waarde van 'n vruggebruik wat 'n langslewende toeval, telkens getoets behoort te word aan die tweede voorbehoudsbepaling tot artikel 5(1)(b) van die Boedelbelastingwet om te verseker dat die voordeel wat hierdie voorbehoudsbepaling met betrekking tot boedelbelasting bied, in gepaste gevalle benut word. Verder moet in gedagte gehou word dat 'n korting ingevolge artikel 4(m) (afgesien van die uitsluiting daarvan deur 'n korting kragtens artikel 4(q) wat in die belasbare boedel van die eerssterwende eggenoot geëis is), net geëis kan word indien die betrokke beperkte reg ten gunste van die langslewende eggenoot geskep is deur die vooroorlede (eerssterwende) eggenoot oor bates wat deel van laasgenoemde se boedel uitgemaak het.

5 2 Ander oorwegings

5 2 1 Boedelsamesmelting kan 'n traumatiese uitwerking op die langslewende en op laasgenoemde se boedel hê. As gevolg van die langslewende se adiasie word die volle eiendomsreg oor sy/haar bates afgestaan en verruil vir 'n beperkte reg as "teenprestasie", afhangende van enige verdere bepalings van die testament. Die beperkte reg het dikwels 'n onvoorsiene beperkende uitwerking op die langslewende se handelsvryheid.[132] Die langslewende wat adieer, verloor die volle beheer oor sy/haar bydrae tot die saamgesmelte boedel. Die boedelbeplanner behoort alternatiewe vir boedelsamesmelting so op te stel dat die boedelsamesmeltingsbepaling vir die langslewende oorwegingswaardig sal wees, anders val die beplanning deur die mat.

5 2 2 Volgens Jordaan[133] is die primêre oogmerk met boedelsamesmelting om koördinasie met die vererwing van bates te bewerkstellig, veral waar partye binne gemeenskap van goed met mekaar getroud is of waar eggenote by 'n huwelik buite gemeenskap van goed albei redelike groot boedels het. Die ordelike verdeling van boedelgoedere kan so bewerkstellig word dat twis en tweedrag tussen bevoordeeldes uitgeskakel word. 'n Billike verdeling van boedelbates moet dus ook 'n doelwit

131 Meyerowitz *Administration of estates* par 28.18 toon tereg aan dat albei die voorbehoudsbepalings tot a 4(q) uitlegprobleme meebring wat verskeie onduidelikhede oor die presiese trefwydte en aanwendingsmoontlikhede tot gevolg het. Beplanners moet by die opstelstadium deeglik met hierdie problematiek rekening hou.

132 Abrie ea *Boedels* 84.

133 *Beplanning* 29.

wees en hier moet die wisselende waardes van boedelbates ook in aanmerking geneem word.[134]

Rasionalisasie en herstrukturering van die boedel kan moontlik ook hierdeur bewerkstellig word: 'n boedel het byvoorbeeld bates wat nie "inpas" by die ander bates van die boedel nie en dit kan herrangskik word om die *quid* en die *quo* met mekaar in balans te bring.

5 2 3 Jordaan meld as verdere oorweging die gemoedsrus van 'n testateur dat die kinders se erfenisse beskerm is in die geval waar die langslewende weer sou hertrou of buite die eg gaan saamwoon, met die gepaardgaande risiko dat 'n derde party of 'n buitestaander die boedelbates kan verkwis.[135]

5 2 4 Die uitvoerbaarheid van die testateur se planne soos vergestalt in 'n boedelsamesmeltingsmodel moet deeglik in ag geneem word. Wanneer daar 'n plaaseiendom in die boedel(s) is, moet die Wet op Onderverdeling van Landbougrond,[136] wat die testamentêre onderverdeling van landbougrond en die skep van onverdeelde aandele in sodanige grond (sonder ministeriële toestemming) verbied in gedagte gehou word.[137] In die geval van die bemaking van minerale moet artikels 20 en 21 van die Mineraalwet,[138] deeglik in oorweging geneem word aangesien dit soortgelyke verbiedinge bevat.

5 2 5 Die kontinuïteit[139] van 'n onderneming kan ernstig benadeel word indien die onderneming weens ondeurdagte testamentêre bemakings belas of gefragmenteer word en boedelsamesmelting kan 'n belangrike oplossing vir sodanige gevalle bied.[140]

5 2 6 Beskerming teen insolvensierisiko's

'n Belangrike oorweging te midde van die huidige ekonomiese situasie is om die erfenisse van erfgename teen die risiko van insolvensie te beskerm deur gebruik te maak van onder andere boedelsamesmelting, waardeur bates uit die langslewende se persoonlike boedel en uit dié van die bevoordeeldes gehaal word deur dit in regspersone of in trusts te plaas.

5 2 7 'n Verkwistende of onkundige[141] erfgenaam, wat wel deur 'n erflater bevoordeel word, kan ook deur middel van boedelsamesmelting teen homself beskerm word wanneer hy slegs 'n beperkte reg verkry. Die uiteindelike begunstigdes se erflating is dan ook meteen daardeur beveilig.

5 2 8 Die implementeringskoste van boedelsamesmelting as instrument by boedelbeplanning is minimaal, aangesien dit slegs die opstelkoste van die testament bedra.[142] 'n Kliënt is ook normaalweg teësinnig om onmiddellik uitgawes aan te gaan en boedelsamesmelting as alternatief in die boedelbeplanningsproses as geheel is dus in hierdie opsig 'n baie koste-effektiewe en nuttige tegniek. Die tydstip dien dus ook die koste-aspek en is voorwaardelik, aangesien dit afhanklik is van die vraag of die langslewende gaan adieer al dan nie. Die testateur kan natuurlik sy testament te eniger tyd voor sy afsterwe wysig, met min of geen finansiële implikasies.

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134 Abrie ea *Boedels* 84; Jordaan *Beplanning* 3; De Villiers 1981 *MBL* 3.
135 Jordaan *Beplanning* 29.
136 70 van 1970 sg.
137 Abrie ea *Boedels* 185; Jordaan *Beplanning* 29.
138 50 van 1991 sg.
139 Abrie ea *Boedels* 83.
140 Jordaan *Beplanning* 34, 123; De Villiers 1981 *MBL* 44.
141 Jordaan *Beplanning* 31.
142 Abrie ea *Boedels* 88.

5 2 9 Die beplanner moet ook die inkomste- en finansiële sekerheid van die uiteindelike begunstigdes en die langslewende wat adieer, oorweeg. Weer eens het boedelsamesmelting as uitgestelde vorm van boedelbeplanning die voordeel dat dit nie 'n onmiddellike impak het op die inkomste en/of finansiële sekerheid van die erflater nie, maar die beplanner moet die gedeelte van die boedels wat saamgesmelt word sodanig oorweeg en bemaak dat dit nie die langslewende se inkomste- en finansiële sekerheid sal beïnvloed nie.

5 2 10 Daar moet egter op gelet word dat die instrument van boedelsamesmelting[143] so aangewend en geformuleer moet word dat die kontantvloei van 'n saamgesmelte boedel by adiasie behoorlik verreken word, veral waar 'n onderneming ter sprake is. Dit is natuurlik ook 'n voordeel van boedelsamesmelting dat die likiditeit van die saamgesmelte boedel op die tydstip van adiasie geëvalueer kan word. Indien die kontantvloei nadelig geraak sou word, kan 'n ander alternatief wat in die testament vervat is, moontlik in plaas van die boedelsamesmeltingsopsie gebruik word. Die kontantvloei van 'n boedel wat met 'n ander boedel in 'n testament saamgesmelt word, word nie onmiddellik beïnvloed deur die gebruikmaking van boedelsamesmelting nie aangesien dit 'n uitgestelde vorm van boedelbeplanning is. Dit is 'n vorm van gebeurlikheidsbeplanning.

Die inkomste van begunstigdes moet sodanig wees dat dit voorsiening maak vir hulle onderhoud en opvoeding. Die ontleding van die huidige inkomste, die vasstelling van die huidige lewenstandaard en die samestelling van die inkomstebronne moet by sowel die opstel- as die evaluasiestadium, wanneer adiasie en repudiasie oorweeg word, in gedagte gehou word.

Boedelsamesmelting het tot gevolg dat 'n groter boedel vir doeleindes van die versorging van die langslewende daargestel kan word, met die gevolg dat die lewenstandaard van die langslewende dieselfde of beter kan wees as wat dit onmiddellik voor die afsterwe van die eerssterwende was. Die vasstelling van die lewenstandaard van die langslewende en die samestelling van inkomstebronne moet by die evaluasiestadium herevalueer word. Die vermoë van die boedel om belastings te kan betaal, hetsy by die opstel- hetsy by die evaluasiestadium, moet ook bepaal word.

5 2 11 Die beplanner moet sowel by die opstel- as by die evaluasiestadium oorweging skenk aan die persoonlike boedelopset van die uiteindelike begunstigdes ten einde vas te stel wat die gevolge van 'n bemaking ingevolge 'n boedelsamesmeltingsbepaling op sy boedelsituasie gaan wees. Daar moet toegesien word dat 'n reeds belaste bevoordeelde se boedel nie weens die verkryging van 'n erfenis verder beswaar word nie. In sodanige geval kan repudiasie van 'n voordeel ooreenkomstig die boedelsamesmeltingstestament oorweeg word. Hierdie aspek beklemtoon die standpunt wat elders in hierdie bydrae ingeneem is, naamlik dat daar 'n holistiese benadering by boedelbeplanning gevolg moet word en dat boedelsamesmelting dus nie as die alfa en die omega oorweeg moet word nie, en meer bepaald nie slegs tot voordeel van die langslewende nie.

5 2 12 Die beplanner moet deeglik kennis neem van die persoonlike hoedanighede en bekwaamhede van 'n begunstigde in gevalle waar daar 'n onderneming ter sprake is.[144] Die bestaan, bestuur en groei van die besigheid of hoofboedelbate en die toekenning van beheer ingevolge 'n boedelsamesmeltingsbepaling moet deeglik in ag geneem word.

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143 *Idem* 82 ev.
144 Jordaan *Beplanning* 118.

5 2 13 'n Belangrike doelwit wat met boedelsamesmelting bereik kan word, is om die fragmentasie van boedelbates te voorkom.[145] In hierdie verband kan die gebruikmaking van 'n *mortis causa*-trust waaraan die uiteindelike begunstigdes se blooteiendomsreg bemaak word, 'n belangrike funksie vervul. Finansiële sekuriteit vir 'n bevoordeelde kan op so 'n manier bewerkstellig word in plaas daarvan om die boedel te fragmenteer. Deurdat boedelsamesmelting plaasvind en 'n beperkte reg aan die langslewende gegee word, kan die bewaring van bates as 'n eenheid en onder sentrale beheer bevorder word.

5 2 14 Die buigsaamheid[146] van boedelsamesmelting as instrument by boedelbeplanning en die aanpasbaarheid daarvan word deur Urquhart en Davis[147] beklemtoon. Hy meld naamlik dat ondanks die feit dat boedelsamesmelting by die verlyding van die gesamentlike testament gereël is, die langslewende op die tydstip wanneer hy/sy moet kies om te adieer of te repudieer die verdere geleentheid kry om alle tersaaklike faktore in heroorweging te neem, spesifiek oor moontlike nuwe omstandighede na te dink en dan aan gebeurlikheidsbeplanning gevolg te gee. Dit is 'n baie belangrike oorweging by die aanwending van boedelsamesmelting as instrument by boedelbeplanning te midde van die relatiewe onsekerheid met betrekking tot geskenkebelasting. Sowel die boedelsituasie as die belasbaarheid kon in die tydperk tussen die opstel- en evaluasiestadium drasties verander het.

5 2 15 'n Verdere oorweging of boedelsamesmelting gebruik moet word al dan nie, is die samestelling van die boedelbates van die partye wat hulle boedels in 'n gesamentlike testament wil saamsmelt. Die samestelling van boedelbates kan aanduidend wees vir beantwoording van die vraag of boedelsamesmelting in die bepaalde omstandighede 'n gepaste tegniek sal wees. By oorweging hiervan is die volgende aspekte ter sake:

(a) die relatiewe belangrikheid van bates vir 'n bepaalde persoon;[148] en

(b) die vraag van watter bates die grootste groeipotensiaal het.

5 2 16 By die oorweging van boedelsamesmelting by sowel die opstel- as die evaluasiestadium, moet die beplanner die uitwerking van inflasie[149] op veral beleggingsbates in gedagte hou. Die groei van die waarde van onroerende eiendom as gevolg van inflasie moet deeglik deur die beplanner verreken word. Die uitwerking van inflasie hou ook nou verband met die kontantvloeisituasie van die boedel tydens die beredderingsproses en met dié van die langslewende en die uiteindelike begunstigdes.[150] Die tegniek van boedelsamesmelting het geen uitwerking op die eerssterwende se boedel nie en het dus beperkte aanwendingsmoontlikhede in sy/haar geval.

5 2 17 Die boedel van die langslewende word by die bereddering van die eerssterwende se boedel reeds in hoofsaak "beredder" deurdat die hoofbates by afsterwe van die eerssterwende uit die langslewende se boedel geneem word.

5 2 18 Die waardasie van eiendom en die moontlike onderwaardasie van bates, tesame met die groeipotensiaal van bepaalde bates te midde van faktore soos inflasie, moet by die opstelstadium kumulatief in gedagte gehou word wanneer die *quid* en die *quo* by uiteindelike adiasie bereken word.

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145 De Villiers 1981 *MBL* 44.
146 *Ibid.*
147 *Estate planning* par 1420.
148 Jordaan *Beplanning* 73 110 par 7 4 1.
149 *Idem* 10–16; Abrie ea *Boedels* 62.
150 De Villiers 1981 *MBL* 43.

6 SLOT

Wanneer 'n beplanner hom op hoogte gestel het van die fiskale slaggate van boedelsamesmelting, sal boedelsamesmelting weer eens sy regmatige plek by boedelbeplanning in die breë sin kan inneem. Die beplanner wat die kliënt se boedel behoorlik ontleed het en op hoogte van die erflater se bedoeling gekom het, kan na oorweging van nie net die toepaslike fiskale faktore nie, maar ook van die ander faktore wat in paragraaf 5 hierbo bespreek is, boedelsamesmelting as 'n alternatief aan die kliënt voorhou. Die gebruikmaking van die tegniek van boedelsamesmelting is egter beperk tot die *mortis causa*-beplanning van 'n kliënt se boedel. Die voordeel wat die evaluasiestadium die erflater bied te midde van onvoorsiene gebeurlikhede wat na die opstelstadium na vore kan kom, kan boedelsamesmelting 'n baie aantreklike beplanningsmodel te midde van ander alternatiewe of geïntegreerde beplanningsmodelle maak. Die boedelbeplanner moet die alternatief van boedelsamesmelting in die testament so hanteer dat dit vir die langslewende oorwegingswaardig sal wees, andersins val die beplanning deur die mat. Dit is daarom belangrik dat die testament so geformuleer moet word dat die vererwing steeds effektief ingevolge die bedoeling van die testateur in die geval van repudiasie deur die langslewende moet kan plaasvind, met die gevolg dat boedelsamesmelting nie die enigste nie,[151] maar een van verskeie alternatiewe in die gesamentlike en/of wederkerige testament moet wees.

> *The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, . . . legislation [which interferes with the right to enter into such relationships] would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right.*
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> *O'Regan J in* Dawood v Minister of Home Affairs 2000 8 BCLR 837 (CC) 861E–G.

151 Urquhart en Davis *Estate planning* par 1420.

Crofting as a way of communal land-use – the Scottish experience*

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OPSOMMING

"Crofting" as 'n wyse van kommunale grondgebruik – die Skotse stelsel

Daar bestaan tans verskeie probleme in verband met die toepassing van kommunale grondgebruik en -beheer in Suid-Afrika. 'n Belangrike knelpunt is die feit dat grondstukke wat vir kommunale grondgebruik toegewys is, dikwels as gevolg van apartheidswetgewing in so 'n mate oorbevolk is dat daar nie sprake van lewensvatbare bestaansboerderye kan wees nie. 'n Probleem wat hiermee saamhang, is dat die gebruiksregte van okkupeerders van kommunale grondstukke grootliks onbeskerm is, deels as gevolg van die toestroming van mense na kommunale grondstukke en deels weens die feit dat kommunale grondreg nog altyd as 'n minderwaardige reg beskou is. Die huidige beleid ten opsigte van kommunale grondbeheer is egter een van aanpassing van grondbeheermaatreëls eerder as die vervanging van die totale grondbeheerstelsel. In die proses is dit egter noodsaaklik dat grondgebruik moet voldoen aan die grondwetlike vereistes van gelyke toegang en demokratiese besluitneming. Dit vereis deelname van en kontrole deur amptenare van die Departement van Grondsake. Die vraag ontstaan hoe dit in die Suid-Afrikaanse reg geïmplementeer kan word.

Die Skotse stelsel van *crofting* stem in verskeie opsigte met kommunale grondgebruik ooreen. Ingevolge hierdie stelsel is 'n *crofter* geregtig op die gebruiksreg van 'n woonhuis en die omringende tuingedeelte en word gemeenskaplike weidingsregte op 'n omskrewe grondstuk aan 'n aantal *crofters* verleen. Alhoewel dit in die negentiende eeu tot veel konflik aanleiding gegee het, is daar sedert 1886 by wyse van kreatiewe wetgewing maatreëls ingestel wat die *crofters* se bewoningsregte deur registrasie beveilig het en die ordelike gebruik van gemeenskaplike weidings gereguleer het. Sedert 1976 is dit moontlik om die geregistreerde bewoningsregte na eiendomsreg op te gradeer indien daar aan bepaalde vereistes voldoen word. Alhoewel die omstandighede in Skotland in verskeie opsigte van die Suid-Afrikaanse omstandighede verskil, is dit nie nodig om die wiel van vooraf uit te vind nie. Daar is verskeie raakpunte wat in gedagte gehou kan word by die aanpassing van kommunale grondbeheer in Suid-Afrika.

1 BACKGROUND

In South Africa there are numerous problems and disadvantages relating to communal land-use in rural areas. The most pressing of these problems are overcrowding and conflicting land rights owing to customary land tenure practices or the application of apartheid land laws and policies, resulting in forced removals and the dumping of thousands of people in rural areas.[1] Often people who were forcibly

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1 Van der Walt and Pienaar *Introduction to the law of property* (1999) 345–349.

removed or evicted were relocated on land that had been occupied by other groups, resulting in disputes and severe pressure on land resources.[2]

Furthermore, there are serious disputes between traditional leaders and local authorities regarding the development of communal land. For all practical purposes, these disputes are bringing such development to a standstill. In the process, the use-rights of the occupiers of such land are often overlooked. The unclear legal status of land use and the land administration processes inhibits development of and investment in the land.[3] This is sometimes called the "messy matrix" of land use in rural areas that needs serious attention from policy-makers and legislators.[4]

An important practical problem is that communal land rights cannot be registered at present. The main results of the lack of registrability of communal land rights are the following:

- Such rights are perceived to be inferior to ownership and other registrable rights owing to the lack of formal protection.[5]
- The fact that financial institutions are not willing to accept these informal land rights as collateral for private development funds and loans, limits the financial assistance for the development of rural areas mainly to state funding.
- The existing deeds registration system in South Africa, although accurate and reliable, has strengthened the notion that ownership is an absolute right[6] and that communal land tenure cannot be described as a right, but as a subservient, permit-based entitlement to occupy or use land that is owned by the state.[7]

In the last instance there are well-known and documented examples of traditional leaders who, over a long period of time, have abused their powers and without popular consent either used the land under their control largely for their own benefit

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2 Anonymous *Tenure Newsletter* 1/1998 1; Kies *Evaluation of the upgrading of tribal land from an ethnological point of view* (1993) 14–16.

3 *Tenure Newsletter* 1/1998 2; Coussins *A role for common property institutions in land distribution programmes in South Africa* (1995) 4–9.

4 Fourie "Property in post apartheid South Africa" in Barry (ed) *Proceedings of the international conference on land tenure in the developing world* University of Cape Town (1998) 168 170–171 proposes that the "messy matrix" can be cleared up only by undertaking a full audit of land rights and land use, to establish which persons or families are entitled to use the land, then to negotiate settlements and legally binding agreements between the different stakeholders and thereafter to register the applicable rights. See also Coussins "How do rights become real? Formal and informal institutions in South Africa's tenure reform programme" in Barry (ed) *Proceedings* 88 96–97.

5 Van der Walt "Property rights and hierarchies of power: an evaluation of land reform policy in South Africa" 1999 *Koers* 259 264–269.

6 Carey-Miller "Revision of priorities in South African land law" in Barry (ed) *Proceedings* 49 50: "Ownership could only be acquired on a derivative basis by an act of registration and racial controls over land ownership were exercised through the Deeds Registries. The emphasis of the Deeds Act upon the concept of an absolute right of ownership, open to allocation and division in only particular prescribed ways, reflected South African common law development."

7 Klug "Defining the property rights of others: political power, indigenous tenure and the construction of customary law" 1995 *Journal of Legal Pluralism and Unofficial Law* 119 123–124; Jensen "South African country profile" in Bruce (ed) *Country profiles of land tenure*: Africa 1996 LTC Resarch paper 130 University of Wisconsin-Madison (1998) 252 253–254.

or have alienated communal property.[8] For more than a century, the legal precedent in South Africa has been that communal property belongs to the chief as trustee for his people. However, it has been decided in several cases that, when alienating communal property, the chief needs only the consent of his councillors and not the consent of the people living on the communal property.[9] The true meaning of the chief as trustee for his people has therefore been distorted by these precedents to fit in with the general political idea of the rightlessness of indigenous people.[10] The power of the chiefs was abused by colonial administrators to develop a system where the rights vested exclusively in the chiefs, while the chiefs formed part of the administrative authority of the colonial power.[11] This concept of lack of land rights of individual people, based on the distortion of the true meaning of communal property rights, was then used to deny political rights to indigenous people.

This does not mean that communal land rights should be abolished. It has been proved in several legal systems in Africa that the abolition of indigenous customary systems disrupts traditional rules, values and customs which have historically governed the use of land in rural areas and have well-developed conflict resolution mechanisms.[12] Replacement strategies often introduce new institutions of land administration that may not be readily accepted, causing disputes and conflict over access to land. Security of tenure should rather be based on the adaptation of the existing tribal structures to ascertain that land tenure in rural areas is exercised and administered within an acceptable system of group rights.[13] The stated aim of the Department of Land Affairs is not to destroy or harm representative, popular and democratic tribal systems. However, the conditions for the continued participation of tribal chiefs in the system of land administration are that the basic human rights and democratic values in terms of the Constitution of the Republic of South Africa Act 108 of 1996 should not be undermined[14] and that the government should have access to members of group-held land tenure systems to ensure that the constitutional values are being adhered to.[15] It is therefore necessary to devise a structure where the influence and skills of reliable chiefs are combined with the administrative infrastructure of the Department of Land Affairs.

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8 Klug 1995 *Journal of Legal Pluralism and Unofficial Law* 119–147; Coussins in Barry (ed) *Proceedings* 88 92; Cross "Reforming land in South Africa: who owns the land?" in Barry (ed) *Proceedings* 104 106.

9 *Tsewu v Registrar of Deeds* 1905 TS 130; *Hermansberg Mission Society v Commissioner of Native Affairs and Darius Mogale* 1906 TS 135; *R v Ndobe* 1930 AD 484; *Bafokeng Tribe v Impala Platinum Ltd* 1993 SA 517 (B) 545–551.

10 Klug 1995 *Journal of Legal Pluralism and Unofficial Law* 119–147; Letsoalo *Land reform in South Africa – a black perspective* (1987) 18–19.

11 Klug 1995 *Journal of Legal Pluralism and Unofficial Law* 119 141; McIntosh, Sibanda, Vaughan and Xaba *Traditional authorities and land: the position in KwaZulu-Natal* (1995) 4–6.

12 Van der Post "Land law and registration in some of the black rural areas of southern Africa" 1985 *Acta Juridica* 213 214–215; Rutsch *South African experiences in communal property associations, community land trusts and other forms of group ownership* (1997) 2–4.

13 Bruce and Freudenberger *Institutional opportunities and constraints in African land tenure: shifting from a "repacement" to an "adaptation" paradigm* University of Wisconsin-Madison (1992) 1–6; Bassett and Jacobs "Community-based land tenure reform in urban Africa: the community land trust experiment in Voi, Kenya" 1997 *Land Use Policy* 215 216–217.

14 Eg equality (the gender issue) – see ss 9 and 39(2) of the Constitution.

15 Thomas, Sibanda and Claassens "Current developments in the South African land tenure policy" in Barry (ed) *Proceedings* 527–535.

2 THE EXISTING LEGAL FRAMEWORK

The policy of the Department of Land Affairs regarding land tenure[16] is contained mainly in the White Paper on South African Land Policy of 1997. The following principles regarding informal land tenure in rural areas are stated:[17]

- It is necessary to recognise the underlying land rights of individuals and groups (eg tribes) on land that is nominally state-owned.
- These rights should vest in the people who exercise the rights and not in institutions such as tribal or local authorities. In some cases, the underlying rights vest in groups of people and in other cases in individuals and families. Where the rights to be confirmed exist on a group basis, the right holders must have a choice about the system of land administration which will determine their rights on a day-to-day basis.
- In situations of group-held land rights, the basic human rights of all members must be protected, including the right to democratic decision-making processes and to equality. Government must have access to members of group-held systems in order to take cognisance of their views and wishes in respect of proposed development projects and other matters pertaining to their land rights.
- Systems of land administration that are popular and functional should continue to operate. They provide an important asset, given the breakdown of land administration in many rural areas. The aim is not to destroy or harm viable and representative institutions. Popular and democratic tribal systems should not be threatened by the proposed measures.

However, the following problems, caused by the lack of legally enforceable rights in property, must be addressed:

- vulnerability to interference with or confiscation of rights whether by the state or others;
- difficulty in securing housing subsidies and other development finance;
- no administrative support for the system of land rights which operates in practice, which in turn contributes to internal breakdowns and administrative chaos giving rise to abuses of power by officials, some chiefs and powerful elites; the position of the poor and vulnerable is exacerbated by the lack of legal certainty and administrative protection; and
- unscrupulous individuals taking advantage of the lack of enforceable land rights to bring others onto land in exchange for money and to bolster their personal power.[18]

The following registration problems exist regarding communal property:

- the land has not been properly surveyed;
- the rights are not exercised on a specific or defined part or parcel of surveyed land (overlapping rights like grazing rights or cultivation of a part of land not specified);
- it is too expensive to register limited real rights in those instances where the use rights qualify as limited real rights;

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16 Including communal land tenure in rural areas.

17 White Paper on South African Land Policy 1997 60–61; Thomas, Sibanda and Claassens in Barry (ed) *Proceedings* 527 528.

18 Thomas, Sibanda and Claassens 527.

- the chief or landowner refuses to cooperate in the case of registrable limited real rights;
- the rights are based on group membership or membership of a communal property association.

The existing legal framework for the occupation of communal property in rural areas is contained mainly in Proclamation R188 of 1967,[19] which provides for temporary or more permanent protection of occupation in terms of legislation[20] and permission by chiefs and tribal authorities on land which is allocated and administered as communal land. The Interim Protection of Informal Land Rights Act 31 of 1996 provides temporary protection to the abovementioned informal or insecure land rights. No person may be deprived of any informal right to land without his or her consent.[21] However, the rights and interests of a tenant, labour tenant, sharecropper, or employee are specifically excluded from the protection of this Act if such rights or interests are of a purely contractual nature or based on the temporary permission of the owner or lawful occupier of the land.[22] Furthermore, no rights in addition to real rights being held in the land, are conferred or protected by the Act.[23] Section 5(2) provides for the Act to lapse on 31 December 1997, but this date was extended to 31 December 2000.[24] At this stage all these informal rights are insecure and the promulgation of the final Land Rights Act is eagerly awaited, but in the interim the rights of millions of people remain insecure.

In terms of chapter 5 of Proclamation R188 of 1969 provision was made for the survey of arable and residential land after consultation with a tribal or community authority in the area. Quitrent of surveyed parcels of land was then granted to approved persons. A permission to occupy land for agricultural, residential, commercial, religious or educational purposes was issued in unsurveyed areas where no township development had taken place.[25] The following requirements must be met in the case of agricultural or residential occupation in terms of permission to occupy:[26]

(i) The land may not be occupied or used for any purpose other than that stated in the permission to occupy without the written consent of a magistrate or land official.

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19 *GG* 2486 of 1969-07-11 issued in terms of s 25 of the Black Administration Act 38 of 1927 and s 21(1) of the Development Trust and Land Act 18 of 1936; see also Pienaar "Toekenning en registrasie van grondregte in die nasionale state" 1989 *Journal for Juridical Science* 1–19; White Paper on South African Land Policy 1997 23; Cross "Informal tenures against the state: landholding systems in African rural areas" in De Klerk (ed) *A harvest of discontent – the land question in South Africa* (1991) 63 68–80.

20 The Constitution of South Africa Act 108 of 1996 s 25 (the property clause); the Restitution of Land Rights Act 22 of 1994; the Development Facilitation Act 67 of 1995; the Communal Property Associations Act 28 of 1996; the Interim Protection of Informal Land Rights Act 31 of 1996; the Extension of Security of Tenure Act 62 of 1997; and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; see also Van der Walt and Pienaar *Law of property* 350–362; Van der Walt 1999 *Koers* 259 270–281; Bouillon *Stedelike ruimtelike en grondontwikkeling in Suid-Afrika* (unpublished LLM dissertation) Potchefstroom University (1999) chs 3 and 4.

21 S 2.

22 S 1(1)(iii).

23 S 1(2)(a).

24 GN R1302 *GG* 20584 of 1999-11-05.

25 Reg 47(1)(a); see also Van der Post 1985 *Acta Juridica* 213 222–225. In the case of areas where township development has taken place, land may be granted in quitrent to approved persons.

26 Annexure 28.

(ii) The land may be inspected by the magistrate or land official to determine whether the regulations are being complied with or to determine the boundaries.

(iii) The rights of the occupant may not be transferred, ceded, leased or mortgaged without the consent of the magistrate or land official.

(iv) Permission to occupy does not entail any form of ownership.

(v) The right to occupy is not executable except in the case of a debt to the state secured by a registered mortgage in favour of the state.

(vi) The occupant must maintain all beacons and give free access to existing roads over the land.

The permission may be withdrawn if there is non-compliance with the above-mentioned requirements, any mistake relating to the allocation of the permission, soil erosion, or the need by the state to use the land for the prevention of soil erosion. This is also possible in cases where the occupant relinquishes his or her right, obtains the permission fraudulently, fails to occupy the land, fails to comply with the requirements of occupation, fails to pay local taxes or fails to use the land for the set purposes.[27] Additional requirements are set for land occupied for commercial, religious or educational purposes.[28]

It is clear that permission to occupy is limited by several requirements and restrictions.[29] Magistrates and land officials also have the discretion to terminate permission to occupy on several grounds. Because this kind of tenure has been interpreted as customary land-use, the policy has evolved not to grant land tenure to women. This is in contradiction to the equality principle in the Constitution 108 of 1996.[30] The result of these measures is that the right to occupy land in terms of such permission is extremely vulnerable and uncertain.[31]

There is no uniform procedure to obtain permission to occupy land. Normally a magistrate or a land official has the final say in the allocation of such permits, but they must rely on information and the consent of the local tribal or community authority.[32] The necessity for the consent of these authorities may differ from area to area. In rural areas situated in KwaZulu-Natal, the magistrate or land official has the power to make a final decision, albeit on advice of the local chief, while the chief and his councillors have the final say in Qwaqwa.[33] Previously, the magistrate had to maintain a register of issued permissions to occupy, but this practice has been abolished in most rural areas and there is seldom an accurate register of existing occupation rights. The procedure was also abolished in many areas where persons had been evicted and forcefully removed to rural areas, resulting in severe over-crowding and disputes about land rights. The present position in rural areas is therefore extremely uncertain.[34]

The establishment and registration of communal property associations in terms of the Communal Property Associations Act 28 of 1996 offers a solution to some of the above-mentioned problems. However, there are also some practical problems

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27 Annexure 29.
28 Annexure 31 (commercial); annexure 30 (educational) and annexure 32 (religious).
29 Van der Post 1985 *Acta Juridica* 213 223.
30 S 9.
31 Pienaar 1989 *Journal for Juridical Science* 1 3–5; Van der Walt 1999 *Koers* 259 261–263.
32 Reg 48.
33 Pienaar 1989 *Journal for Juridical Science* 1 5.
34 Anonymous *Tenure Newsletter* 1/1998 1; Kies *Evaluation* 14–16.

with the application of this Act. Because such associations are structured according to principles completely unfamiliar to tribal people,[35] many tribal chiefs and councillors are not prepared to accept such a system. The rules of community property associations are often perceived by members of a tribe as too sophisticated and, because they often clash with basic customs of the tribe, intensive training of the tribe would normally be required.[36] It also happens that such associations are abused by unscrupulous developers, who convince the management of the association to sell the communal property, often to the disadvantage of the tribe and individual members of the tribe. Although communal property associations have in some instances been established with remarkable success, it is clear that these associations will not solve all of the above-mentioned problems regarding communal tenure and will only have a limited value in clearing up the "messy matrix" of land tenure in rural areas. It is therefore necessary to look at the ways in which similar problems have been solved in other legal systems.

3 HISTORICAL DEVELOPMENT OF CROFTING

Crofting may be historically described as a special form of land tenure in certain parts of the Scottish highlands and islands known as the crofting counties, namely Argyll, Inverness, Ross and Cromarty, Sutherland, Caithness, Orkney and Shetland.[37] It was not recognised as a form of land-ownership, but normally entailed the right to occupy a defined parcel of land and the rights of common grazing and fishing, as well as the gathering of peat on communal property. The land normally belonged to a landowner and the crofters' rights were described as a form of land tenure inferior to ownership with the liability of paying an annual rent to the landowner. It was therefore likened to a form of long term lease.[38] These rights were not freely transferable, but it was possible to bequeath them to a direct descendant of the crofter.[39]

The crofters did not possess registered rights and security of tenure and during the last part of the nineteenth century many crofters lost their rights (sometimes without proper compensation) because landowners needed the land occupied by crofters for sheep farming.[40] In 1883 the Napier Commission was appointed to inquire into the position of crofters, especially with regard to the lack of security, and economic and social problems. They travelled extensively throughout the crofting areas, held a large number of public meetings, collected oral and written evidence, and reported to Parliament in 1884. They accepted that the economic transformation brought about throughout the Highlands during the preceding century had been accomplished with "some constraint, resistance and distress" and recommended the compelling need for Parliament to intervene in crofting affairs by way of special legislation.[41] The Napier Commission identified the basic causes for complaint as:

(a) the size of the holdings;

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35 The structure and management of communal property associations are in many ways similar to the body corporate of a sectional title scheme.

36 Rutsch *South African experiences in communal property associations, community land trusts and other forms of group ownership* (1997) 13–14.

37 Stair Memorial Encyclopaedia *The laws of Scotland* vol 1 (1987) 334.

38 McAllister *Scottish law of leases* (1995) 198.

39 MacCuish and Flyn *Crofting law* (1990) 3.

40 The notorious clearances of the nineteenth century – see MacCuish and Flyn *Crofting law* 3.

41 McAllister *Scottish law of leases* 198.

(b) the lack of security of tenure;

(c) the lack of compensation for tenant improvements;

(d) high rents; and

(e) loss of land for hunting and sporting purposes by the landlord.[42]

The Crofters Holdings (Scotland) Act of 1886 was promulgated as a result of the report of the Napier Commission. This Act introduced a unique form of tenure based on the following principles:

(a) security of tenure subject to compliance with specific statutory conditions;[43]

(b) payment by the crofter of a fair rent, not exceeding £30 per annum;[44]

(c) payment to the crofter on termination of his tenancy of compensation for permanent improvements provided by himself or his family predecessors;[45]

(d) the right to bequeath a croft to any member of the crofter's family, being his or her spouse or any person who would succeed the crofter in the case of intestate succession;[46]

(e) in the absence of a valid bequest or on intestacy, the croft passed to the eldest of the heirs of the crofter according to the rules of intestate succession;

(f) the size of the holdings was limited to 50 acres of land adjacent to the house occupied by the crofter, exclusive of common grazing rights.

A crofter was under an obligation to:

(a) pay a fair rent to the landowner;[47] [48]

(b) obtain the landowner's consent for subletting of subdivision;

(c) meet all the statutory obligations regarding the reasonable use of the property;

(d) allow the landlord to enter upon the holding, subject to payment of compensation for damages, for purposes of mining and quarrying, making roads, fences and drains, and hunting, shooting and fishing.[49] [50]

The croft was terminated under the following circumstances:

(a) death of the crofter without an intestate heir;

(b) failure to pay rent;

(c) breach of any of the statutory conditions following action in the sheriff court;

(d) failure by the crofter to reside on the holding continuously;

(e) on application of the landlord to recover croft land for a reasonable purpose, subject to payment of compensation to the crofter.[51]

In order to administer the Act, a Crofters Commission consisting of three Commissioners was appointed. The chairman had to be an advocate of the Scottish bar of not

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42 MacCuish and Flyn *Crofting law* 3.
43 Ss 1 and 3.
44 S 6.
45 Ss 8, 10 and 34.
46 S 16.
47 S 19.
48 S 6.
49 S 3.
50 MacCuish and Flyn *Crofting law* 4.
51 S 2.

less than ten years' standing and one member had to be a person who could speak Gaelic. The Commission's decision regarding matters within their jurisdiction was final, but decisions on points of law could be set aside by a court of law, namely a Sheriff's Court. The Sheriff Clerks' offices in the crofting counties had to keep a Crofters Holding Book in which all orders of the Commissioners and proceedings in every application coming before them had to be recorded. The Crofters Commission was required to report annually to the Secretary for Scotland, who presented the report to Parliament.[52] Although this Act fell far short of the demands of the crofters, especially regarding the restoration of land that crofters had lost as a result of the clearances, it was a definite point of departure in regulating the affairs of crofters and offering them some security of tenure.

An omission in this legislation was the lack of provision for the management of common grazings in the vicinity of crofting settlements. The Crofters Common Grazings Regulation Act of 1891 repaired this omission. It provided for the appointment by crofters of grazing committees who could make regulations, subject to the Crofters Commission's approval, regulating the fair exercise of crofters' joint rights in grazings. In the absence of such grazing committees appointed by crofters, the Crofters Commission could appoint such a committee and make regulations for the committee.[53] Provision for monetary penalties for breach of the regulations and the appointment by the Commission of a person (the Grazings Officer) to advise and assist grazing committees, was also made by this legislation.[54]

From 1911 until 1955 crofting was regulated in such a way that general legislation for crofters and small landholders was in force for Scotland as a whole and not only in the crofting counties.[55] The Small Landholders and Agricultural Holdings (Scotland) Act of 1931 introduced the Land Court as a replacement for the Crofters Commission and provided that action for removal for failure to pay rent or for breach of any statutory duty by either the crofter or the landlord should be instituted before the Land Court instead of the Sheriff's Court.[56]

The meaning of crofter in its original sense[57] was restored by the Crofters (Scotland) Act of 1955[58] and the Crofters (Scotland) Act of 1961.[59] It was applied solely to those tenants of holdings in the original crofting counties who had qualified as crofters under the 1886 Act or subsequent legislation and consolidated previous legislation, with some important amendments.[60] A new Crofters Commission was constituted, with the general functions of the Commission being the reorganising, development and regulating of all crofting matters. A wide range of specific functions, powers and duties to ensure that croft land continues to be occupied as far as possible to the benefit of crofting communities were granted to the Crofting Commission.[61] This was an indication of the importance of state assistance in the

52 MacCuish and Flyn *Crofting law* 5.
53 Crofters Common Grazings Regulations Act of 1908.
54 MacCuish and Flyn *Crofting law* 6.
55 The Small Landholders (Scotland) Act of 1911; the Land Settlement (Scotland) Act of 1919 and the Small Landholders and Agricultural Holdings (Scotland) Act of 1931. These statutes are collectively called the Landholders Acts. See also Stair Memorial Encyclopaedia 334.
56 S 3.
57 MacCuish and Flyn *Crofting law* 13.
58 S 21.
59 S 58.
60 Stair Memorial Encyclopaedia 334.
61 Crofters (Scotland) Act of 1955 ss 1; 2; and First Schedule.

organisation and regulation of crofting affairs. An important development was brought about by the Crofting Reform (Scotland) Act of 1976. In terms of section 21, the interests of crofters were enhanced beyond that of a mere protected tenant. Crofters obtained the right to acquire ownership, subject to certain statutory conditions, of his or her dwelling house and the adjacent land of the croft and to apply to have such property removed from crofting tenure.[62]

4 THE PRESENT APPLICATION OF CROFTING TENURE

4 1 Description and obligations of a crofter

A crofter is at present defined as a tenant of a croft and a croft means:

(a) any holding situated in the crofting counties as defined in previous legislation (the Landholders Acts)[63] as a croft, a smallholding or land held by a statutory small tenant;[64]

(b) any holding which constitutes a croft by registration in terms of section 4 of the 1955 Act;

(c) any piece of land situated in the crofting counties not exceeding 75 acres (exclusive of common grazing) or an annual rent of £50 as to which the Secretary of State directed that it should be a croft;[65]

(d) any piece of land registered as a croft by an order of the Land Court on joint application by the landlord and tenant;[66]

(e) where an owner of any land that is not in itself a croft or part of a croft agrees to grant a tenancy of that land to an existing crofter as an enlargement and the area of the croft (exclusive of common grazing) together with that land does not exceed 30 hectares and the total rent does not exceed £100.[67]

The crofter may occupy and cultivate his or her croft on the following statutory conditions:[68]

(a) the crofter is to pay rent when it is due and payable;

(b) the crofter may assign the tenancy to a person outside his or her family only with the written consent of the Crofters Commission or to a member of his family with the landlord's consent;

(c) the crofter by himself or his family with or without hired labour must cultivate the croft, without prejudice to his statutory right to make such use of the croft for subsidiary or auxiliary occupations as is reasonable;

(d) the crofter may not prejudice the landlord by the dilapidation of buildings or the deterioration of the soil;

(e) the crofter may not sublet the croft or any part of it without the written consent of the Crofters Commission, although he may sublet any dwelling house to holiday visitors;

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62 MacCuish and Flyn *Crofting law* 17.
63 See fn 55 above.
64 Crofters (Scotland) Act of 1955 s 3(1)(a), 3(1)(b) and (3)(1)(c).
65 S 3(1)(d).
66 MacCuish and Flyn *Crofting law* 13.
67 Stair Memorial Encyclopaedia 335.
68 Crofters (Scotland) Act of 1955 s 37(1) and sch 2.

(f) the crofter may not subdivide the croft;

(g) the crofter must obtain the written consent of the landlord for the erection of any dwelling house other than in substitution for a dwelling house that was already on the croft at the date of the commencement of the 1955 Act; where there is no dwelling house on the croft, the crofter may erect one dwelling house without the landlord's consent;

(h) the crofter may not persistently violate any written condition signed by him for the protection of the interests of the landlord or neighbouring crofters which is legally applicable to the croft and which the Land Court finds to be reasonable;

(i) the crofter must permit the landlord or any person authorised by him to enter upon the croft for the purpose of exercising, subject to reasonable compensation for damages, any of the following rights: mining or prospecting for minerals; quarrying; using of spring water not required on the croft; cutting or taking of timber or peat not required on the croft; opening or making roads, fences, drains or watercourses; reasonable right of way; inspecting at reasonable times the state of the croft and buildings and improvements on it and hunting, shooting, fishing or taking game, wild birds or fish, subject to compensation to the crofter.[69]

4 2 Administration of crofts

The Crofting Commission is required to compile a register of crofts and to keep it updated with regard to assignments, bequests and intestate succession.[70] The register records the names of the landlord and crofter, the rent, the extent of the croft and changes as they occur. In the case of a vacant croft, the landlord is prohibited from letting it without the consent of the Crofters Commission, or the Secretary of State if the Commission withholds consent.[71] The Commission itself can relet the croft if the landlord fails to produce acceptable proposals for reletting. A vacant croft only ceases to be a croft under a direction of the Crofting Commission, with right of appeal to the Land Court.[72]

Since 1976 the Land Court may authorise the acquisition of ownership of a croft by a crofter, subject to such conditions as may be specified.[73] The holding will normally consist of the dwelling house and the adjacent land occupied and cultivated by the crofter. The landlord must transfer the holding to the crofter subject to the payment of such compensation as determined by the Crofters Commission or Land Court. The holding then ceases to be a croft and becomes property registered in the land register. The Land Court will not order the transfer of the property to the crofter if the Land Court is satisfied that in all circumstances pertaining to the landlord, the order will cause a substantial degree of hardship to the landlord or that the order will be substantially detrimental to the interests of sound management of the estate of which the croft forms a part.[74] It is also possible for a crofter to obtain an order for the transfer of the dwelling house on a croft with such boundaries and subject to such compensation and conditions as, failing agreement with the landlord, may be specified in the order.[75]

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69 Agricultural Holdings (Scotland) Act of 1949 s 15.
70 Crofters (Scotland) Act of 1955 s 15.
71 S 16.
72 Crofting Reform (Scotland) Act of 1976 s 22.
73 Crofting Reform (Scotland) Act of 1976 s 2.1; see also *Campbell v Duke of Argyll's Trustees* 1977 SLT (Land Court) 22 and *Robertson v Secretary of State for Scotland* 1983 SLT (Land Court) 38.
74 S 2(2).
75 S 4(1).

The Secretary of State or the Crofters Commission may authorise any person to enter and inspect any land at all reasonable times to determine whether and to what extent the administrative powers vested in the Secretary of State or the Crofters Commission are to be exercised or whether all administrative directions have been complied with. In the case of residential holdings, seven days' notice must be given to the crofter and in the case of any other land, 24 hours' notice.[76]

4 3 Common grazings

The Crofters Commission may apportion a common grazing shared by two or more settlements upon the application of crofters interested, and after consultation with the grazings committee.[77] The Commission takes the place of the Land Court as administrative authority dealing with common grazing matters and handling of applications for apportionment of grazings for the exclusive use of individual settlements or individual shareholders.[78] Members of a grazings committee are elected in a prescribed manner and are normally crofters, although a person who is not a crofter but has the right to share in a common grazing, may also be appointed to the committee.[79] It is the duty of a grazing committee to maintain the common grazing and to provide, maintain and replace the fixed equipment used; to carry out improvements to the common grazing and the equipment; and to make and administer regulations for the management of the grazing. Any improvements to the common grazing or the equipment may be carried out only with the consent of the majority of the crofters and the approval of the grazings committee. The committee has a duty to repair and replace fencing, roads serving all the crofts and dykes between the grazings and the holdings of other crofters, and may recover the cost from all the shareholders in the common grazing.[80]

The grazings committee may promulgate regulations to provide for the recovery of expenditure incurred by the committee in terms of the statutes; the number and kind of stock which each crofter may put upon the common grazing; the alteration of the common grazing; the cutting of peat and the collection of seaweed; and the summoning of meetings and the procedure for the conduct of meetings. The regulations may provide for grazings to be managed on a sheepclub basis.[81] Such regulations take effect only after confirmation by the Crofters Commission. The Commission must consult with the landlord before approving the regulations. If the grazings committee fails to promulgate the necessary regulations after a request by the Crofters Commission, the Commission may promulgate the regulations. Regulations validly promulgated by either the grazings committee or the Crofters Commission have effect notwithstanding the fact that they may be inconsistent with any lease or agreement, whether entered into before or after the regulations come in force.[82]

4 4 Transfer of the croft

The croft may be transferred in any of the following circumstances:

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76 Crofters (Scotland) Act of 1955 s 30.
77 *Idem* s 23(7).
78 MacCuish and Flyn *Crofting law* 14.
79 Crofters (Scotland) Act of 1961 s 15(1).
80 Crofters (Scotland) Act of 1955 s 25; Stair Memorial Encyclopaedia 354.
81 *Neish v North Talisker Grazings Committee* 1968 SLT (Land Court) 4.
82 Crofters (Scotland) Act of 1955 s 26; see also Stair Memorial Encyclopaedia 354–355.

4 4 1 Renunciation

A crofter may renounce his tenancy of a croft upon giving the landlord one year's notice in writing. He may not renounce his tenancy of part of the croft purely to avoid liability for payment of fencing or common grazing expenses.[83]

4 4 2 Assignation

A crofter may assign his croft to a member of his family only with the consent of the landlord, or failing such consent, that of the Crofters Commission. Assignation to a person other than a member of his family may take place only with the written consent of the Crofters Commission. A "member of his family" means any person who would in any circumstances be entitled to succeed to the tenancy in terms of intestate succession.[84] In considering applications for consent, the Commission is required to hear parties and to take into account the family and other circumstances of the crofter and the general interests of the township or settlement where the croft is situated. Any assignation in contravention of these provisions will be null and void and the Commission may declare such croft to be vacant.[85]

4 4 3 Bequest

A crofter may bequeath the tenancy of his croft to any member of his family.[86] If the legatee in terms of a bequest is not a member of the crofter's family, the bequest will be valid only if the Crofters Commission confirms it on application by the legatee. The legatee is required to give notice of the bequest to the landlord within two months after the death of the crofter. If such a notice is not given timeously, the bequest becomes null and void and the tenancy will be treated in accordance with the rules of intestate succession. The giving of notice by the legatee is taken as acceptance of the bequest by the legatee. If the landlord does not object to the Commission within one month from the giving of notice, the legatee automatically takes the deceased crofter's place as from the date of the crofter's death. Where the bequest is declared null and void because of a valid objection by the landlord, the right to tenancy will be treated in accordance with the rules of intestate succession.[87]

4 4 4 Intestate succession

Where no testamentary bequest of the croft was made by a deceased crofter or where a bequest has become null and void, the right to the tenancy of the croft must be determined by the rules of intestate succession.[88] In the case of the death of a crofter after 25 November 1968, the assimilation of the deceased's estate for the purposes of succession of heritage and movables applies to crofting tenure in the same way as to other forms of property. In the case of intestate succession of the tenancy, the executor of the estate of the deceased crofter must furnish the landlord with particulars of the transferee. The landlord must accept the transferee as tenant and must notify the Crofters Commission accordingly. If the landlord is not furnished with particulars of the transferee, the landlord must notify the Commission accordingly, in which event the Commission may nominate any intestate heir as

83 Crofters (Scotland) Act of 1955 s 7.
84 *Idem* s 8(8) with reference to the Succession (Scotland) Act of 1964 Part 1.
85 Stair Memorial Encyclopaedia 339–340.
86 As to the description of "member of his family", see fn 84 above.
87 Stair Memorial Encyclopaedia 340–341.
88 Succession (Scotland) Act of 1964 Part 1.

successor to the tenancy. The Commission must notify the landlord of such nomination and the landlord must accept such nominee as a tenant. If no intestate heir is nominated by the Commission, the Commission may declare the croft to be vacant.[89]

4 4 5 Resumption by the landlord

The landlord may resume the croft or part of the croft or common grazing on authorisation by the Land Court. The landlord has to prove that the resumption is for a reasonable purpose, having regard to the benefit of the croft, the estate or the public interest. The landlord is required to compensate the crofter either by letting to him other land of equivalent value in the neighbourhood or by monetary compensation or otherwise as the Land Court may determine. The tenancy then ceases to exist as a croft.[90]

4 4 6 Removal of the crofter

The crofter may be removed from his croft where one year's rent of the croft is unpaid or he is in breach of one or more of the statutory conditions. The Land Court may, on application by the landlord or the grazings committee and after considering any objections by the crofter, issue an order for the removal of the crofter. In such circumstances the landlord is entitled to set off all rent due (or to become due) by the crofter against any compensation payable by the landlord to the crofter for improvements made on the croft.[91]

4 4 7 Conversion of crofting tenure to ownership

Since 1976[92] it has been possible for a crofter to apply to the Land Court for the conversion of his tenure to ownership. The Land Court may make an order to such effect subject to conditions as may be specified. The landlord is obliged to transfer the land in question to the crofter, unless the Land Court is satisfied that in all circumstances pertaining to the landlord such an order would cause a substantial degree of hardship to him, or that such an order would be substantially detrimental to the interests and sound management of the estate of which the croft forms a part.[93] The Land Court may also determine that the landlord may retain fishing or hunting rights, as well as the payment of reasonable consideration by the crofter to the landlord for such conversion.[94] A crofter has an absolute right to obtain ownership of the dwelling house on the croft, as well as land suitable for a garden around the house.[95] The person who wishes to acquire ownership of the croft must apply to the Crofting Commission for a decrofting direction, whereafter the property is registered in the land register.

4 4 8 Vacant holdings

If a holding becomes vacant in any of the above-mentioned ways and remains unlet for six months, it ceases to be a croft only if the landlord applies to the Crofting

89 Stair Memorial Encyclopaedia 341–342.
90 *Idem* 343–344.
91 *Idem* 344–345.
92 Crofting Reform (Scotland) Act of 1976 s 2(1).
93 MacCuire and Flyn *Crofting law* 16.
94 Crofting Reform (Scotland) Act of 1976 s 3(2) determines that the crofting value payable to the landlord normally equals fifteen years of the present annual rent.
95 MacCuire and Flyn *Crofting law* 16.

Commission for a decrofting direction, after which it is registrable in the land register. If a decrofting direction is not sought or allowed, the landlord has to notify the Crofting Commission that the croft is available for reletting. The landlord may not let the holding to any person without the written approval of the Crofters Commission, or where such consent is withheld, the Secretary of State. The landlord may submit his proposal for reletting the croft to the Crofting Commission. If the Commission refuses to accept the proposal, the Commission may let the croft on such terms and conditions as it thinks fit after consultation with the landlord.[96]

5 LESSONS FOR SOUTH AFRICA

5 1 South Africa is not the only country that has to cope with the administration of communal property. Many other countries have dealt creatively with the problems regarding communal tenure and it is worthwhile to take cognisance of the developments in other legal systems to the extent that such developments are applicable to the South African legal system. It is not necessary to reinvent the wheel.

5 2 Security of rural tenure should be based on the adaptation of existing procedures and customs rather than on the replacement of tribal customs and structures. The individualisation of land tenure does not necessarily have a positive economic effect (as has been proved in many African legal systems) and many people in rural areas want security within their tribal structures and customs.[97]

5 3 It is necessary to acknowledge that ownership is not the only way to obtain security of tenure in rural areas and that there are many other ways to handle the land tenure question. Prerequisites for security of tenure are that the rights must be acknowledged and properly managed by means of an accurate land information system. Such security is also possible in the case of land tenure rights other than ownership.

5 4 The Scottish land tenure system has been developed to such an extent that a reliable record of crofting tenure secures the rights of tenants in such a way that it is possible to upgrade communal tenure to ownership within a set procedure and with the minimum registration cost. Without a proper land information and registration system of communal land rights in South Africa, it will not be possible to obtain security of tenure and solve the problems of overcrowding of communal property and the resulting conflicting land tenure rights.

5 5 To develop a reliable registration system it is necessary to make a full land audit of land rights and land use, negotiate a settlement that leads to legally binding agreements and to register land rights.[98] This will be a costly and time-consuming procedure, but it is a necessary point of departure to obtain an accurate land information system. The work of the first Crofting Commission in Scotland from 1883 to 1885 stresses the importance of negotiated settlements between land users. Furthermore, it took almost 70 years (from 1883 to 1951) to develop the crofting system to such an extent that security of tenure was achieved, and a further 25 years (1951–1976) before it was possible to upgrade crofting tenure to registered ownership.

5 6 The grazing committees in Scotland, consisting of crofters, are good examples of the administration of communal property in accordance with democratic values

96 *Idem* 16–17.
97 See fn 12 and 13.
98 See fn 4.

and principles. The importance of the grazing committees has been increased considerably and such committees contribute in large measure to the success of crofting tenure in Scotland. In South Africa, communal property associations display some similarities to grazings committees. Communal property associations should be established in South Africa where and when such associations offer a viable solution for the administration of communal property, but it is clear that alternatives to communal property associations should be developed and recognised in cases where these associations do not offer such solutions.

5 7 The Crofting Commission and Land Court in Scotland handle the administration, adjudication and transfer of crofting tenure in such a way that security of tenure and the resolution of disputes is attained quickly and without high cost. It is interesting to note that after the first Crofters Commission in Scotland had been dissolved in 1931, the Crofting Commission was re-established in terms of the 1955 Act. In South Africa it is necessary to regulate the administrative matters of communal property by way of an administrative body consisting of members of the Department of Land Affairs and representatives of tribal chiefs and councillors in specific areas. Without a representative and acceptable administrative body, security of tenure, the solving of disputes and sustainable development in the rural areas will be impossible.

5 8 The concept of communal property associations and the procedure for establishing such associations in terms of the Communal Property Association Act 28 of 1996 are often not acceptable to people living in rural areas. In circumstances where the establishment of a communal property association is not viable, it is necessary to establish another form of cooperation. The functioning of grazings committees and the Crofters Commission in Scotland is a good example of a participative management and administration of land tenure affairs.

The Judge is a mythic figure in part because this is understood to be a struggle, much like a religious or monastic struggle, to renounce what is natural and also corrupt and banal in human conduct, to depersonalize him- (or her)self. The Judge has to struggle to achieve his (or her) own constraint. Anyone can try and succeed at this to some extent, but it is one of the domains in which we recognize the possibilities of talent, greatness and genius, in which we have an auteur theory of culture.

Duncan Kennedy A critique of adjudication 3.

AANTEKENINGE

NEW PROBLEMS RELATING TO CONTRIBUTION IN INSOLVENT ESTATES

1 Introduction

Statistics tell us that in more than 40 per cent of all insolvencies, a contribution is levied against creditors (see South African Law Commission Working Paper 29 Project 63 *Review of the law of insolvency* 148). No wonder, then, that the collection of a contribution by a trustee or liquidator becomes a problem, especially when there is no one from whom to collect the contribution. Inability to collect the contribution means that the trustee will probably have to foot the bill him- or herself, which means writing off an amount that probably represents, *inter alia*, the trustee's fee.

Although not new in the context of the administration of insolvent estates in practice, two problems relating to contributions, to which no one apparently has a ready solution, are starting to present themselves frequently, causing major headaches for trustees and liquidators alike. The difficulties relate specifically to the interpretation of section 14(3), read with section 106, of the Insolvency Act 24 of 1936 ("the Insolvency Act").

The first problem, which is one of increasing proportion facing banks in South Africa today, is the insolvency of the owner of a sectional-title unit whose levies have fallen so far in arrears that the arrear levies exceed the market value of the unit itself. In cases where the levies have not fallen so far in arrears, the arrear levies none the less diminish the proceeds of the unit to such an extent that there is an insufficient surplus to cover the outstanding amount due under the bond which has been registered over the unit. Obviously, this has far-reaching financial implications for the banks which provide the financing for the purchase of these units in the first place.

To exacerbate the problem, the body corporate of the sectional-title scheme is often the applicant creditor in proceedings to sequestrate the owner of the unit, the cause of action being the arrear levies owing to the body corporate. The question which then arises is whether the body corporate is liable for a contribution in terms of section 106, read with section 14(3) of the Insolvency Act, should there be a shortfall in the free residue of the estate concerned.

The second problem relates to the levying of contributions in the insolvent estates of companies and close corporations which are wound up voluntarily. In cases such as these, there is no applicant creditor, as the members pass a resolution to wind up the company voluntarily, even though the estate is insolvent (see ss 349 and 351 of the Companies Act 61 of 1973 ("the Companies Act"), and s 67 of the Close Corporations Act 69 of 1984 ("the Close Corporations Act") read with s 351 of the

Companies Act). In fact, in cases such as these, there is not even an order of court in terms of which the company or close corporation is wound up. Section 342(2) of the Companies Act renders sections 14(3) and 106 of the Insolvency Act applicable to the insolvent estates of companies and close corporations.

The purpose of this note is to investigate these problems and not only to provide possible answers to the questions posed above, but also to suggest ways of preventing these problems from arising in the future.

2 Bodies corporate, arrear levies and the levying of contributions

2 1 The rights of the bondholder in terms of the loan agreement (bond document) and the Sectional Titles Act 95 of 1986

Before I refer to the rights and obligations of the owner of the sectional-title unit, the body corporate and the mortgagee in cases of insolvency, it is important to point out that the mortgagee has certain rights which emanate from the bond document (namely, the contract between the sectional-title owner and the bank) and the Sectional Titles Act 95 of 1986 ("the Sectional Titles Act"). Often it is only because the mortgagee has not exercised its rights under the loan agreement or under the Sectional Titles Act that problems arise in practice.

In my view, if mortgagees exercise their rights at the appropriate time, it would be possible for them to reduce their losses by forcing owners to pay their levies timeously and to keep their levies up to date. It is a simple procedure to determine whether an owner's levies are paid up or not. Section 37(3) of the Sectional Titles Act reads as follows:

> "The body corporate shall, on the application of an owner or mortgagee of a unit, or any person authorized by such owner or mortgagee, certify in writing –
>
> (*a*) the amount determined as the contribution of that owner;
>
> (*b*) the manner in which such contribution is payable;
>
> (*c*) the extent to which such contribution has been paid by the owner; and
>
> (*d*) the amount of any rates and taxes paid by the body corporate in terms of section 51 and not recovered by it."

From this subsection it is clear that mortgagees have the right to determine the state of the owner's levies and are able to take appropriate steps should the levies fall into arrears.

The loan agreement between the owner and the mortgagee, which is incorporated in the sectional bond document, also makes provision for the mortgagee to be informed of meetings of the body corporate, and provides for the mortgagee to be present at such meetings and to vote on behalf of the owner. Bodies corporate which do not make sufficient effort to collect arrear levies in accordance with the provisions of the Sectional Titles Act, can be pressurised by mortgagees to take the necessary steps to collect arrear levies. In this way, they would minimise their losses and ensure that the mortgagor does not fall substantially behind with the payment of levies.

The above solution does, however, mean that the banks will need to have hands-on management in order to play policeman over the thousands of mortgagors that own sectional-title units, and it is therefore probably not a practical proposal.

Another possible solution, which is at any rate more practical than the previous one, is to insist that mortgagors pay their levies to the body corporate by way of debit orders. This can be made one of the provisos before an application for a

housing loan is even considered, or before the loan which has been granted is paid out. In the case of a mortgagor cancelling a debit order, the bank will immediately be aware of a potential problem and can take steps to protect its interests.

2 2 The duty of the body corporate to collect levies

While it is true that there are a number of options open to a mortgagee to ensure that the payment of levies by mortgagors is kept up to date, there is also an obligation on the part of the body corporate, through the elected trustees and/or managing agent which they have appointed, to collect levies (see s 37(1) (b) of the Sectional Titles Act). The trustees of a sectional-title scheme should not allow owners to fall too far behind with the payment of levies, since they have various powers in terms of the Sectional Titles Act which they can use to collect outstanding contributions.

Unfortunately these powers are not always utilised by bodies corporate, and this in turn leads to large arrears which cannot be paid by the owner. An interesting question which arises here, is whether the body corporate should be prevented from recovering arrear levies where it has allowed levies to fall into arrear for more than a specified number of months. What a reasonable period of time would be in these circumstances is probably open to debate but, having been involved with schemes of this nature before I suggest there is no reason why levies should fall more than three months in arrear at any time. A person who falls more than three months into arrear is clearly in financial difficulty, and steps should be taken immediately to remedy the situation.

2 3 Arrear levies and the Insolvency Act

In terms of the judgment in *Nel v Body Corporate of the Seaways Building* 1996 1 SA 131 (A), arrear levies are an administration expense which must be set off against the proceeds of a sectional-title unit before the surplus can be applied in paying the creditor whose claim is secured by the registration of a bond over the property. From the decision in the *Seaways Building* case it is clear that the quantum of the levy is not limited to rates and taxes and the provision of water, but includes other amounts such as the cost of painting the building, the cost of other improvements, and maintenance expenses. (It is worth noting that apart from the *Seaways Building* case, the definition of "tax" in s 89(5) of the Insolvency Act is wide enough to cover levies payable in terms of the Sectional Titles Act. It would, however, be preferable to use the *Seaways Building* case as authority, since the recovery of arrear levies is not limited to a period of two years, as is the position in terms of s 89(1) of the Insolvency Act.)

The cause of this particular problem is that arrear levies are an exception to the rule that all creditors in an insolvent estate must prove a claim for the amounts due to them at the date of sequestration, in respect of pre-sequestration debts. Arrear levies are also amounts due by the insolvent prior to sequestration but, owing to the provisions of section 89(1) read with section 89(5) of the Insolvency Act and the decision in the *Seaways Building* case, the amount owing is treated, not as a claim against the insolvent estate, but as an *administration expense*. This means that the body corporate need not prove a claim in terms of section 44 of the Insolvency Act for the arrear levies due to it, since the arrear amounts must be paid as part of the administration expenses before a levy clearance certificate will be issued by the body corporate for the transfer of the unit out of the insolvent estate.

From the decision in the *Seaways Building* case it follows that the arrear levies claimed as an administration expense in terms of the Sectional Titles Act are not limited to two years prior to sequestration (as is the case in respect of arrear taxes in terms of s 89(1) of the Insolvency Act).

Since a body corporate need not prove a claim in terms of the Insolvency Act for the arrear levies due to it, the question arises whether the body corporate is in fact a "creditor" of the estate in question, and therefore a "creditor" in terms of section 106 read with section 14(3) of the Insolvency Act.

2 4 The body corporate as applicant creditor and its liability for contribution in terms of the Insolvency Act

As I pointed out in an earlier article ("Kontribusiepligtigheid van skuldeisers in insolvente boedels" 1993 *De Rebus* 1004 1005–1007), the position of the applicant creditor in respect of contributions is not as simple as would at first glance appear. It is clear, however, that the nature of the applicant creditor's claim plays a major role in determining whether or not the creditor is liable for a contribution.

Section 14(3) of the Insolvency Act reads as follows:

> "In the event of a contribution by creditors under section *one hundred and six*, the petitioning creditor, whether or not he has proved a claim against the estate in terms of section *forty-four*, shall be liable to contribute not less than he would have had to contribute if he had proved the claim stated in his petition."

The fact that the body corporate does not need to prove a claim in order to be paid creates a problem, in that the provisions of section 14(3) cannot be applied. In my view, the purpose of this provision is to compel applicant creditors to pay a contribution in the event of such an applicant choosing not to prove its claim once the sequestration order has been granted. This is especially the case in so-called friendly sequestrations, where a family member or friend brings the application purely to assist the debtor in obtaining an order he or she would not have obtained under an application for voluntary surrender.

Although it can be argued that the purpose of section 14(3) is to ensure that there will always be someone to pay a contribution levied in an insolvent estate (by way of compulsory sequestration), the provisions of section 14(3) are not wide enough to include an applicant creditor who does not need to prove a claim in order to be paid a pre-sequestration debt. In the result, in cases in which a body corporate is the applicant creditor in an insolvent estate, it is my view that the body corporate cannot be held liable for a contribution in terms of section 14(3) when there is a shortfall in the free residue of that estate.

3 The levying of contributions in a company or close corporation which is being wound up as a voluntary winding-up by creditors

3 1 Different modes of winding-up

It is trite that a company (or a close corporation, although for ease of reference only companies are referred to in what follows) may be wound up either by the court or voluntarily. A voluntary winding-up may be either by members or by creditors. (The terms are confusing, for in both cases the resolution is passed by *members*.) In the case of a voluntary winding-up by members, the company is *solvent* and contribution does not become the creditors' problem, since there are no unpaid creditors. It may be assumed that there will also be no need for contribution, since the company is solvent. In the case of a voluntary winding-up by creditors, however, the estate is *insolvent* and there is a very real danger that a contribution may be levied in such an estate.

The problem here is that there is no "applicant creditor", since there has been no application to court, be it by a creditor or by some other person or entity. The company is placed in liquidation by the mere passing of a resolution and the

subsequent registration of it by the Registrar of Companies in terms of section 200 of the Companies Act (see s 352 of the Companies Act).

3 2 Provisions of the Insolvency Act apply

Section 342(2) of the Companies Act provides:

> "The provisions of the law relating to insolvency in respect of contributions by creditors towards any costs shall apply to every winding-up of a company."

This means that section 14(3), read with section 106 of the Insolvency Act, will also apply to companies which are being wound up in terms of the Companies Act. There is, however, no applicant creditor in the case of a voluntary winding-up by creditors, and consequently this subsection will apply only to companies that are being wound up by the court.

The question now arises: Who will be responsible for the payment of a contribution in a company which has been wound up by way of a voluntary winding-up by creditors, where no creditors have proved claims and a shortfall exists in the free residue of the company in question? Since there is no one to pay the contribution, the costs will probably have to abate in terms of section 97(2)(c) of the Insolvency Act. In effect, this means that the liquidator will (once again) have to absorb the loss. Abating the costs of sequestration in accordance with section 97(2)(c) will leave the liquidator in a quandary: abating, for example, the costs for providing a bond of security, the liquidator exposes himself to the possibility that the surety will not grant the liquidator cover in the future. If the liquidator cannot obtain a bond of security for the proper performance of his functions, he will no longer be able to take appointments and this will result in the liquidator's demise as a practitioner. It is for this reason that liquidators absorb the contribution themselves, and hope that the loss can be offset in a larger estate with a bigger fee.

4 Provisions in proposed new insolvency legislation

While the South African Law Commission has been busy with insolvency-law reform for a number of years now, there have been recent proposals for a new unified Insolvency Act which will provide for a single statute regulating the insolvency of all types of debtor (see the *Final Report Containing Proposals on a Unified Insolvency Act, Volume 1*, prepared by the Centre for Advanced Corporate and Insolvency Law at the University of Pretoria ("the Unified Proposals"), which is available for perusal in the Merensky Library at the University).

The question is whether the new provisions take cognisance of the problems currently being experienced with the levying of contributions. Clause 99 of the Draft Insolvency and Business Recovery Act (contained in the Unified Proposals) provides for contribution by creditors in the event of a shortfall in the free residue of an estate (this clause has been taken from the Draft Insolvency Bill prepared by the South African Law Commission, clause 94). The clause provides as follows (only the relevant portion has been reproduced):

> **"Contribution by creditors towards cost of liquidation**
>
> Where there is no free residue in an insolvent estate or where the free residue is insufficient to meet all the costs mentioned in section 83 the following rules shall apply with regard to the liability of creditors to pay contributions towards defraying any such deficiency:
>
> (a) The creditor upon whose application the liquidation order was made, whether or not he or she has proved a claim against the estate, shall be liable to contribute not less than the amount he or she would have had to contribute if he or she had proved a claim for the amount stated in his or her application for liquidation and where he or she is a secured creditor, without reliance on his or her security; . . ."

While this provision has admittedly been drafted more carefully than the current section 14(3) of the Insolvency Act, in my view it is still open to different interpretations when one is confronted with the problems canvassed in this note. The provision should be drafted to provide specifically for the problems currently being experienced.

In addition to the above provision, the South African Law Commission's Draft Insolvency Bill has added a new dimension to the levying of contributions, more specifically in cases where the shortfall is not recoverable from any of the creditors in the estate. Clause 3(3)(b) of the bill (which deals with the application by a debtor for the liquidation of his estate) reads as follows:

> "An application referred to in subsection (1) shall be accompanied by –
>
> (a) . . . ;
>
> (b) a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant *and all costs of the liquidation of the estate referred to in section 79, which are not recoverable from other creditors of the estate*" (my emphasis).

This clause has been duplicated in clause 4(3)(c) of the Law Commission's Insolvency Bill, as well as in clauses 3 and 4(3) of the Unified Proposals, the latter of which relates to applications for the liquidation of companies and close corporations. This is a vast improvement on the current provisions contained in sections 9(3)(b) and 14(1) of the Insolvency Act and section 346(3) of the Companies Act, which provide that the security furnished by the applicant in a compulsory sequestration or liquidation expires as soon as a trustee or liquidator is appointed.

The effect of these new proposals is that the security provided by an applicant for the liquidation of an estate will remain operative until the estate has been completely wound up. Should there be no creditors who are liable for contributions, or should the liquidator fail to succeed in collecting the contributions, the bond will be called up and the proceeds used to defray the outstanding expenses. These provisions have far-reaching implications, and will have a major impact on the provision of security by insurance companies in the bringing of liquidation applications under a new Insolvency Act.

5 Conclusion and recommendations

In my view, clause 99 of the Unified Proposals does not adequately address the problems discussed in this note. If these eventualities are specifically catered for in a new Insolvency Act, the problems discussed here can be pre-empted.

In the result, I suggest that the clause should be amended to read as follows (additions to the clause reproduced above are emphasised):

> **"Contribution by creditors towards cost of liquidation**
>
> Where there is no free residue in an insolvent estate or where the free residue is insufficient to meet all the costs mentioned in section 83 the following rules shall apply with regard to the liability of creditors to pay contributions towards defraying any such deficiency:
>
> (a) The creditor *or other person* upon whose application the liquidation order was made, whether or not he or she has proved a claim against the estate, *and whether or not he or she was required to prove a claim against the estate*, shall be liable to contribute not less than the amount he or she would have had to contribute if he or she had proved, *or was required to prove*, a claim for the amount stated in his or her application for liquidation and where he or she is a secured creditor, without reliance on his or her security; . . .

(e) *if the estate in question is a debtor which has been liquidated as a voluntary liquidation by resolution, and there are no contributories as hereinbefore provided, then the members of such debtor shall be liable for the payment of the shortfall, each member in proportion to his or her share or interest in the debtor concerned.*"

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UITLEG EN TOEPASSING VAN DIE WET OP VOORKOMING VAN ONWETTIGE UITSETTING EN ONREGMATIGE BESETTING VAN GROND 19 VAN 1998

1 Inleiding

Onregmatige okkupasie en onwettige besetting van grond is in die verlede hoofsaaklik deur die Wet op die Voorkoming van Onregmatige Plakkery 52 van 1951 beheer. Die algemene strekking van die wet was dat onregmatige okkupasie of plakkery 'n misdryf daargestel het wat met taamlik drakoniese uitsettingsprosedures aangespreek moes word. Uitsetttingsbevele het gewoonlik ook met slopingsopdragte gepaard gegaan. Hoewel daar onder skrywers gemengde opvattings met betrekking tot dié wet bestaan het, het heelwat stemme veral gedurende die laaste paar jaar opgegaan teen die onderliggende filosofie van die wet, sowel as uitlatings dat die toepassing van die wet in effek die behuisingsnood vererger het, dat dit in die praktyk uiters moeilik uitvoerbaar was, dat dit nie die ideale beplanningsinstrument is wat dit veronderstel was om te wees nie en dat dit plakkers onnodig onverdraagsaam benader het (Lewis "The Prevention of Illegal Squatting Act: the promotion of homelessness?" 1989 *SAJHR* 233, Dodson "The right to housing as a basic human right and the law relating to informal settlement" 1996 *HRCLJSA* 19; Pienaar and Muller "The impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on homelessness" 1999 *Stell LR* 370). Met die inwerkingtreding van eerstens die interim- en later die finale Grondwet van die Republiek van Suid-Afrika 108 van 1996 en die Handves van Menseregte, spesifiek die huidige artikel 26, het die gevaar ontstaan dat kernbepalings van die Plakkerwet (soos dit ook bekend gestaan het) onkonstitusioneel verklaar kon word. Die gevolg was nie net 'n wysiging van die 1951-wet nie, maar die formulering en implementering van 'n nuwe wet, te wete die Wet op die Voorkoming van Onwettige Uitsetting en Onregmatige Besetting van Grond 19 van 1998 (hierna die 1998-wet) wat gedurende Junie 1998 in werking getree het.

Die vraag wat onvermydelik ontstaan, is hoe die nuwe wet geïnterpreteer en in die praktyk toegepas gaan word. Kwelpunte is onder meer wanneer die wet toepassing vind, of daar miskien gevalle van onregmatige okkupasie is wat buite die strekwydte van die wet val, wie *locus standi* het om onregmatige okkupeerders uit te sit en welke remedies hiervoor aangewend kan word. Die oogmerk van hierdie aantekening

is om die interpretasie en praktiese toepassing van die wet in die lig van twee onlangse uitsprake, naamlik *Absa Bank Limited v Amod* [1999] 2 All SA 423 (W) en *Vanessa Ross v South Peninsula Municipality* saakno A741/98 (K), uiteen te sit en te evalueer.

2 Kernbepalings van die wet

Alvorens dié dringende kwessies aangespreek word, word die vernaamste bepalings van die wet eerstens uiteengesit.

2 1 Oogmerke van die wet

Die oogmerk van die 1998-wet is om onregmatige uitsetting te verbied, om prosedures vir die uitsetting van onregmatige okkupeerders uiteen te sit, om die vorige sowel as ander uitgediende wette te herroep en om vir ander aangeleenthede wat hiermee verband hou, voorsiening te maak (sien langtitel).

2 2 Toepassing van die wet

Die wet geld nasionaal, is op alle grond van toepassing en sal relevant wees wanneer onregmatige okkupasie van grond ter sprake is. 'n Onregmatige okkupeerder is 'n persoon wat grond sonder die uitdruklike of stilswyende toestemming van die eienaar of persoon in beheer beset, of grond beset sonder enige ander wettige reg om dit te doen (uitsluitend 'n persoon wat ingevolge die Wet op die Uitbreiding van Sekerheid van Verblyfreg 62 van 1997 grond okkupeer of 'n persoon wie se informele reg op grond deur die Wet op die Tussentydse Beskerming van Informele Grondregte 31 van 1996 beskerm word). Die eienaar is die geregistreerde eienaar van grond (of 'n gedeelte van grond) en sluit ook 'n staatsorgaan in. Die persoon in beheer is 'n persoon wat regsbevoegdheid het of op die tersaaklike tydstip regsbevoegdheid gehad het om toestemming aan 'n persoon te verleen om op die betrokke grond te gaan of daarop te woon. Onder staatsorgaan word verstaan 'n orgaan soos uiteengesit in artikel 239 van die Grondwet.

Die verwysing na die Wet op Uitbreiding van Sekerheid van Verblyfreg kan soos volg verklaar word. Volgens hierdie wet (wat normaalweg gelding in landelike gebiede het of op grond wat vir landboudoeleindes aangewend word – a 2), word die verblyfreg van persone beskerm wat grond okkupeer waarvan hulle nie die geregistreerde eienaars is nie. Dié wet het spesifieke uitsettingsprosedures wat gevolg moet word indien okkupeerders vir doeleindes van die wet grond sonder toestemming beset. 'n Persoon is dus nie 'n onregmatige okkupeerder indien hy of sy binne die strekwydte van Wet 62 van 1997 val nie. Die Wet op die Tussentydse Beskerming van Informele Grondregte beskerm persone se regte vir die duurte van die regering se grondbeheerhervormingsprogram. Persone wat wel beskerming onder dié wet geniet, word dus nie as onregmatige okkupeerders vir doeleindes van die 1998-wet beskou nie.

Wat betref die verwysing na "stilswyende toestemming", kan daar ook na onlangse regspraak handelende oor huurarbeiderwetgewing verwys word, hoewel laasgenoemde nie spesifiek op die 1998-wet betrekking het nie. In *Labuschagne v Sibya and Sibya* (LCC 28/98), wat oor die toepassing van die Wet op Grondhervorming (Huurarbeiders) 3 van 1996 gehandel het, het regter Moloto bevind dat ten einde suksesvol te wees met 'n beroep op stilswyende toestemming

> "it had to be proven that the person who allegedly gave consent acted in such a way or refrained from acting in a way which manifested consent and, secondly, the recipient's conduct or lack therefor was such that it indicated acceptance of the grant of tacit consent" (38).

In *Atkinson v Van Wyk* 1999 1 SA 1080 (LCC) is die volgende met betrekking tot stilswyende toestemming in die geval van plaaswerkers kragtens die Wet op die Uitbreiding van Sekerheid van Verblyfreg bevind:

> "[T]he probability is that the plaintiff, as owner, would have been aware if a person occupied one of his employee's cottages with the consent of the employee. If he was aware of her occupation and did not object to it when the employment contract still subsisted, that would have been sufficient to constitute consent. Tacit consent is sufficient for purposes of the ESTA. If the second defendant did originally have tacit consent to reside on the farm, then even if it terminated with the termination of the employment of the first defendant, the effect of the original consent, together with the fact that the second defendant continued to reside on the land, would have brought her under the provisions of section 3(2) of the ESTA" (1084D–F).

Hoewel bogenoemde regspraak nie na die 1998-wet verwys nie, kan dit steeds met vrug aangewend word as aanduidend van wat onder stilswyende toestemming verstaan word. Dit staan vas dat stilswyende toestemming net so geldig soos uitdruklike toestemming is en dat dit onregmatigheid van okkupasie uitskakel, maar dat dit telkens van die besondere omstandighede afhang of dit wel gerealiseer het.

2 3 Locus standi

Dit is in beginsel die taak en verantwoordelikheid van die grondeienaar om aansoek te doen om 'n uitsettingsbevel. Soos hierbo uiteengesit, sluit die begrip "eienaar" ook 'n staatsorgaan in. Die 1998-wet maak verder ook spesifiek in artikel 6 ("uitsetting op aandrang van staatsorgaan") voorsiening daarvoor dat plaaslike owerhede die bevoegdheid het om aansoek te doen om die uitsetting van okkupeerders op grond wat binne hul jurisdiksiegebied val. Dus ook in gevalle waar plaaslike owerhede nie die geregistreerde grondeienaars is nie.

3 Die verskillende opsies vir optrede teen onregmatige okkupeerders

3 1 Gemenereg

Grondeienaars kan van die gemenereg of van die prosedures soos uiteengesit in die 1998-wet gebruik maak. Die *rei vindicatio* is ter beskikking van grondeienaars in welke geval aan die volgende vereistes voldoen moet word (*Chetty v Naidoo* 1974 3 SA 13 (A)):

(a) Die eiser moet bewys dat hy of sy die eienaar is. In die geval van grond sal die voorlegging van die titelakte voldoende wees.

(b) Die eiser moet bewys dat die saak nog bestaan en identifiseerbaar is.

(c) Die eiser moet bewys dat die saak in besit van die verweerder is.

Die aanwending van die *rei vindicatio* is ook intussen deur die toepassing van die bepalings van die 1998-wet beïnvloed. Dit word hieronder (4 1) by die impak van regspraak in meer besonderhede bespreek.

3 2 Prosedures uiteengesit in die 1998-wet

Die wet maak verder vir die volgende aansoekprosedures voorsiening: artikel 4 (die "normale" uitsettingsaansoek), artikel 5 (dringende uitsetting) en artikel 6 (uitsetting op aandrang van 'n staatsorgaan). Sowel privaateienaars as plaaslike owerhede kan van die gewone en dringende prosedures gebruik maak. In die geval van gewone aansoeke moet die hof minstens 14 dae voor die aanhoor van verrigtinge geskrewe en doelmatige kennis ("written and effective notice") op die onregmatige okkupeerder en die munisipaliteit in wie se regsgebied die grond geleë is, bedien. Dokumente

word soos gewoonlik in ooreenstemming met die Landdroshofreëls beteken, met die kwalifikasie dat die betekening aangepas kan word as die hof oortuig is dat dit nie gerieflik of spoedig kan geskied nie (a 4(4)).

Die kennisgewing moet die volgende inligting bevat:

- dat verrigtinge ingestel is ten einde aansoek te doen om 'n uitsettingsbevel;
- die datum en tyd van die hofverrigtinge;
- die gronde vir die beoogde uitsetting; en
- bevestiging dat die okkupeerder geregtig is om voor die hof te verskyn en dat om regshulp aansoek gedoen kan word.

Daar word verder 'n onderskeid getref tussen gevalle waar grond vir minder as ses en langer as ses maande geokkupeer is. In beide gevalle sal die hof 'n uitsettingsbevel toestaan indien dit reg en billik geag word na oorweging van alle tersaaklike inligting. Daar is nie 'n uitputtende lys van faktore wat oorweeg *moet* word nie, maar daar word wel spesifiek melding gemaak van die regte en behoeftes van bejaardes, kinders, gestremde persone en huishoudings waarvan 'n vrou die gesinshoof is. Indien die grond egter vir 'n tydperk van langer as ses maande geokkupeer is, is een van die *bykomende* faktore wat deur die hof oorweeg kan word, die kwessie of grond beskikbaar gestel is of redelikerwys beskikbaar gestel kan word deur die munisipaliteit of 'n ander staatsorgaan of grondeienaar vir die hervestiging van okkupeerders.

'n Uitsettingsbevel sal toegestaan word indien die kennisgewing die korrekte inligting bevat, indien dit op die korrekte wyse bedien is en indien daar geen geldige verweer geopper is nie. Die wet bevat geen lys van verwere wat moontlik ter sprake kan kom nie. In die lig van die definisie van "onregmatige okkupeerder" sal die betwisting van onregmatigheid (die aanwesigheid van uitdruklike of stilswyende toestemming of 'n reg op okkupasie) 'n geldige verweer daarstel sowel as nienakoming van enige van die hierbovermelde vereistes. Die uitsettingsbevel moet verder die datum aandui waarop die onregmatige okkupeerder die grond moet ontruim (wat billik en regverdig in die omstandighede moet wees) sowel as 'n datum waarop die uitsettingsbevel uitgevoer sal word indien die onregmatige okkupeerder nie die grond ontruim het nie. In die lig van regspraak met verwysing na die Wet op die Uitbreiding van Sekerheid van Verblyfreg, is bepalings met betrekking tot die inhoud van uitsettingsbevele nie bloot aanwysend nie, maar dwingend – *Albertyn v Bhekophezulu* (LCC 6R/99). Uitsettingsbevele wat kragtens laasgenoemde wet uitgereik is, is telkens deur die Grondeisehof op hersiening tersyde gestel omdat landdroshowe nagelaat het om volledige inligting in die uitsettingsbevel uiteen te sit (*Denleigh Farms v Mhlanzi* (LCC 22R/99); *Malan v Gordon* 1999 3 SA 1033 (LCC); *Conradie v Fortuin* 1999 3 SA 1027 (LCC)).

'n Uitsettingsbevel kan ook bepalings bevat vir die sloping en verwydering van geboue en strukture, welke bepalings ook voorwaardelik kan wees.

Dit is ook moontlik om ingevolge artikel 5 vir dringende verrigtinge, hangende die uitslag van verrigtinge om 'n finale bevel, aansoek te doen. Dit sal moontlik wees indien

- daar 'n werklike en dreigende gevaar van wesenlike besering of skade aan enige persoon of eiendom bestaan indien die onregmatige okkupeerder nie onmiddellik van die grond uitgesit word nie;
- die waarskynlike ontbering vir die eienaar of enige ander geaffekteerde persoon indien die bevel nie toegestaan word nie, groter is as die waarskynlike ontbering vir die onregmatige okkupeerder teen wie die bevel aangevra word, indien so 'n bevel vir uitsetting verleen word; en indien

- daar geen ander doeltreffende remedie beskikbaar is nie.

Hoewel die inhoud van die kennisgewing dieselfde as by gewone aansoeke is, word daar, anders as by gewone aansoeke, nie 'n *tydperk* vereis waarbinne kennisgewing moet geskied nie: die wet maak slegs melding van "geskrewe en doelmatige kennis".

Indien die staatsorgaan aansoek doen om 'n uitsettingsbevel met betrekking tot grond wat binne die regsgebied geleë is, moet die bepalings van artikel 6 nagekom word. Dit sal toegestaan word indien dit regverdig en billik in die omstandighede is en indien die toestemming van die staatsorgaan benodig word vir die oprigting van geboue of strukture op die tersaaklike grond en besetting en oprigting ingetree het sonder die nodige toestemming. Dit sal verder ook net toegestaan word indien dit in die openbare belang is – naamlik in die belang van gesondheid en veiligheid van sowel die besetters as die publiek. By die oorweging van die aansoek word daar in die besonder aan die volgende aspekte aandag geskenk:

- die omstandighede waaronder die grond geokkupeer is en geboue opgerig is;
- die tydperk van okkupasie; en
- die beskikbaarheid van geskikte alternatiewe akkommodasie of grond.

Voordat die staatsorgaan bogenoemde aksie loods, moet die grondeienaar minstens 14 dae voor die verrigtinge kennis kry om uitsettingsverrigtinge te begin. Indien die grondeienaar nie binne die voorgeskrewe tydperk reageer (en gevolglik teen die okkupeerders optree) nie kan die hof op versoek van die staatsorgaan die eienaar van die grond beveel om die koste van die uitsettingsverrigtinge te betaal.

Die beskikbaarstelling van alternatiewe grond is dus nie 'n absolute vereiste by uitsettings nie, maar is 'n faktor wat oorweeg *kan* word indien grond van privaateienaars vir 'n tydperk van langer as ses maande geokkupeer is. Waar uitsetting op aandrang van 'n staatsorgaan ter sprake is, word die beskikbaarheid van alternatiewe grond *altyd* as een van die faktore oorweeg by die toestaan al dan nie van 'n aansoek, ongeag die tydperk van okkupasie.

4 Interpretasie in regspraak

Die 1998-wet bevat nie bepalings ten aansien van die kwessie of dit in *alle* gevalle van onregmatige okkupasie toegepas word nie en of die werking daarvan in bepaalde gevalle uitgesluit word. Dit word dus aan die howe oorgelaat om die wet se toepassingsgebied te bepaal. Die kwessie of die wet byvoorbeeld toepassing vind in gevalle waar geboue onregmatig geokkupeer word na die verstryking van 'n huurkontrak is in onlangse regspraak aangespreek. Die implikasies van die uitsprake is egter verreikend wat die toepassing van die wet in die algemeen betref en nie net ten aansien van die vraag of dit ook op die verbreking van huurkontrakte betrekking het nie.

4 1 Ross v South Peninsula Municipality *CPD (A741/98) (3 September 1999)*

Die appellant het in dié geval 'n perseel behorende aan die respondent bewoon. Die respondent het aangevoer dat daar geen ooreenkoms is waarvolgens mevrou Ross en haar gesin die perseel okkupeer nie en dat okkupasie gevolglik onregmatig was. Die uitgangspunt van die aansoek om 'n uitsettingsbevel was dat die eienaar eiendomsreg oor die perseel het en die besit van die eiendom van die verweerder wil terugeis.

Die vraag was egter of artikel 26(3) van die Grondwet die gemenereg verander het met verwysing na uitsettingsbevele, naamlik of die Grondwet nou 'n onus op die eienaar geplaas het om die hof in te lig van omstandighede wat die toestaan van 'n

uitsettingsbevel regverdig in alle gevalle waar die relevante eiendom vir woondoeleindes ("home") aangewend word. Daar word bevind dat, met betrekking tot die vraag waar die bewyslas lê, die antwoord in die substantiewe reg verskaf word. In gevalle waar die ligging van die bewyslas egter nie uiteengesit is nie, lê die howe dikwels riglyne in die verband neer en dit is dikwels 'n kwessie van "policy and fairness based on experience" (*Mbaso v Felix* 1981 3 SA 685 (A)). Appèlregter Grosskopf verklaar verder soos volg in *During v Boesak* 1990 3 SA 661 (A) dat

> ook by die inbreuk op ander fundamentele regte, dit wil sê op die vryheid van die individu in die breër sin, die bewyslas om die regmatigheid van optrede te bewys behoort te berus op die persoon wat inbreuk maak" (673g).

Die ligging van die bewyslas word onvermydelik deur die Grondwet beïnvloed (*Prinsloo v Van der Linde* 1997 3 SA 1012 (KH)). In die onderhawige geval bevind die regter soos volg:

> "Accordingly in deciding this case we need to consider broad reasons of experience and fairness to determine where the onus should be placed. Section 26(3) of the Constitution in effect requires a court hearing an application or action for the eviction of a person from his or her home, not to issue the order until it has had an opportunity to consider all the relevant circumstances. This means that not only may an eviction order not be issued by for example a clerk of the Magistrate's Court or the Registrar of the High Court in an application for default judgement, but that the presiding judicial officer alone can issue such an order *then only after considering all the relevant circumstances*" (14; eie kursivering).

As sowel die eiser as die verweerder alles wat volgens hul mening relevant is voor die hof lê, behoort die hof oor genoegsame inligting te beskik ten einde 'n besluit "in die lig van al die relevante omstandighede" te neem. Die probleem ontstaan egter in gevalle waar die verweerder nie reageer nie en die eiser aansoek doen om 'n vonnis by verstek. Welke inligting en op welke wyse word dit in hierdie omstandighede voor die hof gelê? In die lig hiervan bevind appèlregter Josman soos volg in die *Ross*-gewysde:

> "It is the conclusion of this court that section 26(3) of the Constitution has indeed modified the common law as laid down in the case of *Graham v Ridley* to the extent that a plaintiff seeking to evict a person from his or her home *is now required to allege relevant circumstances which entitle the court to issue such an order.* The respondent did allege that Mrs Ross was occupying the property illegally *but this is not sufficient to satisfy the above requirement*" (16; eie kursivering).

Ongelukkig het die hof nie ondersoek ingestel na die vraag *welke* omstandighede relevant vir howe sal wees nie, maar het wel na die 1998-wet in 'n soeke na moontlike riglyne verwys. 'n Analise van die wet het gevolg waarin die toepassingsgebied onder meer bepaal is. Verskillende benaderings tot die interpretasie en toepassingsgebied van die wet is moontlik. Een benadering sou wees om die definisie van "grond" só te interpreteer dat dit ook geboue en konstruksies op die grond insluit (met verwysing na die definisies van "gebou of struktuur", "uitsit" en "grond" (wat ook 'n gedeelte van grond insluit) soos verskaf in a 1 – die interpretasie-artikel). Die gevolg van dié benadering is dat die 1998-wet in alle gevalle van onregmatige okkupasie toepassing vind ongeag of dit onbeboude of reeds beboude grond is. Die ander benadering sou byvoorbeeld wees om die interpretasie wat in *Absa Bank Limited v Amod* [1999] 2 All SA 423 (W) uiteengesit is, te volg.

4 2 Absa Bank Limited v Amod *[1999] 2 All SA 423 (W)*

In dié saak het dit oor die uitsetting van 'n persoon gehandel wat 'n woonhuis in 'n residensiële gebied beset het. Regter Schwartzman het sowel die aanhef van die wet

as die lys van wette wat deur die 1998-wet herroep is, by die interpretasie van die wet in ag geneem. Op grond hiervan is die slotsom bereik dat die klem van die wet steeds op "unlawful occupation *of land*" val:

> "The Act does not purport to deal in general or specific terms with the unlawful occupation of immovable property *lawfully built* on land . . . In the context of the 1998 Act, the word "land" must mean vacant land (an expanse of country; ground; soil) . . . and does not include permanent structures that have acceded to the land. Had this been the legislature's intention it would have been clearly indicated in the Act . . . I find it difficult to accept that the 1998 Act can be interpreted as turning on its head the common law of landlord and tenant or the common law right of an owner of immovable property who has, in terms of a contract, given another the right to occupy his or her immovable property to recover the same" (429C).

Die volgende slotsom word bereik (429I):

> "Section 4(1) of the 1998 Act limits the common law rights of the owner of land to evict an unlawful occupier from his or her land. An unlawful occupier in turn means 'a person who occupies land without the express or tacit consent of the owner'. In the context of the Act and notwithstanding the definition of 'evict' the meaning I give to these words is that the person referred to is a person who has without any formality or right moved on to vacant land of another and constructed or occupied a building or structure thereon. Had it been the intention of the legislature to affect the common law right of property owners, to which I have referred, the definition of unlawful occupier would have included a person who, having had a contractual right to occupy such property, is now in unlawful occupation by reason of the termination of the right of occupation. The absence of such a provision must affect the extent to which it can be said that the 1998 Act was intended to affect persons' common law right to determine who may occupy their immovable property in terms of agreements."

Appèlregter Josman het dieselfde benadering wat in die *Absa*-saak gevolg is, aangewend met die gevolg dat die 1998-wet *nie* in die onderhawige geval toepassing gevind het nie. Die regter bevind verder dat hoewel die wet nie toepassing vind nie, die verwysings in artikel 4 en 6 na die "regte en behoeftes van bejaardes, kinders, gestremde persone en huishoudings waarvan 'n vrou die hoof is" moontlike omstandighede ("relevant circumstances") is wat deur die hof oorweeg kan word by die toestaan al dan nie van 'n uitsettingsbevel.

5 Bespreking

Uit bogenoemde regspraak blyk dit of die toepassing van die 1998-wet tot die volgende gevalle beperk is:

- waar persone sonder magtiging of regte grond okkupeer ("without formality or right")
- waar oop ("vacant") grond betrokke is
- waar geboue of konstruksies onwettig of onregmatig op die grond opgerig is ("does not include permanent structures that have acceded to the land").

Dit wil dus voorkom dat beboude grond in beginsel uitgesluit is. Gevalle waar geboue wettig opgerig is, sal dus in effek ook uitgesluit wees. Regter Schwartzman verwys spesifiek daarna dat die wet nie van toepassing is op onregmatige okkupasie van onroerende eiendom "lawfully built on land" nie. Tog is sy latere omskrywing van 'n onregmatige okkupeerder verwarrend en kan dit waarskynlik tot verdere regspraak in dié verband lei. Hy vermeld dat 'n onregmatige okkupeerder 'n persoon is wat sonder magtiging of 'n reg "vacant land of another" betree "and constructed or *occupied* a building or structure thereon". Die verwysing na "okkupasie" van 'n

bestaande gebou op die grond is problematies: sou dit dus beteken dan die inname van enige gebou tot onregmatige okkupasie lei? Gesien in die lig van die voorafgaande aanhaling, wil dit tog voorkom of die regter die okkupasie van *bestaande* geboue tot *onwettig* of *onregmatig* daargestelde geboue beperk.

Daar kan dus uit die twee uitsprake hierbo afgelei word dat die bedoeling eerder is dat die normale kontraktuele remedies aangewend behoort te word in huurder-verhuurder-gevalle en dat onregmatige okkupasie-wetgewing nie hierin behoort in te meng nie. Die aanvaarde beginsels is verder dat wetgewing die gemenereg net wysig vir sover dit uitdruklik geskied en dat dit in die onderhawige gevalle nie uitdruklik ook vir kontrakbreuk in die omskrywing van "onregmatige okkupeerder" voorsiening maak nie.

6 Slotsom

Die hofsake waarna in dié bespreking verwys word, is maar net die begin van 'n verwagte vloedgolf wat ons regbank kan tref. Hoe meer die provinsiale administrasies, plaaslike owerhede en privaat eienaars die bepalings van die 1998-wet gaan inspan, hoe groter is die behoefte na duidelike riglyne betreffende die interpretasie en toepassing van die wet op 'n daaglikse basis.

Die sake onder bespreking is om verskeie redes problematies. Hoewel daar simpatie gevind kan word met die uitgangspunt dat die wet nie beoog om met gemeenregtelike en kontraktuele remedies tussen huurders en verhuurders in te meng nie, word die toepassingsgebied van die wet deur die taamlik beperkte interpretasie aansienlik ingekort. Dit wil voorkom of die wet normaalweg slegs toepassing vind by onbeboude grond en uitgesluit word waar daar wel 'n kontraktuele remedie tussen die partye bestaan.

Maar wat gebeur in gevalle waar daar juis geen kontraktuele verhouding tussen die partye (die eienaar en die onregmatige okkupeerder) bestaan nie (wat waarskynlik die meerderheid gevalle gaan wees)? Wat sou die geval wees waar die grond nie oop ("vacant") is nie, maar reeds bebou (wettig, bv ooreenkomstig die Heropbou- en Ontwikkelingsprogram, grondherverdelings- of ander ontwikkelingsinisiatiewe) en daarna onregmatig deur okkupeerders ingeneem word terwyl die reghebbendes geduldig op hul okkupasie wag? Welke remedies is dan ter sprake? Hoewel die okkupeerders onregmatig optree weens onder meer die afwesigheid van toestemming, sal die 1998-wet nie toepassing kan vind nie weens die interpretasie van "onregmatige okkupeerder" en "uitsetting" deur die howe. Die *rei vindicatio* sal wel steeds beskikbaar wees, maar dit is 'n tydrowende en duur proses waarvoor eienaars dikwels nie kans sien nie. Dit is jammer dat 'n prosedure waarvoor reeds in wetgewing voorsiening gemaak word, waarin alle belanghebbendes se regte so ver moontlik oorweeg en in ag geneem word, nie ook in dié gevalle toepassing kan vind nie.

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"Never allow yourself to be swept off your feet: when an impulse stirs, see first that it will meet the claims of justice; when an impression forms, assure yourself first of its certainty."

Marcus Aurelius Meditations.

AUTHORISATION OF TRUSTEES IN TERMS OF THE TRUST PROPERTY CONTROL ACT

1 One of the most fascinating examples of the introduction of a common-law institution into a civilian legal environment is provided by the South African trust. The trust that was introduced into South African law by British settlers towards the end of the nineteenth century was, without doubt, the trust as it had developed in English law. Honoré states that these settlers "brought the trust with them as part of their legal and intellectual baggage" (Honoré "Trust" in Zimmermann and Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 849 ("Honoré") 850). It is clear, however, that the English law of trusts, with its dichotomy of legal and equitable ownership (or "dual" ownership), was not (indeed could not be) received into our law. What has happened is that our courts have developed, and are still in the process of developing, a uniquely South African law of trusts by adapting the basic "trust idea" to the principles of our own law. (See *Braun v Blann & Botha* 1984 2 SA 850 (A) 859E–G.) The story of the development of the South African law of trusts has already been told by others and it is unnecessary to repeat it here (see eg Honoré 851–872; Corbett "Trust law in the 90s: Challenges and change" 1993 *THRHR* 262). For purposes of this note it is enough, perhaps, to say that the main work in this process was done by the courts. The role of the legislature was, generally speaking, a minor and supporting one.

By far the most important contribution of the legislature to the development of the South African law of trusts has been the enactment of the Trust Property Control Act 57 of 1988. This Act was an evolutionary, rather than a revolutionary, step in the development of the South African trust. On a substantive level, a number of intriguing trust problems have been addressed. These include matters such as the standard of care, diligence and skill required of a trustee (s 9(1)); the effect of the trustee's insolvency on the trust property (s 12); and the power of the court to vary trust provisions (s 13). On a formal (or administrative) level, a system of supervision of trustees by the Master of the High Court was introduced. In this regard one can, for example, refer to the requirement that trust instruments must be lodged with the Master (s 4); the fact that the Master must authorise a trustee in writing before the trustee can act in that capacity (s 6(1)); the power of the Master to require the furnishing of security by trustees (s 6(2) and (3)); the appointment of trustees and co-trustees by the Master (s 7(1) and (2)); the power of the Master to call upon trustees to account for the administration of the trust (s 16(1) and (2)); and the power of the Master to remove trustees (s 20(1)).

The focus of this note falls on the second category of statutory measures, namely those dealing with the Master's power of supervision over trustees. It is perhaps surprising that, with one exception, these measures have not yet been the subject of much judicial attention. The exception is section 6(1) which, until now, has been directly and indirectly in issue in a number of decisions at first instance. As pointed out above, this provision states that the Master must authorise a trustee in writing before the trustee can act in that capacity. Section 6(1) is obviously of singular practical significance for those involved with trusts – a fact which, perhaps, explains why it has proved to be the exception. One can think immediately of a number of

obvious and important questions regarding the practical significance of this particular provision. For example, what is the legal effect of a juristic act (such as the conclusion of a contract) performed by a trustee before the Master has issued the required authorisation? Is such a contract void or merely voidable? If it is void, can it be ratified? And if ratification is possible, by whom can it be done? Can the contract be ratified by the trustee (after the necessary authorisation has been received), or is such a power reserved for the Master or, possibly, the court? In this note these and other related questions will be addressed in the light of the relevant case law.

2 Section 6(1) reads as follows:

> "Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master."

After the commencement of the Act in 1989, but before the first reported case dealing with the issue, there was already speculation about the precise implications of section 6(1). Honoré and Cameron, for example, expressed the following view (Honoré's *South African law of trusts* (1992) ("Honoré and Cameron") 180):

> "Although the statute recognises the underlying appointment as trustee, it seems that statutorily unauthorised acts may not be valid, though whether this would be true of all the trustee's actions is open to question. The court may in any event in its discretion validate retrospectively acts performed as trustee by one not duly so appointed."

The authors here tentatively suggested answers to some of the questions posed above:

(a) A juristic act performed by an unauthorised trustee "may" be void (but this is not necessarily always the case).

(b) The court has the power to ratify ("validate") such void acts retrospectively.

According to Olivier (*Trustreg en praktyk* (1989) 57) the authorisation by the Master is a "voorvereiste voordat die trustee kan optree", which leads one to believe that he would regard an unauthorised act as void. He says nothing about the question whether such a void act can later be ratified. Olivier does make the important point, however, that authorisation by the Master would serve as proof of the trustee's "status" (56–57).

A difficult practical question concerns the moment from which authorisation will be regarded as effective. Is it the date of issue of the Master's letter of authority, or is it the date on which the letter is received by the trustee? The answer to this question does not appear from section 6(1) itself, and it has not yet been specifically addressed in any of the cases on section 6(1). It is submitted, however, that the effective date is that of the issue of the letter of authority, as it appears on the standard form (J 246) provided by the Department of Justice. Any other conclusion may lead to much confusion and uncertainty in practice. In three of the cases discussed below, the relevant date was referred to as the date on which the authority was "issued", "granted" or "uitgereik" – which seems to support the above submission. In only one case did the court refer to the date on which the authority was "received". For purposes of this note "authorised to act" will therefore refer to the date of issue of the letter of authority.

3 The first reported case dealing specifically with section 6(1) is *Simplex (Pty) Ltd v Van der Merwe* 1996 1 SA 111 (W).

3 1 In this case the respondents were appointed as trustees of the G and H Trust. They accepted the appointment, and in that capacity signed a contract for the purchase of a certain property. In terms of the contract, they also began occupying the property. It later transpired that the contract was signed before the respondents

had been authorised to act as trustees in terms of section 6(1). The applicant submitted that this lack of authorisation rendered the contract null and void, and that accordingly the respondents' occupation of the property was unlawful. An order ejecting the respondents from the property was therefore sought. The respondents' answers to this submission (as far as they are relevant to this note) were the following (112E–G):

(a) The requirements of section 6(1) of the Act are solely for the protection of trust beneficiaries, and it is therefore not open to a third party to attack the trustees' right to act despite non-fulfilment of these requirements.

(b) The Act does not render null and void or invalid acts performed by trustees without the required authorisation by the Master. This is because the Act provides neither that unauthorised acts will be invalid nor that such acts are criminal offences.

(c) Any lack of authorisation existing when the contract was concluded was cured with retrospective effect by the subsequent issue by the Master of the letter of authority.

(d) The court has, in any event, a discretion to ratify retrospectively any unauthorised act by the trustees. In the present case, this discretion had to be exercised in favour of the respondents.

3 2 In a concise judgment, Goldblatt J responded as follows to these arguments (112J–114J):

(a) Section 6(1) is not purely for the benefit of trust beneficiaries. It is also in the public interest that proper written proof of incumbency of the office of trustee is provided to outsiders. The whole scheme of the Act is to afford a manner in which the Master can supervise trustees in the proper administration of trusts, and section 6(1) is essential to that purpose.

(b) It was so self-evident to the legislature that an act by a person not having the required authority could be of no force and effect that it was not deemed necessary to spell out such a conclusion in the Act. Furthermore, the failure to provide for a criminal sanction points to the fact that the legislature saw no need to punish a party criminally for an act which could have no legal consequences.

(c) The contract cannot be resuscitated by subsequent ratification, either by the Master or by the trustees after receipt of the necessary authority. The reason for this conclusion is the well-established principle that "there can be no ratification of an agreement which a statutory prohibition has rendered *ab initio* void in the sense that it is to be regarded as never having been concluded" (see *Neugarten v Standard Bank of South Africa Ltd* 1989 1 SA 797 (A) 808H, quoted with approval in *Simplex* 113F–G). In other words, a contract concluded without the required authority has no "latent validity" which can later be activated by means of an act of ratification.

(d) The court has no power to validate acts which are expressly prohibited by statute. To do so would be "to arrogate to [the] Court the power to override valid legislative acts" (114I–J).

3 3 The conclusions in *Simplex* obviously run counter to the tentative suggestions by Honoré and Cameron outlined above. (See par 2 *supra*.) In short, unauthorised acts will always be void and there is no question of subsequent ratification or validation (even by the court).

4 The certainty and clarity provided by *Simplex* has, however, been thrown into doubt by the more recent decision in *Kropman v Nysschen* 1999 2 SA 567 (T).

4 1 The facts of *Kropman* need not be repeated in detail here, as the case was concerned mainly with the interpretation and application of certain provisions of the Deeds Registries Act 47 of 1937 and the Administration of Estates Act 66 of 1965. The gist of the matter (in so far as is relevant for present purposes) was whether the plaintiffs, in their capacity as trustees of a testamentary trust, could institute an action against the defendant for the repayment of a loan advanced to the defendant during the lifetime of the testator. It was suggested that the claim against the defendant was ceded to the plaintiffs before they had been authorised to act as trustees under section 6(1) of the Trust Property Control Act, and that they therefore lacked the necessary capacity to institute the action. The court assumed, without deciding, that the cession had in fact taken place before the authorisation in terms of section 6(1) was conferred. The question then arose whether the cession to the plaintiffs could have been valid under such circumstances.

4 2 This question was disposed of in a few terse sentences. The court's point of departure was, quite correctly, that there are no criminal sanctions imposed for a breach of section 6(1) and that the statute does not provide that non-compliance renders the act void. Clearly implying (but not explicitly stating) that such acts must be void, the court immediately addressed the issue whether such void acts can be validated retrospectively (576E–G, *per* MacArthur J):

> "Having regard to the purpose of the legislation, which is clearly designed to protect those who will ultimately benefit from the trust, there seems no reason why a Court in exercising its discretion cannot retrospectively validate any such actions if the circumstances deem it fit to do so."

In this case the plaintiffs, although still unauthorised, took cession of the claim against the defendant. As this was done "for the benefit of the trust", that act should be "approved and ratified" (576G–H). The plaintiffs accordingly had the necessary capacity to institute the action against the defendant.

4 3 *Kropman* appears to follow, without any reference to *Simplex*, the suggestions by Honoré and Cameron as to the possible implications of non-compliance with section 6(1). (See par 2 *supra*, and the court's reference, with approval, to the authors at 576F–G.) The court accordingly supported the idea that it had the power retrospectively to validate unauthorised acts performed by trustees. The test for ratification would seem to be the "benefit of the trust". (As to this test, see further par 6 *infra*.) *Simplex* and *Kropman* are, of course, irreconcilable, and after *Kropman* it was obvious that in any subsequent case a choice would have to be made between the two approaches.

5 The court was confronted with precisely this choice in *Van der Merwe v Van der Merwe* 2000 2 SA 519 (C).

5 1 The facts of this case were, for all practical purposes, identical to those of *Simplex*. The first defendant sold his farm to an *inter vivos* trust of which he was one of the trustees. He signed the contract as seller (in his personal capacity) and as purchaser (in his official capacity as trustee). Pursuant to this contract, the farm was registered in the names of the trustees in the Deeds Office. The plaintiff, to whom the first defendant was married out of community of property, submitted that the contract of sale was void and that the farm had to be transferred back into the name of the first defendant. She advanced as the reason for this that at the time of the conclusion of the contract, the trustees had not yet been authorised to act as such in terms of section 6(1). On the facts, this was indeed correct: the contract was concluded at least sixteen days before the Master issued letters of authorisation.

5 2 After a brief discussion of the two conflicting cases, the court (*per* Griesel J) concluded that *Simplex* was obviously ("klaarblyklik") correct as far as the interpretation and application of section 6(1) was concerned (par 21). The court advanced a number of important considerations for this conclusion, some of which will be revisited in the general analysis in the concluding paragraphs of this note. At this stage, it is sufficient to point out that, consistent with the decision in *Simplex*, the particular contract was held to be void and non-ratifiable. An order was therefore granted declaring that ownership of the farm vested in the first defendant and ordering that re-registration in his name should take place.

6 It is unfortunate, from both an academic and a practical perspective, that the current uncertainty regarding the legal implications of non-compliance with section 6(1) should exist. This uncertainty affects trustees, trust beneficiaries and outsiders who deal with trustees. A quick resolution of the conundrum, either by the legislature or by the Supreme Court of Appeal, is therefore important. In the meantime, however, it is submitted that *Simplex* and *Van der Merwe* are correct and that *Kropman* is wrong.

6 1 The language of section 6(1) ("shall act in that capacity only if authorised thereto") is peremptory and not merely directory. (Regarding this distinction and the difficulties one may encounter with it in the interpretation of statutes, see Du Plessis "Statute law and interpretation" in Joubert and Scott (eds) *LAWSA* vol 25 par 306.) As pointed out in *Simplex*, this indicates an unambiguous prohibition against acting as trustee until the Master has issued the required authorisation (1996 1 SA 112I–J). Put differently: authorisation is a precondition to a trustee's right to act (*ibid*). This entails that non-compliance with the provision will render any unauthorised act void *ab initio*. Support for such a conclusion can also be derived from the decision in *Watt v Sea Plant Products Bpk* 1998 4 All SA 109 (C). The court in *Watt* was concerned primarily with the interaction between section 6(1) and the *locus standi* of trustees, not with the point in question in *Simplex*. (See further par 7 *infra* regarding *Watt* and the issue of *locus standi*.) But in the process of addressing this issue, Conradie J said the following about the interpretation that should be given to the provision (112*h–j*):

> "In my view the prohibitory phrase '. . . shall act in that capacity only if authorised thereto . . .', wide as it is, must be interpreted to mean that a trustee may not, prior to authorisation, acquire rights for, or contractually incur liabilities on behalf of, the trust."

The fact that the Act does not expressly provide that unauthorised acts will be void is not material. The general principle in this regard remains the one formulated by Innes CJ in *Schierhout v Minister of Justice* 1926 AD 99 109 (quoted with approval in *Simplex* 113D–E; see also *Van der Merwe* par 20):

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect."

If the policy considerations underlying section 6(1) are taken into consideration, it becomes clear why unauthorised acts should be visited with nullity. This is how Goldblatt J explained these considerations in *Simplex* (1996 1 SA 112J–113C):

> "I am further of the view that s 6(1) is not purely for the benefit of the beneficiaries of the trust but in the public interest to provide proper written proof to outsiders of incumbency of the office of trustee . . . The whole scheme of the Act is to provide a manner in which the Master can supervise trustees in the proper administration of trusts properly and s 6(1) is essential to such purpose. By placing a bar on trustees from acting as such until authorised by the Master, the Act endeavours to ensure that trustees can only act as such if they comply with the Act. This ensures that the trust deed is lodged with the Master and that security, if necessary, is lodged with him before the trustees start binding the trust's property."

The proposition in *Kropman* (1999 2 SA 576E–F) that section 6(1) was enacted solely for the benefit of trust beneficiaries can therefore not be supported. Although the protection of trust beneficiaries is indeed central to section 6(1), more than that is at stake. Section 6(1) also protects outsiders who deal with trustees, and facilitates compliance with other provisions of the Act. (See also the remarks of Griesel J in *Van der Merwe* par 20; Honoré and Cameron 179.) In appropriate circumstances, the Master may even be obliged to invite representations from co-trustees and other interested persons before issuing an authorisation. (See *Deedat v Master of the Supreme Court* 1997 3 All SA 260 (N); Keightley "Law of succession (including administration of estates) and trusts" 1997 *Annual Survey of SA Law* 374 397–398.) The narrow approach towards section 6(1) adopted in *Kropman* quite obviously influenced the court's view about the implications of non-compliance with the provision.

6 2 The *Kropman* approach can be employed only if two further hurdles can be overcome:

(a) There must be some or other legal basis for the retrospective validation of the unauthorised act. In this respect, *Kropman* is not at all clear. There is no suggestion in the case that the unauthorised act could later be ratified in the normal contractual sense by either the Master or the trustee (after having received the required authorisation). (See also par 3 2(*c*) *supra*.) This would seem to suggest that the act is indeed void *ab initio*. It would also explain why retrospective validation is seemingly reserved for the court. But on what basis can a court validate such a void act? In *Simplex* the court refused to do so because it would have been tantamount to arrogating to the court the power to override valid legislative acts (1996 1 SA 114I–J). Unfortunately, there was no attempt in *Kropman* to address this vital issue. (The reference to *Reichel v Wernich* 1962 2 SA 155 (T) certainly takes the matter no further: see *Simplex* 114H–I and *Van der Merwe* par 20.)

(b) Even if one were to accept that a court does have the inherent power to validate a void act retrospectively, a further question concerns the criterion that should be used for the exercise of such a power. In *Kropman* the criterion used was "the benefit of the trust" (1999 2 SA 576G–H). In general, and also in the context in which the words are used in the case, this can really mean only "the benefit of the trust beneficiaries". This calls for two remarks. First, it has already been pointed out that section 6(1) is concerned with more than the benefit of the trust beneficiaries. (See par 6 1 *supra*.) A criterion which makes this the sole consideration would therefore be too narrow. Secondly, "the benefit of the trust/trust beneficiaries" is in any event an elusive concept, the application of which for this purpose would be fraught with difficulties. What factors would a court consider in making its decision? Would "benefit" include only financial benefits or could other, less quantifiable, benefits also be taken into account? How would the interests of the different classes of beneficiary be weighed up against one another? It is often notoriously difficult in the law of trusts to strike an equitable balance between the interests of income and capital beneficiaries, and a court could be faced squarely with this dilemma when it has to decide whether or not to validate an unauthorised act. The fact that it will sometimes be quite easy to decide the issue (as was obviously the case in *Kropman*) does not detract from the potential complications that could be encountered in this whole exercise. (See also, in general, *Hofer v Kevitt* 1996 2 SA 402 (C), where the court considered the difficulties with the concept "interest of the beneficiaries" in the context of the variation of a trust.)

6 3 Since *Simplex* was reported in 1996, it has been referred to with approval in at least one other case (apart from *Van der Merwe*): *SAI Investments v Van der Schyff* 1999 3 SA 340 (N). *Van der Schyff* was concerned with the law of insolvency and there is no need to elaborate on the case for purposes of this note. Suffice it to say that the court had to decide, *inter alia*, whether a contract signed by a provisional trustee without the authority required in terms of section 18(3) of the Insolvency Act 24 of 1936 was void *ab initio* and, if so, whether the contract could subsequently be ratified. The court referred with approval to *Simplex* and expressed its general agreement with that case regarding the nullity of an act concluded in contravention of a statutory prohibition. The notion that such an act cannot later be ratified or validated also received support (351G–352G.) (For academic references which seem to support *Simplex*, see Pace and Van der Westhuizen *Wills and trusts* (1996) B6 2 3; Wunsh 1996 *Annual Survey* 456 468–469.)

7 The message of *Simplex* and *Van der Merwe* to trustees is therefore clear: do not act without the authority required in terms of section 6(1). The correct view is probably that such an act will be regarded as void *ab initio* and that it is not capable of subsequent ratification or validation. But it must always be borne in mind that section 6(1) is concerned with the *authorisation* of trustees and not with their *appointment*. The appointment of trustees takes place in terms of the trust instrument, a court order or section 7 of the Act (by the Master). The importance (both formally and substantively) of this distinction is illustrated by the decision in *Watt v Sea Plant Products Bpk*. (See par 6 1 *supra*.) In *Watt* a claim was instituted against the second and third defendants (the trustees of a trust). The claim was based on allegedly wrongful conduct of the trustees in the administration of the trust. In a special plea, the formal point was taken on behalf of the defendants that at the time of the issue of the summons they lacked *locus standi* because they had not at the time been authorised by the Master to act as trustees in terms of section 6(1). The court rejected this contention, pointing out that the legislature did not intend in section 6(1) to regulate questions of *locus standi* (114*b–d*):

> "Any conclusion that the second and third defendants were by section 6(1) of the Act deprived of *locus standi in iudicio* (which would mean not only that they could not be sued but also that they could not approach the court to protect the interests of the trust) would not give effect to the intention of the legislature."

On a substantive level, the provision can also not extend to preventing a duly appointed but unauthorised trustee from being held liable for a wrongful act in conducting the affairs of the trust (112*j*). This means, for example, that a trustee who takes control of trust property *qua* trustee, but who has not yet been authorised in terms of section 6(1), can be held liable for damage to the property in question. (See *Simpex [sic] (Pty) Ltd v Van der Merwe* 1999 4 SA 71 (W) 75D–H.)

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It is now apparent that the abyss of history is big enough for everyone.
Paul Valery La Crise de l'Esprit.

KOMMENTAAR OP DIE WET OP ERKENNING VAN GEBRUIKLIKE HUWELIKE 120 VAN 1998

1 Inleidend

Die Wet op Erkenning van Gebruiklike Huwelike 120 van 1998 (hierna die Wet genoem) is aangeneem

> "[o]m voorsiening te maak vir die erkenning van gebruiklike huwelike; om die vereistes van 'n geldige gebruiklike huwelik te bepaal; om die registrasie van gebruiklike huwelike te reël; om vir die gelyke status en bevoegdheid van gades in gebruiklike huwelike voorsiening te maak; om die vermoënsregtelike gevolge van gebruiklike huwelike en die bevoegdheid van gades van sodanige huwelike te reël; om die ontbinding van gebruiklike huwelike te reël; om voorsiening te maak vir die uitvaardiging van regulasies; om sekere bepalings van sekere wette te herroep; en om voorsiening te maak vir aangeleenthede wat daarmee in verband staan" (aanhef van die Wet).

Die totstandkoming van hierdie wet het 'n lang geskiedenis gehad (sien onder andere die Verslae van die Suid-Afrikaanse Regskommissie Projek 51: *Huwelike en Gebruiklike Verbindings van Swart Persone* 1985 en 1986; South African Law Commission Project 90: *The Harmonisation of the Common Law and the Indigenous Law: Issue Paper* 3: Customary Marriages September 1996; Discussion Paper 74: *Customary Marriages* August 1997). Die wet is reeds op 20 November 1998 goedgekeur en die Engelse teks is deur die President geteken. Die wet het egter by die skryf van hierdie aantekening nog nie in werking getree nie.

Die uitgangspunt van die Regskommissie met hierdie wet was nie om 'n sogenaamde unifikasie van die familiereg te bewerkstellig nie, maar om met die wet realistiese oplossings te bied vir sosiale probleme wat ook binne die gewoonteregtelike familiereg bestaan (sien South African Law Commission Project 90: Discussion Paper 74 par 2 2 13). Die Regskommissie poog ook om met hierdie wet uitvoering te gee aan die bepalings van, onder andere artikel 9, 15(3)(a), 30 en 31 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996, wat onderskeidelik gelykheid voor die reg; erkenning van huwelike wat aangegaan is kragtens enige tradisie, of 'n stelsel van godsdiens-, persone- of familiereg; deelname aan kultuur van eie keuse; en genot van hul kultuurgemeenskap waarborg (sien in hierdie verband South African Law Commission Project 90: Discussion Paper 74 par 2 4; 3 1 6–3 1 7). Hierdie kultuurgebruike mag egter nie strydig met enige bepaling van die Handves van Regte wees nie. Gevolglik moes sekere gebruike/instellings van die gebruiklike huwelik die knie buig voor die bepalings van die Handves van Regte.

Die doel met die skryf van hierdie aantekening is om by wyse van bespreking die bepalings van die wet krities te ondersoek.

2 Erkenning van gebruiklike huwelike

Artikel 2 van die wet bevat die bepalings oor die erkenning van gebruiklike huwelike. Dit maak voorsiening vir die erkenning van gebruiklike huwelike wat bestaan het by die inwerkingtreding van die wet en vir die erkenning van gebruiklike huwelike wat na inwerkingtreding van die wet gesluit is.

2 1 Gebruiklike huwelike by inwerkingtreding van die wet

Artikel 2(1) bepaal dat 'n huwelik wat 'n geldige huwelik kragtens gewoontereg is en wat by die inwerkingtreding van die wet bestaan vir alle doeleindes as 'n huwelik erken word. Hierdie bepaling verleen regsgeldigheid aan gebruiklike huwelike wat voor inwerkingtreding van hierdie wet nie die status van "huwelik" gehad het nie (sien hieroor onder andere Van der Vyver en Joubert *Persone- en Familiereg* (1991) 454). Artikel 2(3) verleen aldus ook erkenning aan die gebruiklike huwelike van 'n persoon wat 'n gade in meer as een gebruiklike huwelik by inwerkingtreding van die wet is. Artikel 2(3) verwys verkeerdelik net na "geldige huwelike" in plaas van "geldige gebruiklike huwelike" soos tereg in die Engelse teks aangegee word. Al hierdie gebruiklike huwelike word vir alle doeleindes as huwelike erken. Die wet verleen dus geldigheid aan 'n sogenaamde poliginiese gebruiklike huwelik, omdat ingevolge die gewoontereg net 'n man toegelaat is om meer as een vrou te trou. (Oor die redes en motivering vir die erkenning van poliginiese gebruiklike huwelike en die argumente wat aangevoer word waarom hierdie huwelike moontlik wel grondwetlik is, sien South African Law Commission Project 90: Discussion Paper 74 par 6 1 ev. Die besprekingsdokument maak egter die opmerking dat dit onwys sou wees om poliginie te verban omdat dit aan die een kant onmoontlik is om mans hiervan te weerhou en aan die ander kant informele verbindings sal aanmoedig en veral aan vrouens geen sekuriteit verskaf nie. Die Regskommissie is van mening dat die huwelike erken moet word tot tyd en wyl hulle self in onbruik verval. Sien South African Law Commission Project 90: Discussion Paper 74 par 6 1 14.)

Die toets vir die erkenning van hierdie gebruiklike huwelik(e) is of die gebruiklike huwelik(e) kragtens die voorskrifte van die toepaslike gewoontereg 'n geldige gebruiklike huwelik is.

2 2 Gebruiklike huwelike na inwerkingtreding van die wet

Artikel 2(2) bepaal in dieselfde trant as hierbo (2 1) dat 'n gebruiklike huwelik wat na die inwerkingtreding van die wet gesluit is en wat aan die vereistes van hierdie wet voldoen (sien die bespreking hieronder 3), vir alle doeleindes as 'n huwelik erken word. Dieselfde geld ook waar 'n persoon 'n gade in meer as een gebruiklike huwelik is (a 2(4)). Die Engelse weergawe van hierdie subartikel verwys verkeerdelik net na "marriages" in plaas van "customary marriages".

Die toets vir die erkenning van hierdie gebruiklike huwelike is die vereistes wat deur die wet voorgeskryf word. Vervolgens word hierdie vereistes bespreek.

3 Geldigheidsvereistes van gebruiklike huwelike

Die geldigheidsvereistes vir die sluit van 'n gebruiklike huwelik na die inwerkingtreding van die wet kan, indien die tradisionele (gemeenregtelike) indeling gevolg word, soos volg getabuleer word:

3 1 Die partye moet bevoeg wees om te trou en om met mekaar te trou

Die volgende aspekte word deur die wet gereël:

(a) 'n Gade wat ingevolge 'n gebruiklike huwelik getroud is, is nie bevoeg om 'n burgerlike huwelik ('n huwelik kragtens die Huwelikswet 25 van 1961) gedurende die bestaan van die gebruiklike huwelik te sluit nie (a 3(2)). Daar is een uitsondering op hierdie verbod. Ingevolge artikel 10(1) is 'n man en 'n vrou tussen wie 'n gebruiklike huwelik bestaan, bevoeg om met mekaar 'n burgerlike huwelik te sluit indien nie een van hulle 'n gade in 'n bestaande gebruiklike huwelik met 'n ander persoon is nie.

Wat is die effek van die voltrekking van die burgerlike huwelik ingevolge artikel 10(1) op die voortbestaan van die gebruiklike huwelik? Indien 'n mens die bepalings van artikel 10(3) (hieronder 4 5) in oënskou neem, word daar onder andere vermeld dat hoofstuk III van die Wet op Huweliksgoedere 88 van 1984 van toepassing is "op 'n *gebruiklike* huwelik wat in gemeenskap van goed is soos beoog in subartikel (2)" (my beklemtoning). Hierdie bepaling kan alleen sin maak indien die gebruiklike huwelik nog van krag is. Gaan kyk 'n mens egter na die Engelse teks van die wet (en dit dien ook hier vermeld te word dat die Engelse teks deur die President geteken is), vind mens 'n ander bepaling. Die Engelse bepaling sê dat hoofstuk III van die Wet op Huweliksgoedere 88 van 1984 van toepassing is "in respect of *any* marriage which is in community of property as contemplated in subsection (2)" (my beklemtoning). Die Engelse teks maak eerder sin en het myns insiens tot gevolg dat die gebruiklike huwelik beëindig en vervang word deur die burgerlike huwelik. Indien die gebruiklike huwelik nie beëindig word nie, (en soos hierbo gestel, is dit juis wat die Afrikaanse teks voorstaan indien die bepalings van artikel 10(3) enigsins sin moet maak), word 'n onhoudbare situasie geskep. Die resultaat hiervan is dat twee huwelike gelyktydig bestaan. Hoewel die vermoënsregtelike gevolge van die gebruiklike huwelik ook statutêr binne gemeenskap van goed is, beteken dit dat indien die huwelik deur egskeiding ontbind wil word, sal twee egskeidingsbevele verkry moet word aangesien daar twee huwelike bestaan. Hieronder in (5) word die posisie by egskeiding ingevolge die wet bespreek. Dit moet egter hier reeds vermeld word dat die gebruiklike huwelik net weens een grond, naamlik die onherstelbare verbrokkeling van die huwelik, deur egskeiding ontbind kan word (vgl a 8(1)). Die ander twee egskeidingsgronde wat vir die burgerlike huwelik geld, naamlik geesteesongesteldheid (a 5(1) van die Wet op Egskeiding 70 van 1979) en voortdurende bewusteloosheid (a 5(2)) is nie van toepassing by egskeiding van 'n gebruiklike huwelik nie. Dit dien ook vermeld te word dat daar in die verlede groot kritiek teen die behoud van genoemde twee egskeidingsgronde was (vgl hieroor Van Schalkwyk *Huweliksreg-bronnebundel* (1992) 299 par (2)–300, 304 par (3)). Die twee egskeidingsgronde is egter steeds van krag en kan tot gevolg hê dat twee verskillende gronde vir egskeiding gebring moet word om die huwelike te beëindig, indien die gebruiklike huwelik nie deur die burgerlike huwelik vervang word nie. Dit kon beslis nie die bedoeling van die wetgewer gewees het nie. Dit is my submissie dat die gebruiklike huwelik deur 'n opvolgende burgerlike huwelik vervang word en dat daar nie twee huwelike na dese bestaan nie. Die Engelse teks bied myns insiens ook nie aan die gades die keuse om aan die een vorm van huwelik voorkeur te gee nie (vgl egter hieroor die South African Law Commission Project 90: Discussion Paper 74 par 3 2).

'n Gade wat 'n burgerlike huwelik kragtens die Huwelikswet 25 van 1961 gesluit het, is egter onbevoeg om tydens die duur van daardie burgerlike huwelik enige ander huwelik te sluit (a 10(4)). Die effek van hierdie bepaling is myns insiens dat die gade wat kragtens die Huwelikswet 25 van 1961 getroud is, ook nie bevoeg is om 'n gebruiklike huwelik met dieselfde vrou te sluit nie. 'n Verdere effek van hierdie bepaling is dat dit die sluit van verdere (gebruiklike of burgerlike) huwelike belet, voordat die burgerlike huwelik ontbind is. Dit onderstreep met ander woorde die monogame karakter van die burgerlike huwelik. (Die Swart Administrasiewet 38 van 1927 het 'n gebruiklike *verbinding* 'n beletsel tot die sluit van 'n burgerlike huwelik gemaak (a 22(2)), en het ook as uitsondering bepaal dat 'n man en 'n vrou tussen wie 'n gebruiklike *verbinding* bestaan, bevoeg is om 'n burgerlike huwelik met mekaar te sluit indien die man nie ook 'n deelgenoot in 'n bestaande gebruiklike *verbinding* met 'n ander vrou is nie (a 22(1)). (A 12 van die Wet op die Erkenning van Gebruiklike Huwelike 120 van 1998, herroep nou ook a 22(1) tot (5) van die Swart Administrasiewet 38 van 1927.)

(b) Bloedverwantskap en aanverwantskap as huweliksbeletsel word ingevolge artikel 3(6) van die Wet deur die gewoontereg bepaal. Verwantskap deur aanneming word nie uitdruklik vermeld nie en gevolglik word dit myns insiens ooreenkomstig die toepaslike statutêre reg bepaal.

3 2 Wilsooreenstemming

Artikel 3(1)(a)(ii) vereis dat albei die gades moet instem om met mekaar kragtens die gewoontereg te trou. Die doel met hierdie bepaling is tweeledig. Eerstens vereis dit wilsooreenstemming tussen die partye om met mekaar te trou. 'n Huwelik kan dus nie uitsluitlik tussen die families van die gades beding en gesluit word nie. Hierdie beginsel vind ook toepassing by die burgerlike huwelik en word natuurlik onderskryf (vgl oor wilsooreenstemming as geldigheidsvereiste South African Law Commission Project 90: Discussion Paper 74 par 4.2). Tweedens moet daar ook wilsooreenstemming bestaan oor die soort huwelik wat gesluit word. Daar moet met ander woorde wilsooreenstemming wees dat die huwelik kragtens die gewoontereg gesluit word en dus dat die huwelik 'n gebruiklike huwelik moet wees. Hierdie vereiste vereis dat daar sekerheid oor die aard van die regshandeling moet bestaan. Gevolglik sal die gebruiklike huwelik ongeldig wees as gade A onder die verkeerde indruk verkeer het dat 'n burgerlike huwelik gesluit word. A se dwaling sal dan neerkom op 'n wesenlike dwaling genaamd *error in negotio*.

3 3 Handelingsbevoegdheid

Indien enige van die aanstaande gades 'n minderjarige is, bevat die wet voorskrifte ten opsigte van die toestemmingsvereistes wat verkry moet word vir die sluit van die huwelik.

Artikel 5 van die wet bevat voorskrifte oor hoe die ouderdom van 'n persoon wat na bewering 'n minderjarige is, bewys word. Is die ouderdom van 'n persoon wat na bewering 'n minderjarige is, onseker of in geskil, kan die registrasiebeampte die aangeleentheid na 'n landdroshof verwys wat die persoon se ouderdom moet vasstel en 'n sertifikaat moet uitreik, wat as bewys van die persoon se ouderdom dien (a 5(2)). Artikel 5 is gefokus op die vasstelling van die ouderdom van die persoon. Artikel 27 van die Huwelikswet 25 van 1961, wat handel oor die ouderdom van partye by die sluit van 'n burgerlike huwelik, is nie net gefokus op die bewys van 'n persoon se werklike ouderdom nie, maar verleen ook aan die huweliksbevestiger die bevoegdheid om 'n huwelik te voltrek indien hy van bevredigende bewys voorsien is waaruit dit blyk dat die betrokke party bevoeg is om 'n huwelik sonder toestemming of verlof aan te gaan. Hierdie bepaling maak met ander woorde ook voorsiening vir die geval waar die minderjarige 'n geskeide of weduwee/wewenaar is. Niks hiervan word in artikel 5 vermeld nie. Hoewel artikel 5 niks oor die posisie van wewenaars/weduwees of geskeides bevat nie, word 'n gebruiklike huwelik vir alle doeleindes as 'n geldige huwelik erken (vgl die bepalings van a 2 hierbo 2) en sal bewys van 'n vorige huwelik die bepalings van artikel 5 ook oorbodig maak. Daar moet onthou word dat huweliksluiting nie meerderjarigheid tot gevolg het nie (sien hieronder 4 1(a)).

Die ander interessante aspek is dat artikel 5 aan die registrasiebeampte sekere bevoegdhede verleen. Die rol van die registrasiebeampte is belangrik by registrasie van die huwelik (hieronder 3 3 6 (b)), met ander woorde nadat die gebruiklike huwelik alreeds voltrek is, terwyl artikel 27 van die Huwelikswet 25 van 1961 handel oor die posisie voor voltrekking van die huwelik (tav die afwesigheid van voorsiening van 'n huweliksbevestiger by voltrekking van 'n gebruiklike huwelik, sien hieronder 3 4).

Die volgende toestemmingsvoorskrifte word vereis, na gelang van die geval:

3 3 1 Beide ouers

Artikel 3(3)(a) vereis dat beide die ouers van 'n minderjarige tot die huwelik moet toestem. Artikel 24A(1) van die Huwelikswet 25 van 1961 is die ooreenstemmende bepaling wat ten opsigte van die burgerlike huwelik geld. Artikel 24A(1) bepaal onder andere dat 'n huwelik van 'n minderjarige wat sonder die toestemming van die ouers of voog van die minderjarige gesluit is, nie nietig is bloot omrede hulle toestemming nie verkry is nie. Anders as artikel 3(3)(a) van die wet, verwys artikel 24A(1) van die Huwelikswet 25 van 1961 net na die ouers van die minderjarige en nie na "beide" ouers nie. Ek dink nie hierdie verskil in bewoording maak 'n wesenlike verskil nie. Artikel 24A(1) word so geïnterpreteer dat waar beide ouers leef, moet beide ouers hulle toestemming verleen, tensy die uitsluitlike voogdy net aan een ouer toegeken is, wie se toestemming alleen dan voldoende is. Indien net een ouer leef, word net daardie ouer se toestemming vereis (vgl Van der Vyver en Joubert 502–503). Ten spyte daarvan dat "beide . . . ouers" in artikel 3(3)(a) van die wet gebruik word, is ek van mening dat die uitleg van artikel 24A(1) van die Huwelikswet 25 van 1961 ook hier van toepassing is.

Die bepaling dat beide ouers se toestemming verkry moet word, is egter wel 'n verandering ten aansien van die posisie volgens die gewoontereg. Hierdie verandering is genoodsaak deur die bepaling in die Grondwet dat daar nie op grond van geslag gediskrimineer mag word nie en moontlik ook deur die bepaling van die Wet op Voogdy 192 van 1993, wat aan beide ouers gelyke regte ten opsigte van hulle minderjarige kinders verleen (sien in hierdie verband South African Law Commission Project 90: Discussion Paper 74 par 5 2 11).

Nog 'n aspek wat hier vermelding verdien, is dat artikel 3(3)(a) nie soos artikel 24(1) van die Huwelikswet 25 van 1961 skriftelike toestemming vereis nie, maar bloot bepaal dat toestemming verleen moet word. Ook hierdie verskil in bewoording het myns insiens nie 'n wesenlike verskil tot gevolg nie. Nie-voldoening aan die skrif-vereiste van artikel 24(1) van die Huwelikswet 25 van 1961 het nie tot gevolg dat toestemming nie verleen is nie. Dit is bloot 'n administratiewe voorskrif aan die huweliksbevestiger (vgl Van der Vyver en Joubert 503). Die gevolg hiervan is dat die toestemming ook ingevolge artikel 24(1) van die Huwelikswet 25 van 1961 informeel (mondelings) of stilswyend verleen kan word.

Waar die ouer se toestemming nie verkry kan word nie, is artikel 25 van die Huwelikswet 25 van 1961 van toepassing (a 3(3)(b) van die wet). Artikel 25(1) van die Huwelikswet 25 van 1961 bepaal:

> "**25. Wanneer toestemming van ouers of voog nie verkry kan word nie.** – (1) Wanneer 'n kommissaris van kindersorg soos omskryf in artikel 1 van die Wet op Kindersorg, 1983, na behoorlike ondersoek oortuig is dat 'n minderjarige woonagtig is in die distrik of gebied ten opsigte waarvan hy sy amp beklee, nie 'n ouer of voog het nie of om die een of ander voldoende rede nie in staat is om die toestemming van sy ouers of voog te verkry om in die huwelik te tree nie, kan dié kommissaris van kindersorg na goeddunke skriftelik toestemming aan dié minderjarige verleen om met 'n bepaalde persoon te trou, maar so 'n kommissaris van kindersorg mag sy toestemming nie verleen nie indien die een of ander ouer van die minderjarige wie se toestemming regtens vereis word of sy voog weier om toestemming tot die huwelik te verleen."

Artikel 25(1) is as 'n gebiedende bepaling. Die minderjarige het nie 'n keuse om óf die kommissaris óf die hoë hof as oppervoog van minderjariges te nader nie. Die minderjarige is verplig om die kommissaris se toestemming te verkry (sien *Ex parte Visick* 1968 1 SA 151 (D) 154A–G, nagevolg in *Ex parte Balchund* 1991 1 SA 479

(D) 481C–E). Die kommissaris se toestemming word vereis waar die minderjarige geen ouer of voog het nie; of waar daar voldoende rede bestaan waarom die ouer of voog se toestemming nie verkry kan word nie (sien Van Schalkwyk 73–74 vir gevalle wat as voldoende redes in die verlede aanvaar is). Weier 'n ouer of voog om toestemming tot huweliksluiting van die minderjarige te verleen, besit die kommissaris nie die bevoegdheid om toestemming te verleen nie. Wil die minderjarige dan steeds met die huweliksluiting voortgaan, sal die hoë hof se toestemming eers verkry moet word. Die hoë hof se toestemming word ook verlang waar die kommissaris van kindersorg sy toestemming weier. (Vgl die bepalings van a 25(4) van die Huwelikswet 25 van 1961, hieronder 3 3 4.)

3 3 2 Voog

Indien die minderjarige nie ouers het nie, moet sy of haar wettige voog tot die huwelik toestem (vgl a 3(3)(a) van die wet). Waar die voog se toestemming nie verkry kan word nie, bepaal artikel 3(3)(b) van die wet dat artikel 25 van die Huwelikswet 25 van 1961 van toepassing is (vgl die bespreking hierbo 3 3 1). Weier die voog sy/haar toestemming tot huweliksluiting, moet 'n aansoek om toestemming tot die hoë hof gerig word en geld dieselfde as wat hierbo (3 3 1) gesê is.

3 3 3 Kommissaris van Kindersorg

Soos hierbo (3 3 1 en 3 3 2) genoem, is die bepalings van artikel 25 van die Huwelikswet 25 van 1961 van toepassing waar die toestemming van die ouer of voog nie verkry kan word nie. Weier die kommissaris om toe te stem moet die hoë hof se toestemming verkry word (a 25(4) van die Huwelikswet 25 van 1961, hieronder 3 3 4).

3 3 4 Die hoë hof

Soos reeds genoem (hierbo 3 3 1 en 3 3 2) bepaal artikel 3(3)(b) van die wet dat "[i]ndien die toestemming van die ouer of voog nie verkry kan word nie, is artikel 25 van die Huwelikswet, 1961, van toepassing". Artikel 25(4) van die Huwelikswet 25 van 1961 bepaal:

> "**25. Wanneer toestemming van ouers of voog nie verkry kan word nie.** – (4) Indien die betrokke ouer, voog of kommissaris van kindersorg weier om tot 'n huwelik van 'n minderjarige toe te stem, kan sodanige toestemming op aansoek deur 'n regter van die Hooggeregshof van Suid-Afrika verleen word: Met dien verstande dat so 'n regter nie sodanige toestemming verleen nie tensy hy van oordeel is dat dié weiering van toestemming deur die ouer, voog of kommissaris van kindersorg sonder genoegsame rede en teen die belange van die minderjarige is."

(Oor die verskil in interpretasie ten aansien van die toepassing en omvang van die diskresie wat die hof ingevolge suba (4) verkry – sien veral *C v Van T* 1965 2 SA 239 (O); *Allcock v Allcock* 1969 1 SA 427 (N); *B v B* 1983 1 SA 496 (N).)

3 3 5 Minister van Binnelandse Sake

Artikel 3(1)(a)(i) bepaal dat 'n gebruiklike huwelik net geldig kan wees indien albei die aanstaande gades bo die ouderdom van 18 jaar is. Ondanks hierdie voorskrif verleen artikel 3(4)(a) aan die Minister van Binnelandse Sake of enige beampte in die staatsdiens wat skriftelik deur hom of haar daartoe gemagtig is, die bevoegdheid om skriftelik toestemming te verleen aan 'n persoon onder die ouderdom van 18 jaar om 'n gebruiklike huwelik te sluit indien die Minister of sy beampte die huwelik wenslik en in belang van die betrokke partye ag. Die posisie ten aansien van die burgerlike huwelik word deur artikel 26(1) van die Huwelikswet 25 van 1961 gereël en bepaal dat geen seun onder die ouderdom van 18 jaar of meisie onder die ouderdom

van 15 jaar bevoeg is om 'n huwelik te sluit nie, tensy die Minister van Binnelandse Sake of sy gemagtigde beampte skriftelik toestemming tot die huwelik verleen indien hy of sy beampte so 'n huwelik as wenslik beskou. Die volgende aspekte verdien hier vermelding:

(a) Die ouderdomme van 18 jaar en 15 jaar vir seuns en dogters onderskeidelik word vervang deur die ouderdom van 18 jaar wat vir beide partye geld. Die motivering hiervoor vind mens in die Regskommissie se Discussion Paper 74. In par 5 1 7 word 'n potensiële rede vermeld, maar dan nie aanvaar nie, as sou die genoemde verskil in ouderdomme neerkom op 'n onbillike diskriminasie op grond van geslag ingevolge artikel 9(3) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996. Die hoofmotivering vir hierdie eenvormige behandeling word egter gevind in par 5 1 8 van die besprekingsdokument, naamlik dat dit die Suid-Afrikaanse reg in ooreenstemming bring met die internasionale standaard ten opsigte van die oorgang vanaf kindskap na volwassenheid (vgl bv ook a 28(3) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996).

(b) Ingevolge artikel 3(4)(a) kan die Minister of sy gevolmagtigde beampte toestemming tot huweliksluiting verleen indien die huwelik wenslik en in belang van die betrokke partye is. Dus moet die huwelik nie net wenslik en in belang van die minderjarige nie, maar van beide partye wees. Artikel 26(1) van die Huwelikswet 25 van 1961 vereis net dat die huwelik wenslik beskou moet word en nie ook in belang van die partye nie. Na my mening is hierdie verskil in bewoording nie substansieel nie. Hierdie beskouing word versterk indien gelet word op die bewoording van artikel 26(2) (hieronder 3 3 6 (a)), waar die Minister of sy gevolmagtigde gemagtig word om *ex post facto* skriftelik te gelas dat die huwelik vir alle doeleindes 'n geldige huwelik is, indien hulle "die huwelik as wenslik en in belang van die betrokke partye beskou . . .". Die feit dat die huwelik wenslik beskou moet word, vereis myns insiens net soos in artikel 3(4)(a) van die wet, dat die huwelik vir *beide* partye wenslik moet wees. Hierdie siening word ook versterk indien die bepaling van artikel 26(2) gelees word.

(c) Die toestemming van die Minister of sy gevolmagtigde beampte onthef nie die partye van die verpligting om aan al die ander vereistes wat deur hierdie wet voorgeskryf word, te voldoen nie (a 3(4)(b)). Die eerste voorbehoudsbepaling van artikel 26(1) van die Huwelikswet 25 van 1961 bepaal ook dat die toestemming onder bespreking die partye "nie vrystel nie van die verpligting om aan alle ander regsvoorskrifte te voldoen: . . .". Die woorde "alle ander regsvoorskrifte" word hier gebruik omdat nie al die regsvoorskrifte waaraan 'n burgerlike huwelik moet voldoen, in die Huwelikswet 25 van 1961 vermeld word nie.

(d) Hoewel daar verskil van mening bestaan, verleen artikel 26(1) van die Huwelikswet 25 van 1961 waarskynlik nie aan die Minister of sy gevolmagtigde die bevoegdheid om aan minderjariges onder die puberteitsouderdom toestemming tot huweliksluiting te verleen nie (sien gesag aangehaal in Van Schalkwyk 70 par (4)). Dieselfde uitleg sou na alle waarskynlikheid ook aan artikel 3(4)(a) van die onderhawige wet gegee word.

(e) Daar is nie direkte gesag oor die gevolg van nie-nakoming van artikel 26(1) van die Huwelikswet 25 van 1961 nie, maar daar is gesag daarvoor dat nie-nakoming van artikel 1 van die Huwelikswet Wysigingswet 8 van 1935 (die voorganger van artikel 26(1)), nietigheid van die huwelik tot gevolg gehad het (sien *Shields v Shields* 1959 4 SA 16 (W) 22D–E, 23A, met goedkeuring na verwys in *Abels v Abels* 1961 2 SA 639 (K) 638–639). Indien hierdie interpretasie korrek is, verleen artikel 26(2) (hieronder 3 3 6 (a)) dan die bevoegdheid om 'n nietige huwelik te

ratifiseer. Dieselfde interpretasie behoort myns insiens ook aan artikel 3(4)(a) van die wet gegee te word.

3 3 6 Gevolge waar vereiste toestemming nie verleen is nie

Die volgende aspekte verdien hier vermeld te word:

(a) Wanneer 'n persoon onder die ouderdom van 18 jaar 'n gebruiklike huwelik sonder die skriftelike toestemming van die Minister of betrokke beampte gesluit het, kan die Minister of die betrokke beampte skriftelik die huwelik as 'n geldige huwelik verklaar, indien aan die volgende vereistes voldoen word: eerstens moet die huwelik wenslik en in belang van die betrokke partye geag word; en tweedens moet die huwelik in alle ander opsigte in ooreenstemming met die vereistes van die wet wees (a 3(4)(c)).

Hierdie bepaling se eweknie ten opsigte van die burgerlike huwelik word in artikel 26(2) van die Huwelikswet 25 van 1961 gevind. Dieselfde twee vereistes word ook ten opsigte die burgerlike huwelik aangetref. Subartikel (3) van artikel 26 bepaal dat indien die Minister of sy gevolmagtigde beampte skriftelike toestemming onder hierdie omstandighede verleen, "word daar geag dat hy voor die voltrekking van die huwelik skriftelike verlof daartoe verleen het". Laasgenoemde bepaling ontbreek by artikel 3(4)(c) wat op gebruiklike huwelike van toepassing is.

(b) Word 'n gebruiklike huwelik sonder die toestemming van 'n ouer, voog, kommissaris van kindersorg of 'n regter, na gelang van die geval, gesluit, bepaal artikel 3(5) van die wet dat die bepalings van artikel 24A van die Huwelikswet 25 van 1961 van toepassing is. Myns insiens is die verwysing na 'n regter in artikel 3(5) van die wet oorbodig. 'n Regter se toestemming is nie 'n primêre toestemmingsvereiste nie en word alleen sekondêr ingevolge artikel 25(4) van die Huwelikswet 25 van 1961 vereis (hierbo 3 3 4). Die bepalings van artikel 25 van die Huwelikswet 25 van 1961 is in ieder geval ook van toepassing op gebruiklike huwelike (sien bespreking hierbo 3 3 1–3 3 4). Die gevolg is dat indien 'n gebruiklike huwelik sonder die vereiste toestemming gesluit word, die posisie ooreenstem met dié van 'n burgerlike huwelik wat sonder die vereiste toestemming gesluit is. Die huwelik is nie nietig nie, maar is net deur die ouer/voog/minderjarige self vernietigbaar binne die spertydperke deur die Huwelikswet gestel. Indien die vernietigingsaansoek nie dienooreenkomstig gebring word nie, is die geldigheid van die huwelik onaanvegbaar. (Vgl die bepalings van a 24A(1) van die Huwelikswet 25 van 1961. Vgl hieronder 5 2 2 (d) vir die vermoënsregtelike gevolge waar 'n gebruiklike huwelik wat sonder die toestemmingsvereistes gesluit is, nietig verklaar word.)

3 4 Formaliteite moet nagekom word

Die wet bevat die volgende bepalings:

(a) Die gebruiklike huwelik moet ooreenkomstig die gewoontereg beding en gesluit of voltrek word (a 3(1)(b)). Ek wil in hierdie verband twee sake vermeld:

(i) Eerstens maak die wet nie melding van of voorsiening vir 'n huweliksbevestiger as amptenaar van die staat by voltrekking van die gebruiklike huwelik nie. Soos gemeld, moet die gebruiklike huwelik na voltrekking geregistreer word (hierbo 3 3), maar daar word geen voorsiening gemaak vir die staat se betrokkenheid by die voltrekking van die gebruiklike huwelik nie. Hierdie aspek is myns insiens 'n groot leemte en behoort spoedig die aandag van die wetgewer te geniet. Die saak word des te meer dringend indien in gedagte gehou word dat wanneer 'n verdere gebruiklike huwelik gesluit word, die bestaande huweliksgoederebedeling beëindig moet word

(sien hieronder 4 4). Indien daar nie 'n kundige huweliksbevestiger van die staat teenwoordig is nie, bestaan die waarskynlikheid dat hierdie vereiste nie nagekom sal word nie; dit sal groot onsekerheid oor die huweliksgoederebedeling van die gebruiklike huwelike tot gevolg hê. 'n Laaste motivering vir die voorsiening van 'n huweliksbevestiger is dat die staat by ontbinding van die gebruiklike huwelik deur egskeiding (hieronder 5), die staat betrek. Waarom nie ook by voltrekking nie? (Dit sal nie die eerste keer wees dat aan die voltrekking van 'n gebruiklike huwelik sekere formaliteite gestel word nie; sien in hierdie verband die posisie in KwaZulu/Natal soos beskryf deur die South African Law Commission Project 90: Discussion Paper 74 par 4 5 4–4 5 5.) Die Regskommissie vra in par 4 5 9 die vraag wat die effek sal wees indien die gebruiklike huwelik sonder 'n huweliksbevestiger gesluit word, indien laasgenoemde as vereiste gestel word. Daar moet in gedagte gehou word dat indien 'n burgerlike huwelik voltrek word deur iemand wat nie 'n huweliksbevestiger is nie, die huwelik as algemene reël nietig sal wees. Hoekom moet dit met die gebruiklike huwelik anders wees?

Verder, gesien in die lig van die onduidelikheid oor presies wanneer 'n gebruiklike huwelik ingevolge die gewoontereg tot stand kom, voorsien ek dat daar nog in die toekoms hewige probleme in hierdie verband kan ontstaan en is dit myns insiens jammer dat hierdie aspek nie statutêr gereël is nie (vgl ook in hierdie verband South African Law Commission Project 90: Discussion Paper 74 par 4 4–4 5).

(ii) Tweedens moes die aangeleentheid van die betaling van *lobolo* myns insiens ook hier ter sprake gekom het. Die wet verwys eenmaal na die *lobolo*-gebruik in die woordomskrywingsartikel, en nie weer in die wet nie. Dit is jammer dat die rol wat *lobolo* as geldigheidsvereiste speel, nie hier by die formaliteitsvereistes duidelik uitgespel is nie. (Vir 'n kort beskrywing van die *lobolo*-praktyk sien South African Law Commission Project 90: Discussion Paper 74 par 4 3.)

(b) Die gades het 'n plig om toe te sien dat hulle gebruiklike huwelik geregistreer word (a 4(1)). Die vereistes vir registrasie word breedvoerig uiteengesit (vgl a 4(2)–(7)). Artikel 4(8) bepaal egter uitdruklik dat 'n registrasiesertifikaat onder andere as *prima facie*-bewys van die bestaan van die gebruiklike huwelik dien. Die versuim om 'n gebruiklike huwelik te registreer, raak nie die geldigheid van daardie huwelik nie (a 4(9)). Die bepalings van artikel 4(8) en (9) is 'n statutêre bewoording van die posisie wat geld by die burgerlike huwelik (sien Visser en Potgieter *Inleiding tot die familiereg* (1998) 62).

4 Gevolge van 'n gebruiklike huwelik

4 1 Persoonlike gevolge

Die volgende aspekte moet hieronder vermeld word:

(a) Artikel 6 bepaal:

> "**6. Gelyke status en bevoegdheid van gades.** – 'n Vrou in 'n gebruiklike huwelik het, op grond van gelykheid met haar man en onderhewig aan die huweliksgoederebedeling wat die huwelik reël, volle status en bevoegdhede met in- begrip van die bevoegdheid om bates te bekom en van die hand te sit, om kontrakte te sluit en om te litigeer, asook enige regte en bevoegdhede wat sy kragtens gewoontereg mag hê."

Die ondergeskikte posisie van die vrou ingevolge die gewoontereg word hiermee afgeskaf. Die vrou verkry soos haar suster in die burgerlike huwelik, onderworpe aan die huweliksgoederebedeling, volle handelings- en verskyningsbevoegdheid, sonder om haar regte en bevoegdhede wat sy ingevolge die gewoontereg gehad het, te verloor.

Die bepaling vermeld niks oor terugwerkendheid nie. Indien daar niks tot die teendeel spreek nie, moet gevolglik aanvaar word dat die bepaling nie terugwerkende krag het nie. In die onlangse saak van *Prior v Battle* 1999 2 SA 850 (TkD) het die hof beslis dat artikel 37(a) en 39(2)(ii) van die Transkei Marriage Act 21 van 1978 wat die vrou wat ingevolge 'n burgerlike huwelik getroud is, onder haar man se voogdy en maritale mag plaas, op grond van artikel 8, 10, 11(1), 22, 26 en 28 van die interim Grondwet van die Republiek van Suid-Afrika 200 van 1993 ongrondwetlik is. Die huidige Grondwet 108 van 1996 sou myns insiens tot dieselfde beslissing gelei het. Die hof het egter geweier om te beslis of artikel 37(b) van die Transkeise Wet wat 'n vrou getroud ingevolge 'n gebruiklike huwelik onder die voogdy van haar man plaas, ongrondwetlik is aangesien die applikante nie ingevolge 'n gebruiklike huwelik getroud is nie. Die wet herroep onder andere artikel 37 van die Transkei Marriage Act 21 van 1978 wat ook nou die posisie ingevolge die gebruiklike huwelik verander en net soos die burgerlike huwelik ingevolge die Transkei Marriage Act 21 van 1978 reël. (Vir 'n bespreking en motivering van die gelykheid tussen man en vrou binne die gebruiklike huwelik, sien South African Law Commission Project 90: Discussion Paper 74 par 6 2 ev.)

(b) Artikel 9 bepaal:

> "**9. Ouderdom van meerderjarigheid.** – Ondanks die reëls van die gewoontereg, word die ouderdom van meerderjarigheid van enige persoon vasgestel in ooreenstemming met die bepalings van die Wet op Meerderjarigheidsouderdom, 1972 (Wet No. 57 van 1972)."

Ingevolge artikel 1 van die Wet op Meerderjarigheid 57 van 1972 word meerderjarigheid bereik wanneer 'n persoon die ouderdom van een-en-twintig jaar bereik. Huweliksluiting het met ander woorde nie tot gevolg dat 'n getroude minderjarige persoon meerderjarig word nie. Huweliksluiting het wel tot gevolg dat die getroude minderjarige persoon mondig word. (Sien *Santam Versekeringsmaatskappy Bpk v Roux* 1978 2 SA 856 (A) 863G–866B. Toe hierdie saak beslis is, is die geldigheid van gebruiklike huwelike nog nie erken nie. Daar kan myns insiens nie aangevoer word nie dat die beginsel daarin neergelê nie ook op gebruiklike huwelike van toepassing is nie. Gebruiklike huwelike word by inwerkingtreding van die wet vir alle doeleindes as 'n huwelik erken. Sien a 2 van die wet hierbo 2.)

4 2 Vermoënsregtelike gevolge

Hierdie aangeleentheid word deur artikel 7 van die wet gereël. Vir sistematiese doeleindes deel ek artikel 7 in die volgende onderafdelings:

4 2 1 Gebruiklike huwelik gesluit voor inwerkingtreding van die wet

Artikel 7(1) bepaal dat die vermoënsregtelike gevolge van 'n gebruiklike huwelik wat voor die inwerkingtreding van die wet gesluit is, onderworpe bly aan die gewoontereg. Hoewel hier net van 'n gebruiklike huwelik in die enkelvoud melding gemaak word, geld dit ook vir meerdere gebruiklike huwelike van een manlike gade.

4 2 2 Gebruiklike huwelik gesluit na inwerkingtreding van die wet

Artikel 7(2) bepaal:

> "**7. Vermoënsregtelike gevolge van gebruiklike huwelike en handelingsbevoegdheid van gades.** – (2) 'n Gebruiklike huwelik wat na inwerkingtreding van die Wet gesluit is en waarin 'n gade nie 'n genoot in enige ander bestaande gebruiklike huwelik is nie, is 'n huwelik in gemeenskap van goed en van wins en verlies tussen die gades, tensy sodanige gevolge uitdruklik deur die gades in 'n huweliksvoorwaardekontrak wat die huweliksgoederebedeling van hul huwelik reël, uitgesluit word."

(a) Tensy anders ooreengekom, is 'n gebruiklike huwelik wat na inwerkingtreding van die wet gesluit is, binne gemeenskap van goed. Artikel 7(3) bepaal uitdruklik dat Hoofstuk III en artikel 18, 19, 20 en 24 van Hoofstuk IV van die Wet op Huweliksgoedere 88 van 1984 van toepassing is op 'n gebruiklike huwelik wat in gemeenskap van goed is soos beoog in subartikel (2). Dieselfde huwelik binne gemeenskap van goed wat geld ten opsigte van 'n burgerlike huwelik, is dus ook op gebruiklike huwelike van toepassing. Die strekking van hierdie bepaling is ook verder dat gemeenskap van goed by wyse van huweliksvoorwaardes uitgesluit kan word, net soos in die geval van die burgerlike huwelik. Na analogie van die bepaling van artikel 7(3) sal die huwelik buite gemeenskap van goed met die aanwas wees indien gemeenskap van goed uitgesluit word (vgl a 2 van hoofstuk I van die Wet op Huweliksgoedere 88 van 1984). Beoog die eggenotes om ook die aanwas uit te sluit, sal dit uitdruklik gedoen moet word. Die bepaling van artikel 7(2) wyk af van die Regskommissie se voorgestelde huweliksgoederebedeling van buite gemeenskap van goed (sien South African Law Commission Project 90: Discussion Paper 74 par 6 4 19). Hierdie voorstel van die Regskommissie is nie alleen gemotiveer vanuit die standpunt dat die idee van gemeenskap van goed vreemd aan die gewoontereg is nie, maar weerspieël ook die standpunt van onder andere regter Ngcobo wat van mening is dat poliginie onversoenbaar met gemeenskap van goed is (sien South African Law Commission Project 90: Discussion Paper 74 par 6 4 13. Sien egter my standpunt hieroor, hieronder 4 4 (b)(i)).

(b) Artikel 24 van Hoofstuk IV van die Wet op Huweliksgoedere 88 van 1984 word ook uitdruklik van toepassing gemaak op die vermoënsregtelike gevolge van 'n gebruiklike huwelik wat sonder die vereiste toestemmingsvoorskrifte gesluit is. Dieselfde gevolge word aan hierdie huwelike gegee as wat toegedig word aan die burgerlike huwelik van 'n minderjarige wat sonder die vereiste toestemmingsvoorskrifte gesluit is. Myns insiens is dit 'n goeie toedrag van sake. Hierdie regsreëling geld net vir gebruiklike huwelike wat na inwerkingtreding van die wet gesluit is. (Dit is myns insiens jammer dat hierdie aspek nie onder artikel 3 – hierbo 3 3 6 – tuisgebring is nie.)

4 3 Vrywillige verandering van die huweliksgoederebedeling

Die wet maak voorsiening vir twee verskillende wyses waarop die huweliksgoederebedeling vrywillig verander kan word, afhangende van die betrokke datum van huweliksluiting.

4 3 1 Gebruiklike huwelik(e) gesluit voor inwerkingtreding van die Wet

Artikel 7(4)(a) en (b) maak voorsiening vir die verandering van die huweliksgoederebedeling wat van toepassing is op 'n gebruiklike huwelik(e) wat *voor* inwerkingtreding van die wet gesluit is. Die inhoud van hierdie bepaling stem grootliks ooreen met die bepalings van artikel 21(1) van die Wet op Huweliksgoedere 88 van 1984.

Die gades moet net soos by 'n aansoek ingevolge artikel 21(1) van die Wet op Huweliksgoedere 88 van 1984, gesamentlik die aansoek bring (vgl a 7(4)(a)). Artikel 7(4)(b) vereis dat 'n man wat 'n gade in meer as een gebruiklike huwelik is, alle persone wat 'n voldoende belang in die aangeleentheid het by die verrigtinge moet voeg. Hierdie bepaling maak sin in die lig van die feit dat hierdie gebruiklike huwelik(e) se huweliksgoederebedeling aan die gewoontereg onderworpe is (sien a 7(1) hierbo 4 2 1). Artikel 7(4)(b) bepaal dan ook dat die applikant (enkelvoud) se bestaande gade of gades by die verrigtinge gevoeg moet word. Hierdie bepaling is vreemd en myns insiens totaal oorbodig. Soos reeds vermeld, vereis artikel 7(4)(a) dat die aansoek *gesamentlik* gebring moet word. Dit sluit tog albei die gades of, in geval van meerdere gebruiklike huwelike, al die gades in.

Net soos ingevolge artikel 21(1) van die Wet op Huweliksgoedere 88 van 1984, moet daar gegronde redes vir die voorgenome verandering bestaan; skriftelike kennis van die voorgenome verandering aan al die skuldeisers ten opsigte van bedrae wat R500 oorskry of ten opsigte van sodanige bedrag as wat die Minister van Justisie by kennisgewing in die *Staatskoerant* mag bepaal, gegee word; en geen ander persoon deur die voorgenome verandering benadeel word nie. Hoekom net sekere skuldeisers hier vermeld word, is onduidelik en diskriminerend en wyk ook af van artikel 21(1) van die Wet op Huweliksgoedere 88 van 1984.

Artikel 7(4)(a) bepaal onder andere "dat die huweliksgoederebedeling wat op sodanige huwelik of huwelike van toepassing is, nie langer van toepassing sal wees nie . . .". Hierdie bepaling stel dit myns insiens duideliker as artikel 21(1) van die wet op Huweliksgoedere 88 van 1984 dat die verandering nie terugwerkend gemaak kan word nie, maar suiwer toekomsgerig is. (Vgl die onsekere posisie ingevolge a 21(1) van die Wet op Huweliksgoedere 88 van 1984 soos vergestalt in die beslissings van *Ex parte Krös* 1986 1 SA 642 (NK) waarin beslis is dat die verandering terugwerkend gemaak kan word en *Ex parte Oosthuizen* 1990 4 SA 15 (OK) waarin beslis is dat die verandering nie terugwerkend gemaak kan word nie.)

4 3 2 Gebruiklike huwelik gesluit na inwerkingtreding van die wet

Artikel 7(5) bepaal dat artikel 21 van die Wet op Huweliksgoedere 88 van 1984 van toepassing is op 'n gebruiklike huwelik gesluit na inwerkingtreding van die wet, indien die man nie meer as een gade het nie.

Die bedoeling hier is beslis dat net artikel 21(1) van die Wet op Huweliksgoedere 88 van 1984 van toepassing is, aangesien die bepalings van subartikels (2)(a)–(e) nie meer regskrag het nie.

Gedagtig aan wat hierbo (4 2 2 (a)) gesê is, is die vermoënsregtelike gevolge van 'n gebruiklike huwelik wat na inwerkingtreding van die wet gesluit is, en waarin 'n gade nie 'n genoot in enige ander bestaande gebruiklike huwelik is nie, 'n huwelik binne gemeenskap van goed, tensy 'n ander huweliksgoederebedeling by wyse van huwelikskontrak beding is. Artikel 7(5) van die wet bepaal uitdruklik dat artikel 21(1) van die Wet op Huweliksgoedere 88 van 1984 ook van toepassing is op 'n gebruiklike huwelik na inwerkingtreding van die wet gesluit en indien die man nie meer as een gade het nie. Presies dieselfde vermoënsregtelike gevolge geld ten aansien van die gebruiklike huwelik en die burgerlike huwelik. Indien gades dus 'n gebruiklike huwelik na inwerkingtreding van die wet sluit en daar nie nog 'n gebruiklike huwelik bestaan nie, is die huwelik binne gemeenskap van goed, tensy daar 'n huwelikskontrak gesluit is wat anders bepaal. Hierdie regsposisie geld ook by die burgerlike huwelik. Gestel dat die gades na huweliksluiting hulle huweliksgoederebedeling wil verander. Artikel 7(5) skryf voor dat dit ooreenkomstig artikel 21(1) van die Wet op Huweliksgoedere 88 van 1984 gedoen kan word. Die huweliksgoederebedeling sal nou na enige van die gebruiklike huweliksgoederebedelings wat ook op 'n burgerlike huwelik van toepassing is, verander kan word. Dit is egter my mening dat dit nie vir die gades moontlik sal wees om hulle huweliksgoederebedeling deur die gewoontereg te laat beheers nie. Ek wil twee redes hiervoor aanvoer. Eerstens geld die gewoontereg nie by huweliksluiting van hierdie gebruiklike huwelike nie. Tweedens dink ek nie dat artikel 21(1) van die Wet op Huweliksgoedere 88 van 1984 hiervoor aangewend kan word nie. Die artikel is oorspronklik ingevoer om die huweliksgoederebedeling van die burgerlike huwelik na enige van die *burgerlike* huweliksgoederebedelings te verander.

4 4 Verpligte beëindiging van die huweliksgoederebedeling

Die wet maak ook voorsiening vir die *verpligte* beëindiging van die huweliksgoederebedeling.

(a) Artikel 7(6) bepaal dat 'n man in 'n gebruiklike huwelik wat 'n verdere gebruiklike huwelik met 'n ander vrou na inwerkingtreding van die wet wil sluit, by die hof aansoek *moet* doen om goedkeuring van 'n skriftelike kontrak wat die toekomstige huweliksgoederebedeling van sy huwelike reël. Ek wil hier onmiddellik vermeld dat dit nie relevant is wanneer die vorige gebruiklike huwelike gesluit is nie. Hulle kon ook voor inwerkingtreding van die wet gesluit gewees het, maar indien 'n verdere gebruiklike huwelik na inwerkingtreding van die wet gesluit wil word, is die bepaling van subartikel (6) van toepassing. Die verandering wat nou aangevra word, reël net soos artikel 7(4) van die wet (hierbo 4 3 1) en artikel 21(1) van die Wet op Huweliksgoedere 88 van 1984 (hierbo 4 3 2), net die toekomstige huweliksgoederebedeling van die huwelike. Let ook daarop dat subartikel (6) net van "'n skriftelike kontrak" melding maak en nie van "kontrakte" nie en hierdie skriftelike kontrak reël die "toekomstige *huweliksgoederebedeling* van sy *huwelike*". Die beklemtoonde woorde is myns insiens vatbaar vir net een interpretasie, naamlik dat een en dieselfde nuwe (veranderde) huweliksgoederebedeling vir al die gebruiklike huwelike vanaf die verandering geld.

(b) Subartikel (7) loop hand-aan-hand met die bepalings van subartikel (6). Subartikel (7) maak voorsiening vir twee aangeleenthede. Eerstens skryf dit voor wat die hof se bevoegdhede ten opsigte van die bestaande huweliksgoederebedeling is. Tweedens verleen dit aan die hof sekere bevoegdhede met die aansoek van die skriftelike kontrak wat die toekomstige huweliksgoederebedeling reël. Hierdie twee aangeleenthede word vervolgens verder toegelig.

(i) Eerstens, wat betref die hof se bevoegdhede ten opsigte van die bestaande huweliksgoederebedeling, skryf subartikel (7) voor dat die hof in die geval van 'n huwelik wat in gemeenskap van goed of aan die aanwasbedeling onderworpe is, die huweliksgoederebedeling wat op die huwelik van toepassing is, *moet* beëindig en 'n verdeling van die huweliksgoedere beveel. Die rede vir hierdie bepaling is stellig om die bestaande huweliksgoedere van die bestaande gebruiklike huwelik(e) te verdeel voordat die verdere gebruiklike huwelik voltrek word en om sodoende toe te sien dat die bestaande eggenotes nie enige verlies of skade ly met die totstandkoming van 'n verdere gebruiklike huwelik nie. Ek wil dit met die volgende voorbeeld verduidelik. Gestel M en V_1 is getroud binne gemeenskap van goed. Voordat 'n verdere gebruiklike huwelik met V_2 gesluit kan word, moet die bestaande huweliksgoederebedeling beëindig en 'n verdeling van die huweliksgoedere beveel word. Daar moet in gedagte gehou word dat die beëindiging net op die huweliksgoederebedeling gerig is en nie op die bestaan van die gebruiklike huwelik nie. Gevolglik is dit nie 'n egskeiding nie, en daarom is die bevoegdhede wat 'n hof by egskeiding (hieronder 5) verkry nie van toepassing nie. 'n Mens dink hier byvoorbeeld daaraan dat verbeuring van vermoënsregtelike voordele nie beveel kan word nie. Die skriftelike kontrak wat die toekomstige huweliksgoederebedeling van die huwelike reël, kan myns insiens weer voorsiening maak vir gemeenskap van goed wanneer M ook met V_2 trou. Die hof sal myns insiens in hierdie geval egter nie toelaat dat die toekomstige huweliksgoederebedeling binne gemeenskap van goed die bestaande bates van M en V_1 insluit nie, aangesien dit moontlik strydig met subartikel (7)(b)(iii) kan wees, wat aan die hof die bevoegdheid verleen om 'n aansoek te weier as die hof van mening is dat die belange van enige van die partye wat betrokke is nie voldoende deur die voorgenome kontrak beskerm sal word nie. In hierdie geval behoort die

voorgenome kontrak die bestaande bates van M en V1 buite die gemeenskaplike boedel te hou. Die skuld van M en V1 behoort ook by beëindiging van die gemeenskap van goed afgelos te word. Indien dit ook nie moontlik is nie, behoort die hof ook te weier om die toekomstige huweliksgoederebedeling binne gemeenskap van goed goed te keur aangesien dit die belange van V2 kan benadeel. Voorhuwelikse skuld van V2 behoort ook 'n struikelblok vir 'n toekomstige huweliksgoederebedeling binne gemeenskap van goed te wees, aangesien V1 dan ook in daardie skuld deel. By beëindiging van hierdie nuwe huweliksgoederebedeling word die gemeenskaplike boedel (daar is slegs een bedeling wat vir al die gebruiklike huwelike geld – hierbo (a)) myns insiens as algemene reël in drie gelyke dele verdeel. (Daar moet hier vermeld word dat geen woord in die wet oor die posisie by die dood van een van die gades vermeld word nie en dat die posisie by egskeiding ook hoogs onbevredigend en onseker is – sien hieronder 5 2 2 (e).)

Indien M en V1 in ons voorbeeld instede van binne gemeenskap van goed met die aanwas getroud is, moet die aanwas ook beëindig en verdeel word voordat 'n verdere gebruiklike huwelik met V2 gesluit kan word. Die bedoeling van die wetgewer is myns insiens om in hierdie geval met die beëindiging van die aanwasbedeling, die posisie ten aansien van die berekening van die aanwas te vereenvoudig indien die toekomstige huweliksgoederebedeling van die huwelike weer die aanwasbedeling insluit. Die toekomstige huweliksgoederebedeling (die toekomstige aanwasbedeling) word dan by die sluit van die verdere gebruiklike huwelik opnuut ingestel en dit bied dan aan M en V1, soos vir V2, die geleentheid om die aanvangswaarde van die onderskeie boedels opnuut te stel. Hierdie toedrag van sake is aanbevelingswaardig. Dit is egter ook so dat in die lig van die beslissing in *Ex parte Burger* 1995 1 SA 140 (D) (sien ook Van Schalkwyk "Vonnisbespreking: *Ex parte Burger* 1995 1 SA 140 (D)" 1995 *De Jure* 443 ev) die aanvangswaardes van beide M en V1 se boedels nie opnuut aangegee sal kan word nie, maar dat hulle aanvangswaardes vanaf huweliksluiting sal moet geld. Indien hierdie beslissing korrek beslis is, is die bepalings van artikel 7(6) van die wet nie bevredigend verwoord nie en sal die bepalings gewysig moet word om uitdruklik hiervoor voorsiening te maak.

Indien ek in beide bogenoemde beskouings fouteer, is die gevolg van subartikel (6) en (7) van artikel 7 ongetwyfeld dat die toekomstige huweliksgoederebedeling buite gemeenskap van goed sonder die aanwas of enige winsdeling is.

As die huweliksgoederebedeling van die bestaande gebruiklike huwelik gewoon buite gemeenskap van goed sonder die aanwasbedeling, maar byvoorbeeld met wins en verlies of sonder wins en verlies is, is die bepaling van subparagraaf (ii) van subartikel (7)(a) myns insiens van toepassing en verleen dit aan die hof wat die aansoek aanhoor, die bevoegdheid om 'n billike verdeling van goed te verseker. Wat met hierdie bepaling bedoel word, is om die minste te sê vreemd en onseker. (Die motivering vir hierdie billike verdeling word onder andere in paragraaf 6 4 1 van die South African Law Commission Project 90: Discussion Paper 74 gevind. Dit bestaan daarin dat die reg insake die burgerlike huwelik aan 'n hof 'n diskresie verleen om 'n billike verdeling van die huweliksgoedere by egskeiding te beveel. Hierdie is egter 'n oorvereenvoudiging van die regsposisie, aangesien die egskeidingshof by 'n burgerlike huwelik nie 'n sodanige diskresie besit nie.) Ingevolge hierdie bepaling verkry die hof 'n diskresie om die huweliksgoedere billik te verdeel. Geen faktor oor hoe die diskresie uitgeoefen moet word, word vermeld nie, behalwe dat enige relevante omstandighede van die familiegroep wat geraak sal word indien die aansoek toegestaan word, in aanmerking geneem moet word (a 7(7)(a)(iii)). Die vermelding van subparagraaf (iii) dui myns insiens op die geval waar die bestaande gebruiklike huwelik se huweliksgoederebedeling aan die gewoontereg onderworpe is.

(ii) In die tweede instansie verleen subartikel (7) aan die hof sekere bevoegdhede ten aansien van die skriftelike kontrak wat die toekomstige huweliksgoederebedeling van die huwelike reël. Dit bepaal dat die hof verdere wysigings van die bedinge van die kontrak kan toelaat (a 7(7)(b)(i)); die hof die bevel (aansoek?) kan toestaan op enige voorwaarde wat die hof goedvind (a 7(7)(b)(ii)); of die hof die aansoek kan weier indien die hof van mening is dat die belange van enige van die partye wat betrokke is nie voldoende deur die voorgenome kontrak beskerm sal word nie (a 7(7)(b)(iii)). Die bestaande gade of gades en ook die man se aanstaande gade, moet by die aansoekverrigtinge ingevolge subartikel (6) gevoeg word (a 7(8)). Omdat hierdie aansoek ingevolge subartikel (6) verpligtend is en nie vrywillig en gesamentlik soos byvoorbeeld die aansoeke hierbo (4 3 1; 4 3 2) vermeld nie, word die man verplig om die bestaande en aanstaande gades by die verrigtinge te voeg (a 7(8)). Soos reeds hierbo (3 4 (a) (i)) genoem, veroorsaak die feit dat die wet nie voorsiening vir 'n huweliksbevestiger maak nie, 'n groot leemte wat reggestel moet word deur vir die aanstelling van 'n huweliksbevestiger by voltrekking van 'n gebruiklike huwelik voorsiening te maak om toe te sien dat aan die bepalings van artikel 7(6) en (7) uitvoering gegee word.

Wanneer die hof die aansoek toestaan, moet die griffier of die klerk van die hof, na gelang van die geval, elke gade van 'n hofbevel wat 'n gewaarmerkte afskrif van sodanige kontrak insluit, voorsien en toesien dat sodanige bevel en gewaarmerkte afskrif van sodanige kontrak na elke registrateur van aktes van die gebied waarin die hof geleë is, gestuur word (a 7(9)).

4 5 Verpligte verandering van die huwelikstelsel

Hierbo (3 1 (a)) word gesê dat 'n man en vrou tussen wie 'n gebruiklike huwelik bestaan, bevoeg is om 'n burgerlike huwelik kragtens die Huwelikswet 25 van 1961 te sluit. Artikel 10(2) bepaal dat so 'n daaropvolgende burgerlike huwelik, 'n burgerlike huwelik binne gemeenskap van goed en van wins en verlies is, tensy sodanige gevolge uitdruklik deur die gades in 'n huweliksvoorwaardekontrak wat die huweliksgoederebedeling van hul huwelik reël, uitgesluit word. Artikel 10(3) bepaal dan die volgende:

> "**10. Verandering van huwelikstelsel.** – (3) Hoofstuk III en artikels 18, 19, 20 en 24 van Hoofstuk IV van die Wet op Huweliksgoedere, 1984 (Wet No. 88 van 1984), is van toepassing op 'n *gebruiklike* huwelik wat in gemeenskap van goed is soos beoog in subartikel (2)." (My beklemtoning.)

Artikel 10(3) se Engelse weergawe sien egter soos volg daaruit:

> "**10. Change of marriage system.** – (3) Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), apply in respect of *any* marriage which is in community of property as contemplated in subsection (2)." (My beklemtoning.)

Soos duidelik blyk, verskil die bewoording van die twee subartikels. Dit is myns insiens verder ook duidelik dat die bewoording van die Engelse teks in vergelyking met die Afrikaanse teks, dié teks is wat sin maak (sien ook hierbo 3 1 (a)). Hoekom verskil die twee tekste so geweldig in bewoording? Ek dink dat dit 'n geval van onnoukeurige wetsopstelling is. Die Afrikaanse subartikel (3) kom woordeliks ooreen met die Afrikaanse subartikel (3) van artikel 7 (sien hierbo 4 2 2). Dit is my waarneming dat subartikel (3) van artikel 7 net so oorgeneem is sonder om die nodige aanpassings te maak. Die nodige aanpassings is wel ten opsigte van die Engelse artikel 10(3) gemaak, maar myns insiens weereens ook nie met die nodige omsigtigheid nie. Die woord "any" moes eerder "a" gelees het.

Die gevolg van artikel 10(2) en (3) is dat die gebruiklike huwelik vervang word deur die burgerlike huwelik (sien ook hierbo 3 1 (a)). Artikel 10(2) stel dit duidelik dat die normale gevolg van die burgerlike huwelik 'n huweliksgoederebedeling binne gemeenskap van goed is, tensy dit deur huweliksvoorwaardes uitgesluit word. Die artikel vermeld egter nie wat die gevolg is waar die gebruiklike huwelik byvoorbeeld buite gemeenskap van goed is, terwyl hulle die burgerlike huwelik later sonder huweliksvoorwaardes wat gemeenskap van goed uitsluit, trou nie. Indien die standpunt wat gehuldig word, korrek is, vervang die burgerlike huwelik die gebruiklike huwelik (hierbo 3 1 (a)) en sal die burgerlike huwelik binne gemeenskap van goed wees.

5 Ontbinding van die gebruiklike huwelik deur egskeiding

5 1 Grond vir egskeiding

Artikel 8(1) bepaal dat 'n gebruiklike huwelik slegs deur 'n hof ontbind kan word by wyse van 'n egskeidingsbevel op grond van die onherstelbare verbrokkeling van die gebruiklike huwelik. 'n Egskeidingsbevel word verleen op grond van die onherstelbare verbrokkeling van die gebruiklike huwelik indien die hof oortuig is dat die huweliksverhouding tussen die partye by die gebruiklike huwelik so 'n toestand van verbrokkeling bereik het dat daar geen redelike vooruitsig op die herstel van 'n normale huweliksverhouding tussen hulle bestaan nie (sien a 8(2)).

Die omskrywing van onherstelbare verbrokkeling van die huwelik stem woordeliks ooreen met dié in artikel 4(1) van die Wet op Egskeiding 70 van 1979. Wat vreemd opval van die omskrywing in artikel 8(2) is dat die term "huwelik" instede van "gebruiklike huwelik" gebruik word en myns insiens weereens van onnoukeurige wetsopstelling getuig. Die uitleg wat aan die term "onherstelbare verbrokkeling van die huwelik" ingevolge die Wet op Egskeiding 70 van 1979 gegee is, is myns insiens ook van toepassing op die uitleg van die term ingevolge artikel 8 van die Wet.

Die wetgewer doen weg met die ander twee gronde van egskeiding waarop 'n burgerlike huwelik ontbind kan word, naamlik geestesongesteldheid en voortdurende bewusteloosheid. Die weglating van hierdie twee gronde van egskeiding kan in die lig van hulle geskiedenis verwelkom word (sien hieroor Van Schalkwyk 299 par (2 3), 304 par (3) en die gesag daar aangehaal), maar dit is aan die ander kant jammer dat die beskermingsbepalings van artikel 5(3) (die hof se bevoegdheid om 'n regspraktisyn vir die verweerder by egskeidingsverrigtinge op grond van geestesongesteldheid of voortdurende bewusteloosheid aan te stel) en 5(4) (die hof se bevoegdheid om sekerheid te vereis van die eiser ten opsigte van enige vermoënsregtelike voordele waarop die verweerder geregtig mag wees) van die Wet op Egskeiding 70 van 1979 in die bepalings van artikel 8 van die wet ontbreek.

Soos aangetoon, word die ontbinding van 'n gebruiklike huwelik deur egskeiding statutêr gereël. Daar is egter geen woord oor die beëindiging van die huwelik deur die dood nie. Dit is vreemd dat die wetgewer niks hieroor bepaal nie, veral as in gedagte gehou word dat 'n gebruiklike huwelik nie noodwendig deur die dood van een van die gades outomaties tot 'n einde kom nie.

5 2 Gevolge van egskeiding

5 2 1 Die posisie van minderjarige kinders

Die wet het twee bepalings wat betrekking het op die posisie van minderjarige kinders by egskeiding.

(a) Artikel 8(3) bepaal dat die Wet op Bemiddeling in Sekere Egskeidingsaangeleenthede 24 van 1987, van toepassing is op die ontbinding van gebruiklike huwelike. Die Wet op Bemiddeling in Sekere Egskeidingsaangeleenthede 24 van 1987 is aanvanklik in werking gestel om die belange van minderjarige kinders by 'n egskeiding van 'n burgerlike huwelik te beskerm deur van die dienste van die gesinsadvokaat gebruik te maak. Hierdie wet word nou uitdruklik ook van toepassing gemaak by die egskeiding van 'n gebruiklike huwelik. Hierdie situasie word verwelkom. Die praktiese uitvoering hiervan kan egter myns insiens 'n groot probleem wees, aangesien mannekragtekort mag voorkom. In die bemiddeling ooreenkomstig die gewoontereg van enige geskil of aangeleentheid wat ontstaan het voor die ontbinding van 'n gebruiklike huwelik deur 'n hof, word geen bepaling in artikel 8 só uitgelê dat dit 'n deur die gewoontereg erkende rol van 'n persoon (met inbegrip van 'n tradisionele leier) beperk nie.

Artikel 8(3) bepaal ook dat artikel 6 van die Wet op Egskeiding 70 van 1979 op die ontbinding van gebruiklike huwelike van toepassing is. Soos bekend, loop artikel 6(1) van die Wet op Egskeiding 70 van 1979 hand-aan-hand met die Wet op Bemiddeling in Sekere Egskeidingsaangeleenthede 24 van 1987 en is dit daarop gerig om 'n egskeidingsbevel slegs te verleen indien die hof oortuig is dat die voorsiening wat vir die minderjarige of afhanklike kinders getref is, bevredigend is of die beste is wat in die omstandighede bewerkstellig kan word. Artikel 6(3) verleen aan die hof wat die egskeiding verleen die bevoegdheid om 'n bevel ten opsigte van die onderhoud van 'n afhanklike kind, die bewaring van, of voogdy oor of toegang tot 'n minderjarige kind te maak. Die hof kan ook, indien dit in die belang van die kind is, 'n bevel ten opsigte van uitsluitlike voogdy oor of die uitsluitlike bewaring van 'n minderjarige kind aan een ouer toeken (vgl tav die gewoonteregtelike probleme oor bewaring en toesig en voogdy van minderjarige kinders South African Law Commission Project 90: Discussion Paper 74 par 7 5 ev).

Artikel 8(4)(a) van die wet maak ook artikel 8 van die Wet op Egskeiding 70 van 1979 van toepassing op gebruiklike huwelike met die gevolg dat 'n onderhoudsbevel of 'n bevel met betrekking tot die bewaring van, of voogdy oor, of toegang tot 'n kind deur 'n hoë hof ingetrek, gewysig of opgeskort kan word (vgl ook hieronder 5 2 2 (a)). Artikel 8(4)(e) verleen ook aan die hof wat 'n gebruiklike huwelik ontbind, die bevoegdheid om in die geval waar 'n bevel vir die betaling van onderhoud gemaak word, enige voorsiening of reëling wat in ooreenstemming met die gewoontereg gemaak is, in ag te neem.

(b) Die tweede bepaling van die wet word gevind in artikel 8(4)(d). Hierdie paragraaf verleen aan die hof wat die ontbinding van die gebruiklike huwelik beveel, die bevoegdheid om 'n bevel met betrekking tot die toesig en beheer of voogdy van enige minderjarige kind uit die huwelik te maak. Soos hierbo (5 2 1 (a) vermeld, maak artikel 6(3) van die Wet op Egskeiding 70 van 1979 reeds hiervoor voorsiening en is hierdie bepaling myns insiens oorbodig.

5 2 2 Die posisie van die gades

Artikel 8 maak voorsiening vir die volgende aangeleenthede rakende die posisie van die gades by egskeiding:

(a) Artikel 8(4)(a) bepaal dat 'n hof by ontbinding van die gebruiklike huwelik ook oor die bevoegdhede soos beoog in artikel 7 van die Wet op Egskeiding 70 van 1979 beskik. Soos bekend, maak artikel 7(1) en (2) voorsiening dat een gade beveel kan word om onderhoud aan die ander gade te betaal. Hierdie bevoegdheid van 'n egskeidingshof wat ten aansien van die burgerlike huwelik geld, word nou ook van

toepassing op die gebruiklike huwelik gemaak en is 'n absoluut vreemde konsep in die gewoontereg (vgl oor onderhoudsvoorsiening vir 'n gade in 'n gebruiklike huwelik ooreenkomstig die gewoontereg: *South African Law Commission Project 90: Discussion Paper* 74 par 7 4 ev).

Hand-aan-hand met die onderhoudsvoorsiening in artikel 7(1) en (2) van die Wet op Egskeiding 70 van 1979 loop die bepalings van artikel 8(1) en (2) wat voorsiening maak vir die intrekking, opskorting en wysiging van onderhoudsbevele ingevolge artikel 7(1) of (2). Artikel 8(4)(a) maak ook die bepalings van artikel 8 van toepassing by die egskeiding van 'n gebruiklike huwelik. (Hoewel dit nie uitdruklik in die wet vermeld word nie, is die Wet op Onderhoud 99 van 1998 ongetwyfeld ook op gebruiklike huwelike van toepassing.)

Artikel 7(3)–(6) bevat die bepalings rondom die regterlike diskresie waaroor 'n egskeidingshof ten aansien van sekere burgerlike huwelike buite gemeenskap van goed beskik. Hierdie bepalings is myns insiens nie van toepassing op 'n gebruiklike huwelik nie, aangesien daar nie aan die bepalings van artikel 7(3)(a) of (b) voldoen word nie, omrede die gebruiklike huwelik wat hier ter sprake is, se vermoënsregtelike gevolge ooreenkomstig die gewoontereg bepaal word en dus nie 'n huwelik buite gemeenskap van goed soos ingevolge die "burgerlike reg" is nie.

Die bepalings van artikel 7(7)–(8) ('n pensioenbelang word behoudens sekere uitsonderings geag 'n vermoënsregtelike voordeel te wees) is myns insiens ook van toepassing op 'n gebruiklike huwelik wat na inwerkingtreding van die Wet op die Erkenning van Gebruiklike Huwelike 120 van 1998 gesluit is, maar nie op 'n gebruiklike huwelik wat voor hierdie datum gesluit is nie en waarvan die huweliksgoederebedeling nie ingevolge artikel 7(4) van die wet verander is na 'n "burgerlike huweliksgoederebedeling" nie.

(b) Artikel 8(4)(a) bepaal ook dat artikel 9 van die Wet op Egskeiding 70 van 1979 van toepassing is op die ontbinding van 'n gebruiklike huwelik. Artikel 9 van die Wet op Egskeiding 70 van 1979, bepaal dat 'n hof by egskeiding 'n verbeuring van vermoënsregtelike voordele onder sekere omstandighede mag beveel. Hierdie bepaling vind ook toepassing op 'n gebruiklike huwelik. Net soos hierbo (5 2 2 (a)) ten aansien van artikel 7(3)–(6) vermeld is, is dit myns insiens twyfelagtig of artikel 9 van die Wet op Egskeiding 70 van 1979 toepassing sal vind op 'n gebruiklike huwelik waarvan die huweliksgoederebedeling deur die gewoontereg beheers word.

(c) Kostebevele wat ingevolge artikel 10 van die Wet op Egskeiding 70 van 1979 op egskeidings van burgerlike huwelike van toepassing is, word ook ingevolge artikel 8(4)(a) van toepassing gemaak op egskeidings van partye ingevolge gebruiklike huwelike.

(d) Artikel 8(4)(a) bepaal ook dat 'n hof wat 'n bevel vir die ontbinding van 'n gebruiklike huwelik verleen, oor die bevoegdheid beskik soos beoog in artikel 24(1) van die Wet op Huweliksgoedere 88 van 1984. Soos bekend, handel laasgenoemde bepaling nie met ontbinding deur egskeiding nie, maar reël die geval waar die huwelik van 'n minderjarige ontbind is as gevolg van gebrek aan die vereiste toestemmingsvoorskrifte. Dit is jammer dat artikel 3 van die wet (hierbo 3 3 6) nie ook in 'n subartikel hierdie bepaling geïnkorporeer het nie, aangesien artikel 8 van die wet hoofsaaklik met ontbinding deur *egskeiding* van 'n gebruiklike huwelik te doen het. Dit is myns insiens nietemin te verwelkom dat hierdie bepalings wat op die burgerlike huwelik van 'n minderjarige van toepassing is, ook op soortgelyke gebruiklike huwelike van toepassing gemaak word (sien ook hierbo 3 3 6 (b) vir die bepalings van artikel 24A van die Huwelikswet 25 van 1961).

(e) Soos reeds vermeld (hierbo 4 2 2), is die vermoënsregtelike posisie in 'n gebruiklike huwelik gesluit na inwerkingtreding van hierdie wet, dieselfde as dié van 'n burgerlike huwelik. Artikel 8(4)(b) van die wet bepaal:

> "**8. Ontbinding van gebruiklike huwelike.** – (4) 'n Hof wat 'n bevel vir die ontbinding van 'n gebruiklike huwelik verleen –
>
> (b) moet, in die geval van 'n man wat 'n gade in meer as een gebruiklike verbinding is, alle tersaaklike faktore met inbegrip van enige kontrak, ooreenkoms of bevel ingevolge artikel 7(4), (5), (6) of (7) in aanmerking neem en moet enige bevel wat die hof billik ag, gee;"

Hierdie bepaling verg myns insiens die volgende kommentaar:

(i) Die woord "verbinding" in paragraaf (b) moet ongetwyfeld "huwelik" wees. Die Engelse weergawe gebruik die regte woord, naamlik "marriage". Hierdie is weereens 'n voorbeeld van onnoukeurige woordgebruik by die opstel van die wet.

(ii) Die bepaling dat die hof enige bevel wat hy billik ag, moet gee by die ontbinding van 'n gebruiklike huwelik in die geval waar die man 'n gade in meer as een gebruiklike huwelik is, skep groot onsekerheid. Beteken hierdie bepaling dat nieteenstaande 'n gekose huweliksgoederebedeling, die egskeidingshof 'n diskresie verkry om enige verdeling wat dit billik ag, te beveel? Dit kan tog nie korrek wees nie. Wat is die doel van 'n huweliksgoederebedeling en kontrak dan? Hoekom geld hierdie diskresie dan ook net waar die man 'n gade in meer as een gebruiklike huwelik is? (Vgl ook die kommentaar hierbo 4 4 b (i).) In dieselfde asem kan ook gevra word wat die betekenis van die woorde "enige kontrak, ooreenkoms" is? Slaan dit ook op informele huwelikskontrakte voor en na huweliksluiting? (Vgl in hierdie verband *Ex parte Spinazze* 1985 3 SA 650 (A); *Honey v Honey* 1992 3 SA 609 (W).) Die betekenis hiervan is ook onseker. Myns insiens moet ek weereens sê dat "enige kontrak, ooreenkoms" vir my daarop dui dat die gades enige huweliksgoederebedeling kan kies, en nie beperk is by meerdere gebruiklike huwelike tot 'n huwelik buite gemeenskap van goed sonder enige vorm van winsdeling nie (vgl ook die kommentaar hierbo 4 4 (b) (i)).

(iii) Artikel 8 maak ook nie soos artikel 7(6) (hierbo 4 4 (a)) voorsiening vir 'n bevel wat die toekomstige huweliksgoederebedeling van die oorblywende huwelik(e) reël nie. Myns insiens verdien hierdie aspek ook dringend die aandag van die wetgewer.

(f) Laastens bepaal artikel 8(4)(c) dat enige persoon wat in die oordeel van die hof voldoende belang in die aangeleentheid het by die verrigtinge gevoeg kan word. Hierdie bepaling maak dit nie verpligtend nie, maar laat dit in die diskresie van die hof. Daar kan voorsien word dat hierdie bepaling toepassing kan vind waar die man 'n gade in meer as een gebruiklike huwelik is.

6 Diverse aangeleenthede

(a) Artikel 11 bepaal dat die Minister van Justisie in oorleg met die Minister van Binnelandse Sake regulasies rakende aangeleenthede wat deur die wet voorgeskryf word, kan uitvaardig. Hierdie aspek word nie hier bespreek nie.

(b) Artikel 12 maak voorsiening vir die wysiging van artikels 17 en 45*bis* van die Registrasie van Aktes Wet 47 van 1937. Ook hierdie onderwerp word daar gelaat.

(c) Artikel 13 herroep die wette in die mate waartoe soos in die Bylae vermeld.

7 Slot

Daar word al lank reeds op die bepalings van hierdie wet gewag. Soos vermeld, het hierdie wet nog nie in werking getree by die skryf van hierdie aantekening nie. Aanduidings dui egter daarop dat dit binnekort behoort te gebeur.

Opsommenderwys wil ek hierdie aantekening afsluit deur eerstens volgens my beskouing die positiewe aspekte van die wet te noem en tweedens na die negatiewe aspekte van die wet te verwys.

Daar is myns insiens drie positiewe aspekte waarmee ek wil afsluit.

(a) Eerstens is daar die bepalings ingevolge artikel 6 van die wet (hierbo 4 1 (a)) wat die vrou as gelyke huweliksvennoot met haar man verklaar. Hierdie bepaling is te verwelkom. Net soos die maritale mag by die burgerlike huwelik plek moes maak vir die gedagte van gelyke huweliksvennote, net so is hierdie tendens by die gebruiklike huwelik ook te verwelkom. Dit word myns insiens in elk geval ook genoodsaak deur die bepalings van artikels 9(3) en 15(3)(b) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996.

(b) Tweedens word die huweliksgoederebedeling van die gebruiklike huwelik in hoofsaak net soos die huweliksgoederebedeling van die burgerlike huwelik gereël. Hierdie toedrag van sake is myns insiens ook aan te prys. Die gewoonteregtelike huweliksgoederebedeling van die gebruiklike huwelik is myns insiens uit voeling met die behoeftes van die moderne tydsgewrig. Dit word denkend met 'n beter en meer gesofistikeerde huweliksgoederebedeling vervang.

(c) Derdens is ek ook ten gunste van die wyse waarop die gebruiklike huwelik deur egskeiding ontbind word.

Die volgende punte van kritiek moet egter weer eens kortliks vermeld word:

(a) Die voorbeelde van onnoukeurige wetsopstelling vul 'n mens met groot ongemak. (Sien hierbo 2 1 – net die Afrikaanse teks; 2 2 – net die Engelse teks; 4 5 – beide die Afrikaanse en Engelse teks; 5 1 – beide die Afrikaanse en Engelse teks; 5 2 2 (e) – net die Afrikaanse teks.)

(b) Artikel 8 van die wet moet by ontbinding van een gebruiklike huwelik, indien daar meerderes is, ook voorsiening maak vir die reël van die toekomstige huweliksgoederebedeling van die voortgaande huwelik(e), soos artikel 7(6) en (7) voorsien, by die sluit van verdere gebruiklike huwelike. (Sien hierbo 4 4 (a); 4 4 (b) (i) en 5 2 2 (e) (iii).)

(c) Die feit dat die wetgewer dit goed gedink het dat 'n gebruiklike huwelik sonder 'n huweliksbevestiger voltrek kan word, is jammer en kan myns insiens groot probleme in die toekoms tot gevolg hê. (Sien hierbo 3 4 (a) (i). Dit dien miskien net hier vermeld te word dat die Verslag van die Suid-Afrikaanse Regskommissie Projek 51 par 11 2 2 1 destyds die voorstel dat 'n gebruiklike huwelik slegs erken behoort te word indien dit formeel deur 'n huweliksbevestiger voltrek is, laat vaar het aangesien dit min steun en baie teenstand gekry het. Die rede hiervoor aangevoer, is dat so 'n gebruik vreemd aan die gewoontereg is en waarskynlik nie nagekom sal word nie. Hierdie beweegrede om so 'n belangrike element van huweliksluiting weg te laat, veral gesien in die lig van die belang van die funksie wat die huweliksbevestiger moet vervul, kan nie onderskryf word nie.)

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REGISTRABILITY OF RIGHTS IN THE DEEDS OFFICE

1 Introduction

The question whether rights are real or personal, and whether they are registrable in terms of section 63(1) of the Deeds Registries Act 47 of 1937, recently received the attention of the courts in two reported decisions, *Low Water Properties (Pty) Ltd v Wahloo Sand CC* 1999 1 SA 655 (SE) and *Denel (Pty) Ltd v Cape Explosive Works Ltd*; *Cape Explosive Works Ltd v Denel (Pty) Ltd* 1999 2 SA 419 (T).

Section 63(1) of the Deeds Registries Act reads as follows:

> "No deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration: Provided that a deed containing such a condition as aforesaid may be registered if, in the opinion of the registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed."

Section 63(1) therefore contains a prohibition against the registration of personal rights, coupled with a proviso to that prohibition. This note will focus on the treatment of these two aspects of section 63(1) in the *Low Water Properties* and *Denel* cases.

In terms of section 3(1) of the Deeds Registries Act the Registrar of Deeds is empowered to register specific categories of real right, as well as any real right not specifically mentioned in subsection (1) (s 3(1)(r)). There is, accordingly, no *numerus clausus* of real rights, and new rights may develop (*Denel* 434D–E). The converse, for purposes of section 63(1), of a condition which does not restrict ownership is a condition that indeed restricts the exercise of ownership, namely a real right. In other words, personal rights may not be registered but real rights may. The following factors have contributed to the difficulties encountered in determining which rights may, and which rights may not, be registered:

(a) the absence of a definition of "personal right" in the Deeds Registries Act;

(b) the circular definition of "real right" in the Deeds Registries Act (see Van der Walt and Pienaar *Introduction to the law of property* (1999) ("Van der Walt and Pienaar") 31; Badenhorst and Coetser "*Pearly Beach Trust v Registrar of Deeds* 1990 4 SA 614 (C): The subtraction from the dominium test revisited" 1991 *De Jure* 375 ("Badenhorst and Coetser") 377);

(c) the possible proliferation of real rights in terms of section 3(1)(r) of the Deeds Registries Act (*Denel* 434D–E); and

(d) the use of different tests, sometimes with imprecise content, to determine registrability.

The essence of the problem is: What is a real right, as opposed to a personal right, or rather, as proposed by Boraine (*Probleme rakende die registreerbaarheid van regte* (1987) Wits LLM 132–133), what is the distinction between registrable and unregistrable rights?

This issue has been a source of conflicting case law and divergent academic opinion (see *Ex parte Geldenhuys* 1926 OPD 155 162 164; *Ex parte Zunckel* 1937 NPD 295 299; *Schwedhelm v Hauman* 1947 1 SA 127 (E) 134–136; *Ex parte Pierce* 1950 3 SA 628 (O) 633 634; *Fine Wool Products of South Africa Ltd v Director of Valuations* 1950 4 SA 490 (E) 499 500 509E–G; *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* 1953 1 SA 600 (O) 605C–F 610F–H; *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 2 SA 400 (A); *Lorentz v Melle* 1978 3 SA 1044 (T); *Pearly Beach Trust v Registrar of Deeds* 1990 4 SA 614 (C); *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 1 SA 879 (A); Van der Merwe *Sakereg* (1989) ("Van der Merwe") ch 3; Kleyn and Boraine *Silberberg and Schoeman's The law of property* (1992) ("Kleyn and Boraine") ch 4; Sonnekus and Neels *Sakeregvonnisbundel* (1994) ("Sonnekus and Neels") ch 3; Van der Walt and Pienaar ch 3; Badenhorst and Coetser *passim*; Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*: *Pearly Beach Trust v Registrar of Deeds* 1990 4 SA 614 (K)" 1991 TSAR 173; Van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" 1992 *THRHR* 170 ("Van der Walt").

The Appellate Division accepted in *Erlax Properties (Pty) Ltd v Registrar of Deeds* (885A–C) that in order to determine whether a right is real, the courts work with two requirements, namely (a) that it must be the intention of the person who creates the right to bind not only the present owner but also subsequent owners, and (b) the nature of the right must be such that the registration results in a subtraction from *dominium* (*Denel* 434A–B).

The second requirement involves the application of the so-called subtraction-from-*dominium* test. The *locus classicus* on this test is the following formulation of De Villiers JP in *Ex parte Geldenhuys*:

> "One has to look not so much to the right, but to the correlative obligation. If that obligation is a burden upon the land, a subtraction from the *dominium*, the corresponding right is real and registrable; if it is not such an obligation, but merely an obligation binding on some person or other, the corresponding right is a personal right, or right in *personam*, and it cannot as a rule be registered" (1926 OPD 164).

In the application of the subtraction-from-*dominium* test, the courts work with the concept of an "obligation". It seems that the concept should be understood in the sense of a duty, rather than a *vinculum iuris*. Although this use in itself may contribute to some of the confusion surrounding the subtraction-from-*dominium* test, the use of the term "obligation" will be retained for purposes of convenience. With reference to the above *dictum* in *Ex parte Geldenhuys*, one can state that the converse of an obligation (in the sense of a duty) which (a) places a burden on land or (b) amounts to a subtraction from (or restriction of) ownership is a real right. Accordingly, a real right either places a burden upon land or restricts the exercise of ownership. The first aspect, requirement (a), relates to the land as legal object, whereas the second aspect, requirement (b), relates to ownership as a real right. The requirement of "restrict[ing] the exercise of any right of ownership in respect of immovable property" is also found in the prohibition in section 63(1) of the Deeds Registries Act.

If the emphasis falls on ownership, then the subtraction-from-*dominium* test is based upon the reasoning that a limited real right diminishes the owner's *dominium* over his property in the sense that it either

(a) confers on the holder certain entitlements inherent in the universal right of ownership, or

(b) to some extent prevents the owner from exercising his right of ownership (Kleyn and Boraine 50–51).

The subtraction-from-*dominium* test is capable of other formulations (see Badenhorst and Coetser 380–382). It has been submitted that the subtraction-from-*dominium* test may be formulated as follows: If a legal transaction involves the transfer of an entitlement to ownership of land to a person other than the owner of the land, a subtraction from ownership of the land takes place, and the right encompassing the entitlement qualifies as a real right (Badenhorst and Coetser 389).

There are other tests to determine whether or not a right is real and therefore registrable in the deeds office. (See, in general, Van der Merwe 60–64; Sonnekus and Neels 89–102; Van der Walt and Pienaar 32; Van der Walt 184–194.)

2 Facts and issues

2 1 Low Water Properties

In *Low Water Properties (Pty) Ltd v Wahloo Sand CC* the court examined the enforceability of a servitude to draw water from a borehole, store the water in a demarcated servitude area, and convey the water from the servient tenement to the dominant tenement by way of a pipeline, as well as a servitude of right of way against the successors in title to the grantor (1999 1 SA 657A–C). The deed of servitude created real rights and personal rights in favour of the owners of the dominant tenements (the applicants), with correlative obligations upon the grantor of the servitude (660B–C). In issue was whether the applicants, as owners of the dominant tenements, were entitled to enforce the personal rights against successors in title to the grantor (including the respondent) (660C–D).

2 2 Denel

In *Denel (Pty) Ltd v Cape Explosive Works Ltd*, Armscor acquired land from Capex (the first respondent). Clause 6 of the deed of sale provided for a land-use restriction to the effect that the property could be used only for the manufacture of armaments by the government for defence or military purposes. In clause 7(a) a right of repurchase of the property exclusive of improvements was created (1999 2 SA 422J–423B 426H–427H). Clause 7(b) provided that if Capex wished to repurchase the property it would have the right to buy improvements which Armscor was desirous of selling at a price "as may be agreed upon between the seller and the purchaser" (427H–I). The property was transferred to Armscor and both clauses 6 and 7 were incorporated in the deed of transfer (423C–D). Various alienations, acquisitions and consolidations of the land followed. The land-use restriction was perpetuated in respect of only a small portion of the original property, while the right to repurchase was omitted altogether and continued to be omitted from all subsequent documents of title, including the title deeds under which Denel (the applicant) had acquired the property from Armscor (423D–H). Denel applied for a declaratory order to the effect that the properties were not encumbered by the conditions contained in clauses 6 and 7 of the deed of sale (424A–B), whereas Capex averred that those conditions still applied to the original land (424B). In issue was, inter alia, the question whether the rights created in clauses 6 and 7 were personal or real, and whether they were registrable in terms of section 63(1) of the Deeds Registries Act (424C–D).

3 The prohibition against registration of personal rights

3 1 1 Relying on *Erlax Properties (Pty) Ltd v Registrar of Deeds* (434A–B) and regarding the court as bound by *Lorentz v Melle* (434E, 436I–J), Hartzenberg J

suggested in *Denel* the application of a two-stage test in order to determine whether or not a right is real (435E–F). The application of the two-stage test proposed by the court was as follows:

(1) The first leg of the exercise was to determine whether the right was capable of being a real right.

  (a) In order to determine whether a right is capable of being a real right, the subtraction-from-*dominium* test is applied (see *Ex parte Geldenhuys*). The right in question is compared to the correlative obligation to see whether the obligation is a burden upon the land itself, or whether it is something to be performed by the owner personally. If it is the former, the right is capable of being a real right. If it is the latter, it cannot be a real right (435F–H). In order for an obligation to be a burden on land, one of the following requirements must be satisfied:

    (i) the owner's rights must be curtailed in relation to the enjoyment of the land in the physical sense (*Lorentz v Melle* 1978 3 SA 1052E–F); or

    (ii) the obligation must "affect the land" or "run with the land" (*Fine Wool Products of South Africa Ltd v Director of Valuations* 1950 4 SA 509E–F) (435H–I).

  (b) The subtraction-from-*dominium* test can be supplemented by other tests:

    (i) If a right restricting an owner in the exercise of his ownership has as its object performance to be rendered by the owner, then the right is a personal right and performance cannot be claimed from the owner's successors in title (435I–J). If a right restricting an owner in the exercise of his ownership has a thing as its object, then the right is a real right.

    (ii) If a right bestows a direct power of absolute control over a thing on the holder of it, it is a real right (433J).

  (c) If it is clear that the right in question is a personal right, the whole exercise is complete, and the right is not registrable (436B–C). Neither intention nor registration in the deeds office can change a personal right into a real right (*Hollins v Registrar of Deeds* 1904 TS 603 607; *Schwedhelm v Hauman* 1947 1 SA 136; *Lorentz v Melle* 1978 3 SA 1050H) (436B–D).

(2) If it is found that the right is capable of being a real right, it has to be established whether or not the creator of the right intended it to be a real right (435F, 436F–G).

  (a) If the parties agree that the right is a personal one and not a real one, then it is also not registrable (436D–E).

  (b) If the parties agree that the right is a real one, then it is registrable.

3 1 2 Simply by reversing the two requirements of the *Erlax* decision, one can see that the two-stage test suggested by Hartzenberg J makes a great deal of sense. Because intention cannot elevate a personal right into a real right (*Lorentz v Melle* 1978 3 SA 1050H, *Denel* 434I–J, 436B–C), intention is fallible as a test of whether a right is a real one. Hartzenberg J gives effect to the importance and true role of intention by focusing on intention only after the preliminary investigation, namely whether the right in question is capable of being a real right. The two-stage test resolves the conflict between the principle that a personal right cannot be converted into a real right by the intention of the parties and the sentiment that, if possible, one should give effect to the intention of the parties (see Van der Walt *Law of property casebook for students* (1999) ("Van der Walt *Casebook*" 27–28). The first leg of the two-stage test is objective, whereas the second leg is subjective.

Hartzenberg J gives some content to the subtraction-from-*dominium* test. On the one hand, he requires that the obligation be a burden upon the land itself. On the other, in setting out the meaning of the expression "burden upon the land", he also works with the idea of a restriction upon ownership. It should, however, be noted that a burden upon land and a subtraction from *dominium* were alternatives in the formulation of the test of registrability by De Villiers JP in *Ex parte Geldenhuys* (see 1 above). To the extent that emphasis on either a burden upon land or a restriction of ownership may produce different results, the content of the subtraction-from-*dominium* test, as formulated by Hartzenberg J, may be vague. Overall, it seems as though the judge places greater emphasis on the effect of an obligation on the land. The restriction on ownership, when used as a criterion, is qualified by the court in requiring a restriction relating to the enjoyment of land in the physical sense. This requirement, which (as indicated above) was set out in *Lorentz v Melle* 1978 3 SA 1052E–F, makes nonsense of the subtraction-from-*dominium* test, for according to that test, an obligation either amounts to such a subtraction (in which event the corresponding right is real) or it does not (in which event the corresponding right is a personal one) (Van der Walt *Casebook* 27). This requirement of the subtraction-from-*dominium* test is much narrower than a requirement of restriction upon ownership. The question therefore arises whether or not restrictions relating to other entitlements of ownership of land can amount to a subtraction from *dominium*. The formulation of the subtraction-from-*dominium* test as such by Hartzenberg J resembles to a large degree the test distinguishing real and personal rights with reference to their objects, namely land and performance by the owner personally. In the court's explanation of the notion of a "burden upon land", subtraction -from-*dominium* terminology is used again.

The court also showed that, even if a right may be capable of being a real one, the parties can intend to create a personal one (436H–I). This is, of course, correct. It is submitted, however, that this does not mean that a real right is converted into a personal one. The intention to create a real right is simply lacking in such an instance. The parties merely created an agreement (with performance as object of the right) between them.

3 1 3 By referring to "another useful test" (435I), Hartzenberg J presumably countenanced the use of other tests. In his formulation of one of the other tests (in point (1)(b)(i) of 3 1 1 above), Hartzenberg J referred to a right which restricts an owner in the exercise of his ownership. If a right restricts the exercise of ownership, it already amounts to a subtraction from *dominium*, and therefore a real right (see 1 above). A real right cannot have performance as an object. This seems to be contradictory, and such a test should simply distinguish between real and personal rights with reference to the object of the right, namely things and performance, respectively. The contradiction may, however, be more apparent than real, because Hartzenberg J, in relying on the formulation of the subtraction-from-*dominium* test in *Ex parte Geldenhuys*, seems to have placed more emphasis on the notion of a burden upon land, and appears to have restricted curtailments of ownership to "enjoyment of the land in the physical sense" (435H).

In applying the two-stage test, Hartzenberg J found as follows:

(1) Clause 6 of the deed of sale, which provided for a land-use restriction, was registrable (437H–I). The parties did not, however, intend to create a real right but merely an agreement *inter partes* which was not to be recorded in the deed of transfer (438F–G, 439A–B).

(2) Clause 7 of the deed of sale, which created a right of repurchase, was not registrable because it did not affect the property or curtail the owner's right of enjoyment of the property in the physical sense (438A–B, 439B).

The court's formulation of the two-stage test was preceded by its conclusion that the following principles are applicable:

(1) Purely personal rights are not registrable.

(2) An extension of the types of right which may be registered should be made conservatively.

(3) The fact that the parties to a contract may agree that certain rights in it are to be registered against a title deed is not necessarily of any consequence in the determination whether or not those rights are registrable.

(4) In order to determine whether a right is real, one applies the subtraction-from-*dominium* test.

(5) If a personal right is registered erroneously, registration does not change the right into a real one.

(6) The contents of a purely contractual right and of a servitudinal right may be, and often are, identical.

(7) What is prohibited by section 63(1) of the Act is the registration of personal rights and conditions which do not restrict the exercise of any right of ownership in respect of immovable property (434E–435D).

3 1 4 In arriving at the decision in *Denel*, Hartzenberg J had to deal with *Ex parte Zunckel* and *Pearly Beach Trust v Registrar of Deeds* (which seemed to be in conflict with his decision). In *Ex parte Zunckel* it was held that rights of pre-emption contained in a will have been readily inserted in title deeds in South Africa for more than a century (1937 NPD 298). Gane J decided that such a right of pre-emption is registrable because it restricts the right of ownership, for it interferes with the free discretion of an owner as to the sale of his own immovable property (1937 NPD 298–299). (See further Badenhorst *Die juridiese bevoegdheid om minerale te ontgin in die Suid-Afrikaanse reg* (1993) 678–685.) For purposes of the present discussion it will be assumed that a right of repurchase and a right of pre-emption are of the same nature.

Hartzenberg J was of the view that *Ex parte Zunckel* was authority only for the proposition that it is established practice for pre-emptive rights created in wills to be accepted for purposes of registration (1999 2 SA 437C–D). He also pointed out that *Ex parte Zunckel* was decided in the Natal Provincial Division, and to the extent that it cannot be reconciled with *Lorentz v Melle*, the court was bound by the latter decision (436J–437A). He also pointed out that it was undisputed between the parties that an option is not registrable in terms of section 63(1) of the Deeds Registries Act (437F).

It is true that options are not regarded as registrable (*Kotzé v Civil Commissioner of Namaqualand* (1900) 17 SC 37; *Henderson Consolidated Corporation Ltd v Barnard* 1903 TS 33; *Lazarus and Jackson v Wessels, Oliver, and the Coronation Freehold Estates, Town, and Mines Ltd* 1903 TS 499 510). There are, however, views to the effect that options (for purposes of prospecting contracts) are indeed registrable (Franklin and Kaplan *The mining and mineral laws of South Africa* (1982) 283; Lowe *et al Elliott The South African notary* (1987) 220). This contradictory state of affairs, that is, unregistrable options as opposed to registrable rights of pre-emption, is attributed to historical practices and policy considerations (Van der Merwe and De Waal *The law of things and servitudes* (1993) ("Van der Merwe

and De Waal") 45). With his decision that a right of repurchase is not registrable, Hartzenberg J has narrowed the ambit of the contradiction, which can be attributed to different emphases on the subtraction-from-*dominium* test and the possibility of different formulations of that test.

The court did not take note of the fact that, prior to *Ex parte Zunckel*, rights of pre-emption were not regarded as registrable (*Michell v De Villiers* (1900) 17 SC 85 88; *Van der Hoven v Cutting* 1903 TS 299 307 315; see also *Ex parte Van der Merwe* 1903 TS 859 860; *Van Heerden v Van Vuuren* 1924 TPD 222 227).

The court also did not take into account that a prohibition of alienation (*British South Africa Company v Bulawayo Municipality* 1919 AD 84 96; *Friedlander v De Aar Municipality* 1944 AD 79 92–93; *Standard Bank van Suid-Afrika v Van der Merwe* 1960 4 SA 282 (C) 286E–F; *Bodasing v Christie* 1961 3 SA 553 (A) 561pr–A; *Greeff v Registrar of Deeds, Cape Town* 1986 1 SA 175 (A) 186H–187A 188B–C), a reversionary right (see *Commissioner for Inland Revenue v Estate Hobson* 1933 CPD 386 394) and a fideicommissary right (*Barnhoorn v Duvenage* 1964 2 SA 486 (A)) are registrable in the deeds office. These rights are all restrictions on the owners' entitlement to deal with the property. If it is accepted that a right of pre-emption is registrable because it amounts to a restriction upon the owner's entitlement to deal with the property, the same should apply to an option or a right of repurchase, and *vice versa*. If this view is correct, the finding of the court in *Denel* regarding clause 7 seems to be wrong. The opponents of the subtraction-from-*dominium* test point out in particular that one of the weaknesses of the test is that a personal right can also restrict the exercise of ownership (Sonnekus and Neels 102–103). This may explain the apparent limitation by Hartzenberg J of the application of the subtraction-from-*dominium* test to curtailments of ownership which restrict the owner's entitlement to enjoyment in the physical sense. In other words, presumably, according to the court, because the right of repurchase (albeit a restriction upon ownership) did not amount to a restriction upon enjoyment of land in the physical sense, it was not a registrable real right. As indicated before, this type of reasoning seems to amount to a negation of the subtraction-from-*dominium* test.

It is true that a right of option and a right of pre-emption are personal rights because the object of the right is performance in terms of the contract in question (Sonnekus and Neels 103). Does this now mean that a restriction upon or an acquisition of an entitlement to deal with the property is not possible? It is submitted that the matter can be taken one step further than the contract. To the extent that it is possible to acquire an entitlement to deal with the property, it is submitted that the encompassing right may be capable of being a real right. It should be noted that the contents of a purely contractual right (performance restricting alienation) and of a real right (restriction upon the entitlement to alienate) may be and often are the same.

If it is accepted that a limitation upon an entitlement to dispose of land is capable of being a real right, then the only remaining question is whether the parties intended it to be a real right. If the answer to both questions is Yes, the court's finding in *Denel* with regard to clause 7 of the deed of sale seems to be incorrect, unless one argues that it did not amount to a limitation in the physical sense. As indicated previously, such a proviso runs counter to the subtraction-from-*dominium* test.

In *Pearly Beach Trust v Registrar of Deeds* it was held that a condition providing that a third party was entitled to receive from the transferee and his successors in title one third of the consideration received for any option or right to prospect for minerals on the property, or one third of the consideration received in consequence of the expropriation of the property or upon the sale of the property to any authority

vested with the power to expropriate it, was registrable in terms of section 3(1)(r) of the Deeds Registries Act (1990 4 SA 618E–F). While relying on the subtraction-from-*dominium* test as formulated by De Villiers JP in *Ex parte Geldenhuys*, King J applied the subtraction-from-*dominium* test as follows:

> "In my view one of the rights of ownership is the *jus disponendi* or right of alienation and if this right is limited in the sense that the owner is precluded from obtaining the full fruits of the disposition it can be said that one of his rights of ownership is restricted" (617H–J).

Hartzenberg J did not follow *Pearly Beach Trust v Registrar of Deeds* because it was irreconcilable with *Lorentz v Melle*, which he regarded as correct and binding upon him (1999 2 SA 437E–F). He pointed out that the rights in question in the *Pearly Beach* case were personal obligations of the owner of the property because "[t]here was no restriction in the physical sense of the owner's right to deal with the property" (437E). This time Hartzenberg J referred to the "right" to deal with the property, which could have been relevant to the decision in *Denel*. If these two formulations of the subtraction-from-*dominium* test are read together, it would seem that a restriction upon the entitlements to enjoy and to deal with property (the *ius disponendi*) could amount to a subtraction from *dominium* provided that it relates to such a restriction in the physical sense. It is to be doubted whether the subtraction-from-*dominium* test is limited to those two entitlements. In other words, the restriction upon ownership may relate to any entitlement of ownership, provided that the limitation amounts to a restriction upon the land in the physical sense. A relationship between the right and the land is therefore required. As already indicated, such a proviso runs counter to the subtraction-from-*dominium* test.

3 1 5 In a different context, it was also found by the court in *Denel* that clause 7(b) of the deed of sale was void for vagueness because neither the improvements which were the subject of the sale nor their price could be said to be certain or determinable (433A–B). It was also held that clause 7(a) was void because clause 7(b) could not be severed from it. The registrar of deeds was under no duty to register the terms of void agreements (433D–G). (Owing to the voidness of clause 7, it was to some extent unnecessary for the court to examine the registrability of clause 7.)

3 1 6 The following *dictum* of Hartzenberg J is to be regretted:

> "Personal rights which are real rights are registrable. There are quite a number of them. The best known of these personal servitudes are usufruct, usus and habitatio, which were recognised in Roman law. It is not necessary for the purpose of this case to indicate which personal rights have been recognised as personal servitudes" (435D-E).

Like Mullins J in *Cowley v Hahn* 1987 1 SA 440 (E) 446, Hartzenberg J confuses a personal servitude with a personal right (see Scott "*Cowley v Hahn* 1987 1 SA 440 (OK). Koopkontrak van grond – aard van vruggebruik oor grond" 1987 *De Jure* 181; Van der Walt "Saaklike regte en persoonlike serwitute" 1987 *THRHR* 343; Breed "Usufruct: A Personal or a real right? A ground of eviction or a latent defect?" 1987 *THRHR* 352). A personal right (having performance as an object) cannot be a real right (having a thing as an object). Although in Roman law personal servitudes were possibly not recognised as servitudes until, or after, the classical period, personal servitudes were always recognised as real rights (Buckland *A manual of Roman private law* (1939) 153–154; Nicholas *An introduction to Roman law* (1962) 141 144; Thomas *Textbook of Roman law* (1976) 202; Van Zyl *Geskiedenis en beginsels van die Romeinse privaatreg* (1977) 181; Kaser *Roman private law* (trans Dannenbring) (1984) 144 149; Thomas *Introduction to Roman law* (1986) 59 62; Spiller *A manual of Roman law* (1986) 123). Personal servitudes are

not personal rights, and *vice versa*. This does not, however, detract from Hartzenberg J's otherwise sound decision. In *Low Water Properties (Pty) Ltd v Wahloo Sand CC* 661J Liebenberg J correctly pointed out that both real and personal servitudes are real rights.

3 2 In *Low Water Properties* the following positive duties were imposed on the owner of the servient tenement: (1) to extract water from the borehole; (2) to supply the borehole; (3) to supply the pump for extracting water from the borehole to ensure that the supply of water was at all times sufficient for domestic use by the occupiers of the dominant tenements; and (4) to maintain the pipeline and, if the pipeline was broken or in a state of disrepair or blocked, or if the continuous water flow through the pipeline was interrupted for whatsoever reason, to repair the pipeline immediately (659G–I). Liebenberg J followed *Schwedhelm v Hauman* 1947 1 SA 127 (E) in preference to *Van der Merwe v Wiese* 1948 4 SA 8 (C) (661A–E). In *Schwedhelm* it was decided, *inter alia*, that: (1) the terms casting obligations *in faciendo* upon the servient owner did not constitute real burdens upon the land and were not of a servitutal character; and (2) the mere fact of becoming owner of the property would not *per se* subject a subsequent owner to the burden of purely personal obligations (660G–H). One can therefore assume that Liebenberg J accepted that those positive obligations constituted, not real burdens upon the land (or restrictions upon ownership of land), but mere personal obligations by which the successors in title to the servient tenement were not bound.

It should be remembered that the maxim *servitus in faciendo consistere nequit* – namely, that a holder of a servitude cannot impose a positive duty on the owner of the servient tenement – is a prerequisite of a praedial servitude (Van der Merwe and De Waal 202), not of real rights in general. The proviso to section 63(1) of the Deeds Registries Act was introduced to make provision for the registration of a right or duty imposing a positive obligation on the owner of the servient tenement if, in the opinion of the registrar, it is complementary or ancillary to a registrable condition or right contained in the deed (Van der Merwe and De Waal 202).

4 The proviso to section 63(1) of the Deeds Registries Act

4 1 In *Low Water Properties* Liebenberg J pointed out that the proviso to section 63(1) does not allow the registration of personal rights *per se* (662F–G). It merely authorises the registration of the deed even though it contains personal conditions or rights, provided that the personal rights or conditions are complementary or otherwise ancillary to a registrable condition or right contained or conferred in the deed (662G). It was held that the registration of a personal right in terms of the proviso to section 63(1) of the Deeds Registries Act does not convert it into a real right (662A–C, 662H–I; see also 660H–I).

4 2 In *Denel* Hartzenberg J found that clause 7 was not registrable in terms of the proviso to section 63(1) as complementary or otherwise ancillary to a registrable condition (sc cl 6) (438B–439B). Clauses 6 and 7 were independent clauses dealing with different matters. The court found that clause 7 was neither ancillary nor complementary to clause 6. According to the court, it was possible to regard clause 6 as complementary to clause 7 in the sense that a reference to it was necessary in order to recognise the land use in question. Hartzenberg J concluded, however, as follows:

> "As clause 7 is not on its own registrable I cannot see how it can become registrable on the basis that, if the parties had agreed to register clause 6, clause 7 now becomes registrable. It is my view that clause 7 is not registrable and that the parties have specifically agreed not to record clause 6 in the title deed" (439A–B).

5 Doctrine of notice

In *Denel* it was unnecessary to decide whether the doctrine of notice was applicable (439C–D). In *Low Water Properties* the court rejected the argument that the respondent had accepted the correlative obligations by virtue of the doctrine of notice or by express agreement (662F–665C). Liebenberg J decided that the doctrine of notice is not applicable to personal rights and correlative obligations (663C–D). The court relied, *inter alia*, on *Vansa Vanadium SA Ltd v Registrar of Deeds* 1997 2 SA 784 (T). (Cf, however, Badenhorst and Olivier "Die aard van regte ingevolge 'n prospekteerkontrak" 1997 *TSAR* 583; Bobbert "Weer kennisleer: *Vansa Vanadium SA v Registrar of Deeds*" 1997 *De Rebus* 667.) This aspect will not be discussed further in this note.

6 Conclusion

The question whether rights are real or personal, and whether they are therefore registrable in terms of section 63(1) of the Deeds Registries Act, can be answered by the application of a two-stage test. The first leg of the test is to determine whether the right in question is capable of being a real right. If it is, then it must be determined whether the parties intended to create a real right. In the application of the first leg of the test, the subtraction-from-*dominium* test is employed. Accordingly, a right capable of being a real right in terms of that test, if it was intended by the parties to be a real right, is registrable in the deeds office.

It is submitted that in the application of the first leg of the two-stage test, other recognised criteria may still be employed. The test which focuses on the differing objects of real and personal rights remains useful in distinguishing between real and personal rights. Intention should not be elevated to a separate test in the determination whether a right is capable of being a real right. Once it becomes clear from the application of the subtraction-from-*dominium* test and other tests that a right is capable of being a real right, it has to be established whether the parties intended to create a real right under the circumstances. Intention cannot, however, convert a personal right into a real right or *vice versa*. Intention as a criterion makes sense only once it has been determined that a right is capable of being a real right.

In the application of the subtraction-from-*dominium* test, one compares the right in question and its correlative obligation to see whether the obligation is a burden upon the land itself or is something to be performed by the owner personally. An obligation constituting a burden upon land has to curtail the entitlements of the owner in relation to the enjoyment or the disposal of land in a physical sense, or must "affect the land" or "run with the land".

It is submitted that the subtraction-from-*dominium* test should be (i) applicable to all entitlements of ownership, and (ii) not require a restriction upon an entitlement of ownership of land in the physical sense. Whether the subtraction-from-*dominium* test relates to land, to ownership of land or to both, needs to be clarified. In other words, is a restriction on ownership of land a subcategory of a burden upon land or are both alternative formulations of the subtraction-from-*dominium* test? It is also submitted that in the application of the test the emphasis should fall upon restriction of ownership. To avoid confusion in the application of the test, reference should be made to a "duty" instead of to an "obligation". A clear formulation of the test should be given by the courts.

The contradictory state of affairs in case law regarding the registrability of options, rights of pre-emption and other rights relating to entitlement to deal with property will continue until the content of the subtraction-from-*dominium* test is finally determined by the courts.

In terms of the proviso to section 63(1), a deed containing personal rights (or duties) may be registered if the personal rights (or duties) in it are complementary or otherwise ancillary to real rights contained or conferred in the deed (and not *vice versa*). If the personal rights (or duties) relate to matters that are independent and different from the real rights, then the personal rights (or duties) are not registrable. Even if personal rights (or duties) are registered, they remain of a personal nature.

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THE RECOGNITION OF CUSTOMARY MARRIAGES ACT OF 1998: A COMMENTARY

1 Introduction

The coming into operation of the Recognition of Customary Marriages Act 120 of 1998 will bring about fundamental changes to South African family law. (Indications are that the Act will come into effect during the year 2000 but that it will be implemented only after regulations have been drawn up in consultation with the Home Affairs Ministry.) The main aim of this Act is to bring to finality the long overdue question of the recognition, for all intents and purposes, of customary marriages. The only valid form of marriage recognised for all purposes in South Africa is a civil marriage (Sinclair *The law of marriage* vol 1 (1996) 305). Customary marriages are recognised only for certain purposes specified by legislation. They are therefore not recognised for all intents and purposes and, as a result, consequences flowing from them can be enforced only if they are not against public policy or natural justice. (See, *inter alia*, *Samente v Minister of Police* 1978 4 SA 632 (E), *Nkambula v Linda* 1951 1 SA 377 (A), *Mthembu v Letsela* 1998 2 SA 675 (T) and *Ryland v Edros* 1997 2 BCLR 77 (C). See also Singh "'Women know your rights!' The recognition of African Customary Marriages Act: Traditional practice and the right to equal treatment" 1999 *De Jure* 314.)

The present constitutional dispensation in South Africa has brought some form of relief. The Constitution of the Republic of South Africa Act 108 of 1996 provides for the equality of all men and women and people of all races (s 9). It also provides for the enactment of legislation aimed at recognising

(a) marriages concluded under any tradition, or system of religious, personal or family law; or

(b) systems of personal and family law under any tradition or adhered to by persons professing a particular religion (s 15(3)).

The refusal to recognise a customary marriage was based on the fact that this marriage is polygamous in nature. Even in those instances where it was de facto monogamous, it could not be recognised for the simple reason that it was potentially polygamous and as such against public policy. A typical example of the refusal

recognise and enforce the consequences of this type of marriage (potentially polygamous) is the following dictum in Ismail v Ismail 1983 1 SA 1006 (A):

> "Claims are based on a custom or contract which arises directly from, and is ultimately 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 contract is vitiated. See *Ngqubela v Sihele* (*supra*) 352 and *Kaba v Nteta* (*supra*) 269 – in each instance the court held that no action could be brought for the recovery of lobola cattle because they have been paid in respect of a Black customary union, ie a polygamous union. I should mention that the courts have since been precluded by s 11 of Act 38 of 1927, from declaring that the custom of lobola or bogadi is repugnant to the principles of public policy. The principles enunciated in the aforementioned cases, nevertheless, still hold good as far as consequences of polygamous unions between other members of our community are concerned." (1025C–1026B)

This approach by our courts changed after the adoption of the interim Constitution of 1993 (Act 200 of 1993, which came into operation on 1994-04-27). It therefore came as no surprise when the Cape Provincial Division deviated from the *Ismail* case in which the court had refused on the ground of public policy to recognise or give effect to the consequences of polygamous marriages (*Ryland v Edros* 1997 2 SA 690 (C); 1997 1 BCLR 77 (C)). In defining public policy, the court held that it was not proper to all the values of the new South Africa for one group to impose its values on another and that the courts should brand a contract as offensive to public policy only if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it (707G–H). Thus the stage was set for the enactment of a measure that could ultimately give recognition to polygamous marriages (see Maithufi "Customary law of marriage and a Bill of Rights in South Africa: *Quo vadis*?" 1996 *THRHR* 298).

2 Union or marriage?

There are presently a number of enactments dealing with marriage in South Africa. Prominent among these are the Marriage Act 25 of 1961, the Black Administration Act 38 of 1927, the Matrimonial Property Act 88 of 1984, the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, the KwaZulu Act on the Code of Zulu law 16 of 1985, the Natal Code of Zulu law of 1987 (Proc R151 of 1987) and the Transkei Marriage Act 21 of 1978.

It is interesting to note that all these enactments, with the exception of the Marriage Act of 1961, make a distinction between a customary and a civil marriage. The reason is not hard to find, namely to differentiate that which is legal, valid and recognised from that which is not fully recognised or used to be unrecognised. In fact, the Black Administration Act of 1927, which is the primary legislation on which these enactments, with the exception of the Marriage Act, are based, refers to a customary marriage as a "customary union" and defines it as

> "an association of a man and a woman in conjugal relationship according to Black law and custom, where neither the man nor the woman is a party to a subsisting marriage" (s 35).

It defines a marriage (civil) as:

> "The union of one man and one woman in accordance with any law for the time being in force in any province governing marriages, but does not include any union recognised as a marriage in Black law and custom under the provisions of section one hundred and forty-seven of the Code of Zulu law contained in the Schedule to Law 19 of 1891 (Natal) or any amendment thereof or any other law" (*ibid*).

The Recognition of Customary Marriages Act of 1998 defines a customary marriage as a marriage concluded in accordance with customary law (s 1).

3 The Recognition of Customary Marriages Act of 1998

The purpose of this legislation is set out in its long title. The Act has the following objectives:

(a) to accord recognition to customary marriages;

(b) to specify the requirements for a valid customary marriage;

(c) to provide for the equal status and capacity for the spouses in customary marriages;

(d) to regulate the proprietary consequences of customary marriages and the capacity of the spouses of such marriages;

(e) to regulate the registration of customary marriages; and

(f) to regulate the dissolution of customary marriages.

These issues are discussed here.

3 1 Recognition of a customary marriage and requirements

The Act provides that a marriage which is valid at customary law and existing at the date of commencement of this Act is recognised for all purposes (s 2(1)). A marriage valid at customary law is one which complies with the requirements set by customary law. (For these requirements see, *inter alia*, Bekker *Seymour's Customary law in Southern Africa* (1989) 105–109, Olivier *et al Indigenous law* (1995) 17–22.)

Before the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1998 (which commenced on 1988-12-02), it was possible for a customary marriage to be dissolved or superseded by a civil marriage. On the other hand, a man could not, during the subsistence of a civil marriage, contract a valid customary marriage with another woman. This was not regarded as bigamy, since the ensuing marriage by custom was null and void. Where the second marriage was by civil rites, it had the effect of dissolving the previously subsisting marriage by custom (*Nkambula v Linda* 1951 1 SA 377 (A), *Malaza v Mndaweni* 1975 BAC (C) 45). Although a customary marriage may be valid because it complies with the requirements laid down at customary law, it may be regarded as invalid if it has been dissolved or superseded by a civil marriage contracted by the husband or wife of such marriage before the commencement of the Marriage and Matrimonial Property Law Amendment Act of 1988.

The Marriage and Matrimonial Property Law Amendment Act now provides that a spouse to a customary marriage is not competent to contract a civil marriage with another person during the subsistence of such customary marriage. Spouses to a customary marriage may, however, contract a civil marriage with each other. A spouse in a customary marriage is therefore prohibited from contracting a civil marriage with another person, except his or her spouse by customary rites and then only if the man is also not a partner to a customary marriage with another woman (s 22(1) of Act 38 of 1927). Thus presently a customary marriage is not dissolved or superseded by a civil marriage. Although this is the position, it would appear that the ensuing civil marriage is not void *ab initio* but merely voidable. (See Maithufi "Do we have a new type of voidable marriage?" 1992 *THRHR* 628.)

A valid customary marriage envisaged by this Act is one that does not conflict with principles governing marriages in terms of South African common law and furthermore complies with the requirements laid down by customary law. Therefore

where the husband is married to more than one wife, one in terms of custom and another by civil rites, a possibility exists that the customary marriage may be invalid.

Section 2(2) provides that a customary marriage contracted after the commencement of this Act and which complies with the requirements laid down, is recognised for all purposes as a valid marriage. The requirements for the validity of a customary marriage are set out in section 3. Section 3(2) further provides that a spouse in a customary marriage is not competent to contract a marriage under the Marriage Act 25 of 1961. Thus it appears that a man or woman already married by custom is totally prohibited from contracting a civil marriage with another person during the subsistence of such customary marriage. A man and a woman between whom a customary marriage exists may, however, contract a civil marriage with each other if *neither* of them is a spouse in a subsisting customary marriage with another person (s 10(1) – my emphasis. See par 4 below, and also Singh 317).

Provision is also made to the effect that a spouse of a civil marriage is not competent to enter into another marriage, including a customary marriage, during the subsistence of such civil marriage (s 10(4)). A person who contravenes these provisions is guilty of an offence and on conviction is liable to a fine or imprisonment for a period not exceeding one year (s 11(4)). Does this contravention have any effect on the validity of the ensuing marriage?

Despite the penalty imposed for this contravention, it appears that a marriage entered into in contravention of this measure, whether it be a civil or a customary marriage, will be regarded as null and void *ab initio*. It would, however, be difficult to determine whether or not a person is still married by custom when he or she contracts a civil marriage with another person, as customary marriages are dissoluble extra-judicially. Thus it is quite possible that a man or a woman still married by custom may contract a civil marriage. To this end, the Act makes provision for the promulgation of regulations relating to the manner in which the registering officer of customary marriages may satisfy him- or herself as to the existence or validity of a customary marriage (s 11(ii)). Although this is the position, the possibility that a person already married may contract another marriage would still exist because incorrect or falsified information may be provided to such officer at the time when the customary marriage is concluded. Moreover, a registering officer does not have jurisdiction relating to the contracting of civil marriages unless this vacuum is filled by the envisaged regulations. Thus our courts would still in future, when this Act comes into operation, be called upon to determine the validity or otherwise of a marriage, civil or customary, contracted in contravention of the provisions of this Act.

3 2 Further requirements and registration

It has been indicated above that only persons who are not married by civil rites may contract customary marriages (s 3(2) read with s 10(4)). A person who is married by custom is similarly prohibited from contracting a civil marriage with another person during the subsistence of a customary marriage. Persons married by custom may contract a civil marriage with each other.

Other requirements laid down are that—

(i) the prospective spouses must both be above the age of 18 years;

(ii) both spouses must consent to be married to each other under customary law; and

(iii) the marriage must be negotiated and entered into or celebrated in accordance with customary law (s 3(1)(a) and (b)).

Where a prospective spouse is under the age of majority, the consent of both his or her parents or legal guardian is required (s 9). The Minister of Home Affairs is also authorised to grant consent in writing to a minor for the purposes of contracting a customary marriage if he or she considers the marriage desirable and in the interest of the parties. This happens where one of the prospective spouses is under the age of eighteen (s 3(3)(a), (b) and (4)). Customary law determines the blood relationship between persons who wish to contract a customary marriage (s 3(6)).

Requirement (iii) above relates to negotiations preceding the customary marriage as well as celebrations. Customary marriages are normally preceded by negotiations between the families of the prospective spouses. Such negotiations may even take place at the time when the prospective spouses or one of them is still a minor. This, amongst the Batswana, is known variously as *go tlhoma lotlhokwa, go opa mpa* or *go baya monwana*. (See Schapera *A handbook of Tswana law and custom* (1977) 130.) It would appear that this Act recognises these types of betrothal, provided that when the marriage is contracted, both prospective spouses consent and have reached the required age. The consent of the parents of both prospective spouses would have been obtained during negotiations. If at the time of the marriage one of the prospective spouses is under the age of eighteen, ministerial consent in writing is a requirement. It would also appear that a betrothal preceded by *ukuthwala* is also sanctioned, provided that the parties consent and are of the required age.

Preferred marriages are also sanctioned by this Act, as relationship by blood is determined by customary law. Amongst the Batswana, for example, it is said:

> "Traditionally the women regarded as a man's most suitable bride are his own relatives of certain categories. The marriage most preferred is with the *ntsala*, i.e. the daughter of a maternal uncle or of a paternal uncle, and particularly with the former. *Ntsala wa motho ke mogatse*, says the proverb . . ." (Schapera 128).

Lobolo is not indicated expressly as an essential requirement for the validity of a customary marriage. This is understandable, since at negotiations relating to a customary marriage, an agreement as to the lobolo required will normally be reached. This is one of the characteristics of a customary marriage which distinguishes it from other forms of marital relationships. The Act defines lobolo as

> "the property in cash or in kind, whether known as *lobolo, bogadi, xuma, lumalo, thaka, ikhazi, magadi, emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage" (s 1).

(Note, further, that the Act does not use the word "pays" in the definition of lobolo but rather "gives".)

The Act places a duty on the spouses in a customary marriage to have the marriage registered. The applicant must furnish the registering officer with the prescribed information and any additional information in order to satisfy the said officer as to the existence of the marriage (s 4(1) and (2)). An unregistered customary marriage contracted before the commencement of this Act, must be registered within twelve months or within such period as may be determined by the Minister by notice in the *Gazette*. Customary marriages contracted after the commencement of this Act must be registered within three months after conclusion or within such longer period as may be prescribed (s 4(3)).

The registering officer is obliged to register a customary marriage if satisfied that a valid marriage has been concluded. If it has, he must record the identity of the spouses, date of the marriage, any lobolo agreed to and any other prescribed particulars and issue a certificate of registration (s 4(4)). It should be noted that what is to be issued here is a registration certificate, not a marriage certificate.

Any person who can satisfy a registration officer that he or she has a sufficient interest in an unregistered customary marriage, may apply to such officer to inquire into the existence of the marriage and if the registering officer is satisfied that a valid marriage exists, he must register the said marriage and issue a certificate of registration (s 4(5)). A court, as defined by this Act, may also, upon application, order the registration of any customary marriage or the cancellation or rectification of any registration of a customary marriage effected by a registering authority (s 4(7)).

The registration of a customary marriage facilitates proof of its existence, although failure to have it registered does not affect its validity.

3 3 Proprietary consequences

A distinction is made between marriages entered into before and after the commencement of the Act. Proprietary consequences of customary marriages concluded before the date of commencement of this Act continue to be governed by customary law (s 7(1)). Such consequences are described by Olivier as follows:

> "The marriage creates a separate proprietary entity; if there is only one wife, there is only a single undivided economic unit, under control of the husband as head of the family which contains all the assets and income, from whatever source, belonging to or collected or earned by members of the family. If, however, the family is polygamous, a distinction is made between general family property and house property, over which the individual house has a large measure of autonomous control" (Olivier *et al* 49).

A customary marriage contracted after the commencement of this Act is regarded as in community of property and of profit and loss provided that the husband is not a spouse in any other existing customary marriage. Such consequences may, however, be specifically excluded in an antenuptial contract (s 7(2)). Spouses to a marriage concluded before the commencement of the Act may jointly apply to a court for leave to change the matrimonial property system applicable to their marriage or marriages (s 7(4)).

A husband who wishes to conclude another customary marriage has to make an application to a court to approve a written contract which will regulate the future matrimonial property system of his marriages. When the application is considered, the court must terminate the matrimonial property system applicable to the marriage and effect a division of the matrimonial property in the case of a marriage in community of property or which is subject to the accrual system. The court is further empowered to effect an equitable distribution of property and to take into account all the relevant circumstances of the family groups which would be affected if the application is granted (s 7(7)(a)). The court may allow further amendments to the terms of the contract, grant the order subject to any condition it may deem just, or refuse the application if in its opinion the interests of any of the parties would not be safeguarded by the proposed contract (s 7(7)(b)).

A husband who makes an application to conclude another customary marriage and to approve a written contract which will regulate the future matrimonial property system of his marriage, must join in such proceedings all persons having a sufficient interest in the matter and in particular his existing spouse or spouses and his prospective spouse (s 7(8)).

3 4 Equal status and capacity of spouses

Spouses in customary marriages are regarded as equal, subject to the matrimonial property system governing their marriage. The wife has full status and capacity (capacity to acquire assets and dispose of them, to enter into contracts and litigate) in addition to any rights and powers that she might have at customary law (s 6). This

is in keeping with the Constitution, which provides for equality before the law and equal protection and benefit of the law (s 9).

3 5 Dissolution

Dissolution of a customary marriage may, in terms of Act 120 of 1998, be effected only by a decree of divorce on the ground of irretrievable breakdown of the marriage. A decree of divorce may be granted on this ground if the court is satisfied that the marriage relationship between the parties has reached such a stage of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them (s 8(1) and (2)). In granting a decree of divorce, the court is obliged to take into account all relevant factors including any contract, agreement or order made in terms of section 7 in the case of a husband who is a spouse in more than one customary marriage (s 8(4)(b)).

A court may also, in granting a decree for the dissolution of a customary marriage, order that any person who in its opinion has a sufficient interest in the matter, be joined in the proceedings (s 8(4)(c)). One such person who may have a sufficient interest in the proceedings is the father of the wife as the *lobolo* holder. The general principle is that he must be involved in the dissolution of a customary marriage as he was in its creation. As a *lobolo* holder, he must be placed in a position to be able to restore the *lobolo* furnished less certain deductions allowed by custom at the dissolution of the marriage. Thus when a dispute relating to the restoration of *lobolo* arises, the court may order that the father or any other person who is the *lobolo* holder, should be joined as a party to the proceedings (see in this regard Bekker 207). In the case of a polygamous marriage, other wives may also have a sufficient interest in the matter.

A court may also in granting a decree of divorce make an order with regard to the custody or guardianship of any minor child of the marriage (s 8(4)(d)). Originally, at customary law, the father's right to the custody and guardianship of his children could not be taken away. The court as the upper guardian of all minors has, however, modified customary law in this regard by looking at the interest of the children. (See Bekker 217 227.) This position is presently regulated by the provisions of the Constitution (s 28(2)) and indicated in *Hlophe v Mahlaela* 1998 1 SA 449 (T) in the following words:

> "It did, however, become apparent to me, that whatever the position might have been in general in indigenous law regarding the custody of children, the basic principles thereof have to a certain extent been excluded in favour of the common law. It appears to be uncertain whether the common law has been incorporated into customary law or whether customary law has simply been excluded in favour of the common law" (458F–G).

In making an order for the payment of maintenance on dissolution of a customary marriage, the court may take into account any provision or arrangement made in accordance with customary law (s 8(5) of Act 120 of 1998). Such arrangements may include, *inter alia,* the provision of *isondlo,* the allocation of property to members of the family during the subsistence of the customary marriage and the allocation of property to a house established by the customary marriage.

4 Conclusion

The Recognition of Customary Marriages Act of 1998 is an interesting piece of legislation. It tries to achieve what has been long overdue: the recognition of customary marriages in South Africa. Although its aims are laudable, it has certain shortcomings.

One such shortcoming is that although registration of a customary marriage appears to be compulsory, failure to have it registered does not affect the validity of the marriage. Proof of the existence of a customary marriage has been a thorny issue in our law for a very long time. This is indicated by the passing of laws such as the General Laws Amendment Act of 1963 (s 31; see also Singh 317). It cannot be disputed that many unsatisfactory decisions regarding the existence or otherwise of a customary marriage have been reached despite the existence of this legislative measure. (See Dlamini "Claim by a widow of a customary union for loss of support" 1984 *SALJ* 34.) It is suggested that registration should be made a compulsory requirement to facilitate proof of the existence of a customary marriage in future.

Act 120 of 1998 provides that no spouse to a customary marriage is competent to contract a civil marriage with another person (s 3(2)). Spouses to a civil marriage are also not competent to contract another marriage during the existence of such civil marriage (s 6(4)). Spouses to a customary marriage are competent to contract a civil marriage with each other provided that neither of them is a spouse to a subsisting marriage with any other person (s 10(1)). Does this mean that a woman can be a spouse to more than one customary marriage? If she is the only spouse in one of such marriages, can such marriage be converted into a civil marriage? The Act seems to discourage polygamy. It provides that a husband who wishes to contract a further marriage has to make an application to a court to approve a written contract which will regulate the future matrimonial property system of his marriages. In such an application the husband has to join all persons having a sufficient interest, and in particular his existing spouse or spouses (s 7(6)). Failure to comply with this will presumably be visited with a criminal sanction (s 11(4)). No provision is made as to whether or not a marriage contracted in contravention of these provisions will be valid. As litigation is expensive, this particular provision will be difficult to adhere to and in order to avoid unnecessary litigation, it is advisable that the legislature expressly provides that such a marriage is invalid *ab initio*.

Furthermore, the Act perpetuates legal pluralism in South Africa. It has already been indicated elsewhere that it would have been preferable for the recognition of customary marriages and all other marriages not yet recognised, to be achieved through the amendment or repeal of the present Marriage Act of 1961 which should be accompanied by the enactment of legislation governing all types of marriage in South Africa (see Maithufi "The effect of the 1996 Constitution on the customary law of succession and marriage in South Africa: Some observations" 1998 *De Jure* 285).

Despite these shortcomings, the legislature has to be commended for enacting this piece of legislation. The decisions of our courts on the interpretation of the provisions of this measure, when it comes into operation, are eagerly awaited.

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Hermeneutical mediation comes to an end whenever one party arrogates to itself a sovereign prerogative, that is, the capacity to determine the meaning of legal . . . texts in a unilaterally binding fashion.

Fred Dallmayr "Hermeneutics and the rule of law" in Legal hermeneutics: History, theory and practice (*ed Leyh*) 17–18.

VONNISSE

TAALREGTE IN DIE REGSPROSES

R v Beaulac
[1999] 134 CCC (3d) 481 (SCC)

1 Inleiding

In die saak *R v Beaulac* [1999] 134 CCC(3d) 481 (SCC) het die volgende feitestel na vore getree: B is in 1989 in die Kanadese staat British Columbia van moord in die eerste graad aangekla. Sy voorlopige verhoor is in Januarie 1989 afgehandel. Op 1 Januarie 1990 is artikel 530 van die Kanadese Strafkode (Criminal Code; CC) in British Columbia van toepassing gemaak. Hierdie artikel gee aan 'n beskuldigde die reg om aansoek te doen om 'n verhoor voor 'n regsprekende beampte, insluitende 'n regter en 'n jurie, wat sy taal kan praat. "Taal" verwys hier na 'n amptelike taal soos in artikel 16(1) van die Canadian Charter of Rights and Freedoms (CCRF) beskryf, naamlik Engels en Frans. In Oktober 1990, vyf dae na die aanvang van sy verhoor, het B 'n aansoek ooreenkomstig artikel 530CC gebring. Die aansoek is afgewys, maar 'n herverhoor is later beveel. In Februarie 1991, voor die herverhoor, het B opnuut 'n aansoek ooreenkomstig artikel 530CC gebring, naamlik dat die hof saamgestel word uit 'n regter en jurie wat beide amptelike tale magtig is. Dié aansoek is ook afgewys aangesien die regter van oordeel was dat B Engels behoorlik magtig is. B is skuldig bevind maar by appèl is 'n herverhoor egter weer eens beveel. Voor die aanvang van die derde verhoor het B sy aansoek herhaal. Dit is ook afgewys, die verhoor is in Engels voortgesit en B is weer skuldig bevind. B se appèl na die British Columbia Court of Appeal (BCCA) is afgewys. Hy beroep hom vervolgens op die hoogste Kanadese hof, naamlik die Supreme Court (SC).

In die onderhawige bydrae word die vraagstuk rondom taalaanwending in die regsproses binne 'n taalpluralistiese regstaat teen die agtergrond van die beslissing van die SC in dié saak onder die loep geneem.

2 Die Kanadese reg

Benewens artikel 530CC en artikel 16(1) CCFR, wat hierbo genoem is, is 'n verdere twee wetgewingstukke in onderhawige verband ter sake. Artikel 133 van die Constitution Act, 1867 verwys na die status van Engels en Frans in Kanada en bepaal dat "either of those languages may be used by any person or in any pleading or process in or issuing from any court of Canada established under this Act, and in or from all or any of the courts of Quebec".

Artikel 2 van die Official Languages Act (RSC 1985, c 31 (4th Supp)) lui soos volg:

> "The purpose of this Act is to . . . (a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions . . . (b) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and . . . (c) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada."

Sedert 1975 het die SC die taalwaarborge vervat in artikel 133 van die Constitution Act, 1867 as 'n minimum bepaling geïnterpreteer en die moontlikheid geskep vir uitbreiding van taalregte deur die federale en provinsiale wetgewers. 'n Doeldienende en liberale benadering tot taalregte is in die algemeen deur die SC ingeneem en bevorder (sien bv *Jones v Attorney General of Canada* (1975) 16 CCC(2d) 297 (SCC) 305ff; *Attorney General of Quebec v Blaikie* (1981) 60 CCC(2d) 524 (SCC) 538ff). In beslissings in die middel-tagtiger jare van die twintigste eeu het die SC egter van dié liberale benadering afgesien (sien bv *MacDonald v City of Montreal* (1986) 25 CCC(3d) 481 (SCC) 98ff; *Bilodeau v Attorney General of Manitoba* (1986) 25 CCC(3d) 289 (SCC) 293ff). Dit was egter van kortstondige duur. Die SC het spoedig 'n nuwe rigting ingeslaan en die klem geplaas op die belangrikheid van taalregte vir kultuurbeoefening en-uitlewing. In *Ford v Quebec* (*Attorney General*) ([1988] 2 SCR 712 748–749 met goedkeuring aangehaal deur regter Bastarache in *R v Beaulac* 499) word, byvoorbeeld, soos volg verklaar:

> "Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is . . . a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality."

(Sien ook *Mahe v Alberta* [1990] 1 SCR 342 365 en *Reference re Public Schools Act* (*Man*) [1993] 1 SCR 839 850; Bastarache "Language rights in the Supreme Court of Canada: The perspective of Chief Justice Dickson" 1991 *Manitoba LJ* 392 403.)

Teen dié agtergrond wys regter Bastarache in *R v Beaulac* 500, namens die meerderheid van die hof daarop dat "there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities". Hy wys verder daarop dat die "objective of protecting official language minorities . . . is realized by the possibility for all members to exercise independent, individual rights which are justified by the existence of the community". Taalregte is nie negatiewe of passiewe regte nie en kan slegs uitgeoefen word indien die kanale daarvoor geskep word. Volgens regter Bastarache (*R v Beaulac* 500) is die hierbo geskilderde uitlegraamwerk ("interpretative framework") belangrik vir 'n behoorlike begrip van taalregte asook vir bepaling van die aanwendingsveld van artikel 530CC. Die uitoefening van taalregte kan nie beskou word as iets uitsonderliks of as 'n akkommodasieversoek nie. Taalregte moet in alle gevalle doeldienend geïnterpreteer word en op so 'n wyse dat dit in ooreenstemming met die bewaring en ontwikkeling van amptelike taal-gemeenskappe is. Teen hierdie agtergrond konkludeer regter Bastarache (*R v Beaulac* 504) soos volg:

> "Section 530(1) creates an absolute right of the accused to equal access to designated courts in the official language that he or she considers to be his or her own. The courts called upon to deal with criminal matters are therefore required to be institutionally bilingual in order to provide for the equal use of the two official languages of Canada. In my view, this is a substantive right and not a procedural one that can be interfered with."

Taalregte moet nie verwar word met billike verhoor-regte nie, aangesien die reg op 'n billike verhoor ("fair trial") universeel is en nie anders vir lede van die amptelike taal-gemeenskappe as vir lede van 'n ander taalgroep is nie. Taalregte het 'n heeltemal ander oorsprong en rol; dit het ten doel om amptelike taalminderheidsgroepe te beskerm en om die gelyke status van Frans en Engels te verseker (*R v Beaulac* 510). Dit blyk dat die BCCA se bevinding in *R v Beaulac* verkeerdelik op B se taalvermoë in Engels gebaseer is. Regter Bastarache merk in dié verband (512) soos volg op:

> "Language rights are not subsumed by the right to a fair trial. If the right of the accused to use his or her official language in court proceedings was limited because of language proficiency in the other official language, there would in effect be no distinct language right. The Court of Appeal fell into error, no doubt, because there is a natural relationship between the ability to express oneself and taking full advantage of the possibility of convincing the court of the merits of one's case . . . But language rights are not meant to enforce minimum conditions under which a trial will be considered fair, or even to ensure the greatest efficiency of the defence. Language rights may no doubt enhance the quality of the legal proceedings, but their source lies elsewhere."

Artikel 530CC het nie as sodanig te make met die versekering van 'n billike verhoor nie. Blykens artikel 686(1)(b)(iii)CC het 'n hof die bevoegdheid om 'n skuldigbevinding ter syde te stel slegs indien 'n substansiële onreg of geregtelike dwaling plaasgevind het. Volgens artikel 686(1)(b)(iv)CC kan 'n hof 'n appèl teen 'n skuldigbevinding afwys indien 'n prosessuele onreëlmatigheid inderdaad plaasgevind het, maar die staat kan bewys dat dit geen benadeling vir die beskuldigde meegebring het nie (sien ook *R v Tran* [1994]92 CCC(3d) 218 (SCC)). Volgens regter Bastarache (in *R v Beaulac* 514) vind artikel 686(1)(b)CC nie toepassing nie, aangesien skending van artikel 530CC 'n substansiële onreg en nie bloot 'n prosessuele onreëlmatigheid daarstel nie. 'n Herverhoor word derhalwe weer deur regter Bastarache vir B beveel.

3 Die Suid-Afrikaanse reg

Artikel 6(1) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 bepaal dat Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, Engels, isiNdebele, isiXhosa en isiZulu die amptelike tale is. Volgens artikel 6(3)(a) kan die nasionale en provinsiale regerings enige van die amptelike tale vir regeringsdoeleindes gebruik, inagnemende gebruik (frekwensie), praktiese oorwegings, regionale omstandighede, finansiële oorwegings en die bevolking se behoeftes en voorkeure in die algemeen of in 'n spesifieke provinsie. Ten minste twee amptelike tale moet deur die nasionale regering en iedere provinsiale regering gebruik word. Volgens artikel 6(3)(b) moet plaaslike owerhede die taalgebruik en -voorkeure van die inwoners in berekening bring. Artikel 6(2) gee die staat opdrag om praktiese en positiewe maatreëls te tref om die status en gebruiksaanwending van die (benadeelde) inheemse tale te bevorder. Teen dié agtergrond moet alle amptelike tale gelyke behandeling geniet. Die nasionale en provinsiale regerings word opdrag gegee om deur wetgewende en ander maatreëls die gebruik van die amptelike tale te reguleer en te monitor. Artikel 6(5) lê

die grondslag vir die skep van 'n Pan-Suid-Afrikaanse Taalraad wat ten taak het die bevordering en skep van omstandighede vir die ontwikkeling en gebruik van, onder andere, die amptelike tale. Die taalbeleid in Suid-Afrika is, om dit lig te stel, onseker en verwarrend. Regter Albie Sachs van die Konstitusionele Hof ("The language question in a rainbow nation: The South African experience" 1997 *Dalhousie LJ* 5 11–12) merk teen die agtergrond van bogenoemde bepalings van ons Grondwet in dié verband soos volg op:

> "Whether or not these provisions (together with the others dealing with language in the courts and in education) achieve the multilingual accommodation we seek, is a question for the future. We have tried hard for an appropriately South African solution. No doubt the Constitutional Court will one day have to consider the implications of the final text. Until then, I remain silent on how I feel it should be interpreted; judicial reminiscences are acceptable, prognostications are not!"

Wat 'n mens op hierdie stadium wel kan sê, is dat die "bevolking" (of dele daarvan) blykbaar die "keuse" uitgeoefen het om slegs Engels en Afrikaans as onderrigmedium in skole en universiteite aan te wend. Leslie Green ("Are language rights fundamental?" 1987 *Osgoode Hall LJ* 639 669) maak die opmerking dat "[t]he interest in language, genuine as it is, takes root and flourishes only late in the process of political development" (vgl ook Horton "The Manitoba language rights reference and the doctrine of mandatory and directory provisions" 1986–1987 *Dalhousie LJ* 195; Kerr "The remedial power of the courts after the Manitoba language rights case" 1986 *Windsor Yearbook of Access to Justice* 252 267; Magnet "Language rights: Canada's new direction" 1990 *University of New Brunswick LJ* 1 21–22; Strydom en Pretorius "Language policy and planning: how do local governments cope with multilingualism?" 1999 (2) *TRW* 24). Die "keuse" wat groot getalle swartes teen moedertaal onderwys gemaak het, sou in die lig van die historiese en hedendaagse politieke en sosiale milieu waarin dit gemaak is, nóg as ingelig nóg as vry nóg as finaal beskou kon word (sien bv Van Niekerk *Intimidation as a factor in the liberation struggle in South Africa with special reference to Bela Bela (Warmbaths): An anthropological perspective* (ongepubliseerde MA-verhandeling, Unisa, 1999) veral 207ff).

4 Analise en konklusie

Wilhelm von Humboldt het by geleentheid opgemerk dat taal die eksterne manifestering van die mens(volk) se siel is (aangehaal deur de Varennes "Language and freedom of expression in international law" 1994 *HRQ* 163 167 vn16 uit *Einleitung über die Verschiedenheit des menschlichen Sprachbaues und ihre Einfluss auf die geistige Entwicklung des Menschengeschlechts* (1836)). In Switserland word die vryheid om 'n taal te gebruik as 'n essensiële, indien nie as 'n noodsaaklike nie, voorwaarde vir die bestaan van ander vryhede gesien (*Association de l'écol francaise* 1965-03-31, in *Arréts du Tribunal fédéral* 91 1 480 486 met goedkeuring aangehaal deur de Varennes 167 vn17. Vgl ook Whitley "The Manitoba language reference: Judicial consideration of 'language charged with meaning'" 1986 *Manitoba LJ* 295).

Minderheidsregte, waaronder taalregte, word in 'n toenemende mate 'n primêre internasionale fokuspunt van fundamentele regte. So merk Cullen ("Education rights or minority rights?" 1993 *International Journal of Law and the Family* 143) tereg op:

> "As ethnic and religious tensions take on a new ferocity throughout the world, issues of minority rights have become once again a focus of international human rights law. For an increasing number of groups, the maintenance of a distinct

> collective identity is a priority. It is therefore likely that the demands which will be made of education systems throughout the world by minority groups will increase. States will be called upon to respect and promote diversity to an extent which would have been inconceivable until even a few years ago."

(Sien ook Rosenfeld "Can human rights bridge the gap between universalism and cultural relativism? A pluralist assessment based on the rights of minorities" 1999 *Columbia Human Rights LR* 249 283–284; Réaume "Language, rights, remedies, and the rule of law" 1988 *Canadian J of Law and Jurisprudence* 35 61–62; Venter "The protection of cultural, linguistic and religious rights: the framework provided by the Constitution of the Republic of South Africa, 1996" 1988 *SA Publiekreg/Public Law* 438 439ff.)

Taalregte is intiem verbind met menswees-, ontwikkeling en funksionering. In die woorde van de Varennes:

> "The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus live in society" (163).

(Vgl ook Kriel "Antjie Krog se *Relaas van 'n moord*: Woord wat vlees word in taalkursusse vir regstudente" 1998 *Obiter* 271 287ff.)

Menseregte kan slegs effektief in 'n betrokke gemeenskap funksioneer indien dit gewortel is in 'n menseregte-ontvanklike en -vriendelike psigo-kulturele bodem (sien Labuschagne "Psigo-kulturele onderbou van effektiewe menseregte: opmerkinge oor die posisie van die vrou in die inheemse reg" 1995 *Stell LR* 348 360ff en "Eerste wêreldse regsgevoel in 'n derde wêreldse sosio-ekonomiese en kulturele milieu: opmerkinge oor die reg op regsverteenwoordiging in die strafproses" 1994 *SAS* 36 54ff). Sonder verrekening van die diversiteit in Suid-Afrika sal "nasiebou" 'n mite bly. Verskeidenheid binne 'n staat genereer 'n interaktiewe dinamiek wat die grondslag van standhoudende stimulasie en verryking kan onderlê. Dink net hoeveel armer ons regstelsel sou gewees het indien ons nie deur Afrikaans toegang tot die Nederlandssprekende en Duitssprekende regswêreld gehad het nie!

Die Kanadese Supreme Court se uitgangspunt is ongetwyfeld suiwer en sinchroniseer met moderne (menseregtelike) beskouinge in die internasionale wêreld. Suid-Afrika sou slegs internasionale menseregtelike (regstaatlike) legitimiteit kon verkry indien minderheidsgroepe se regte effektief oor die hele spektrum van staatsaktiwiteite erken, gerespekteer en gehandhaaf word. Dit sluit taalregte in die regsproses in. Die moderne geskiedenis van die mens in verskeie wêrelddele bied hiervoor oorvloedige getuienis.

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In hell there will be nothing but law, and due process will be meticulously observed.

G Gilmore The ages of American law (1977) 111.

THE "POTENTIALLY POLYGAMOUS" SAGA: WHEN WILL IT END?

Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening) 1999 4 SA 1319 (SCA)

1 Introduction

The line of reasoning which led to the case *of Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) coming before the Supreme Court of Appeal is well known (see *Davids v The Master* 1983 1 SA 458 (C), *Ismail v Ismail* 1983 1 SA 1006 (A) and *Kalla v The Master* 1995 1 SA 261 (T)).

The facts of the case, very briefly, were that Mrs Amod – whose husband had been killed in a motor collision in 1993 – lodged a claim against the respondent for damages for loss of support. In the decision of the court *a quo* (*Amod v Multilateral Motor Vehicle Accidents Fund* 1997 12 BCLR 1716 (D), per Meskin J) the Multilateral Motor Vehicle Accidents Fund (MMF) escaped liability on the ground that, since the "potentially polygamous" Muslim marriage is not lawful at common law, the MMF was under no legal duty to compensate Mrs Amod for her loss.

The Supreme Court of Appeal reversed the decision of the court *a quo*. What is striking about the judgment of Mahomed CJ is its simplicity and lack of legal technicality, based as it is on considerations of justice, equity and decency. For the unanimous concurrence of a remarkably multi-ethnic Bench, the Supreme Court of Appeal deserves three cheers!

2 The first cheer – for the new ethos

The insistence that the duty of support which a potentially polygamous but *de facto* monogamous marriage imposed on the husband was not worthy of legal protection, the court held, could not be justified except on the basis that the only duty of support protected by law was one flowing from a marriage solemnised and recognised by one faith or philosophy to the exclusion of others. This was inconsistent with the new ethos of tolerance, pluralism and religious freedom in the present constitutional legal order, and was an untenable basis for the determination of the *boni mores* of society (1327I–1328C). In this regard, the court stated that a legally enforceable duty to support a spouse arose from a solemn marriage in accordance with the tenets of a recognised and accepted faith. The court added that the inequality, arbitrariness, intolerance and inequity which would result from not following this approach was inconsistent with the new ethos (1329G–H). The Chief Justice added:

> "This new ethos is substantially different from the ethos which informed the determination of the *boni mores* of the community when the cases which decided that 'potentially polygamous' marriages which did not accord with the assumptions of the culturally and politically dominant establishment of the time did not deserve the protection of the law for the purposes of the dependant's action" (1328D–F).

This gives reason for a second cheer.

3 The second cheer – for protection based on equity and decency

The approach of Mahomed CJ, although not completely novel, is one which will afford welcome and long-overdue relief to Muslim widows. He declared:

> "In my view, the correct approach is not to ask whether the customary marriage was lawful at common law or not but to enquire whether or not the deceased was under a legal duty to support the appellant during the subsistence of the marriage and, if so, whether the right of the widow was, in the circumstances, a right which deserved protection for the purposes of the dependant's action" (1327E–F).

The court emphasised that the crucial enquiry was whether the relationship between the deceased and the dependant was one which deserved recognition and protection at common law, and that considerations of equity and decency informed the duty of support in Roman-Dutch law (see *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T) 316E–F).

4 The third cheer – for development of the common law

Although the court reached its finding without any reliance on the interpretation clauses of either the Constitution of the Republic of South Africa 200 of 1993 or the Constitution of the Republic of South Africa 108 of 1996, and although Mahomed CJ said that the proper remedy is for the legislature to effect statutory redress as it did in the case of widows married by African customary law, he added:

> "I have no doubt that it would be perfectly proper for the Legislature to enact such legislation if it considered it necessary, but it does not follow that the Courts should not interpret and develop the common law to accommodate this need if it was consistent with the relevant common-law principles which regulate the objectives and the proper ambit of the dependant's action in Roman-Dutch law" (1331G–1332A).

Why, however, has it taken our courts so long to adopt this approach, based as it is on Roman-Dutch natural-law concepts of justice and equity?

5 A matter of judicial reasoning and mental attitude

It is submitted that the line of judicial reasoning in the *Davids*, *Ismail* and *Kalla* decisions – as well as the old decision in *Seedat's Executors v The Master (Natal)* 1917 AD 302 – did not accord with the fundamental precepts of interpretation and judicial reasoning in Roman-Dutch law. Devenish *Interpretation of Statutes* (1992) 23 makes the point well when he writes:

> "The overwhelming weight of authority in Roman-Dutch law supported a purposive rather than a literal technique of interpretation. Furthermore, the jurisprudence of natural law was, according to Wessels, indisputably 'the corner-stone of the whole fabric', whereas the literal theory of interpretation is compatible with and reflects the jurisprudence of legal positivism."

It should be borne in mind that Wessels, as quoted by Devenish, was writing in the first decade of the twentieth century (see *History of the Roman-Dutch law* (1908) 293). Devenish adds that

> "the inestimable value of Roman-Dutch law does not lie essentially in its rules as such, but rather in its underlying jurisprudence and the way in which the great Roman-Dutch scholars set about their tasks and the quality of their judicial reasoning " (22).

Indeed, Cowen has written that the

> "mental attitude which characterized our best Roman-Dutch authorities – the way they set about their work – is no less important to us than the books which they wrote and the opinions and judgments which they gave".

(See "Prolegomenon to a restatement of the principles of statutory interpretation" 1976 *TSAR* 131 143.)

If one takes into account the fact that freedom of religion was recognised as a fundamental principle of Roman-Dutch law, it is further submitted that the line of judicial reasoning in the *Seedat*, *Davids*, *Ismail* and *Kalla* cases, as well as the decision of Meskin J in *Amod*, is one which involved – to borrow the language employed by Meskin J "a sacrifice of justice on the altar of legal technicality" and which should have in the past been considered to be "morally indefensible" (1997 12 BCLR 1722B–C).

6 The question left open

In *Ryland v Edros* 1997 1 BCLR 77 (C) Farlam J stressed that what the court had held in that case did not necessarily apply to a marriage which was actually, as opposed to merely potentially, polygamous (709C–E). In *Amod* Mahomed CJ added:

> "I have deliberately emphasised in this judgment the *de facto* monogamous character of the Muslim marriage between the appellant and the deceased in the present matter. I do not thereby wish to be understood as saying that, if the deceased had been party to a plurality of continuing unions, his dependants would necessarily fail in a dependant's action based on any duty which the deceased might have towards such dependants. I prefer to leave that issue entirely open" (1330B–D).

While the Supreme Court of Appeal has certainly taken the matter an important step further, is this piecemeal recognition and development of certain consequences of an Islamic marriage the proper route to follow? When will the "potentially polygamous" saga come to an end?

7 The years ahead

One hopes – and prays – that the years ahead will see the statutory recognition not only of the Muslim marriage but also of its corpus of family law as a whole. This will enable the focus to be shifted to the consequences of a Muslim marriage – such as issues of maintenance, divorce, the equitable division of property upon dissolution of marriage and, perhaps most importantly to the Muslim community, the question of inheritance – rather than continually on its potentially polygamous nature.

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The legal process is always the same, an open, though bounded, forum where forensic battles are contingently and temporarily won.

Stanley Fish.

WHY THE COMMENTS ON THE CURRENT SOUTH AFRICAN CRIME SITUATION?

S v Dlamini; S v Dladla; S v Joubert; S v Schietekat 1999 7 BCLR 771 (CC)

1 Introduction

I do not take issue with the outcome of these cases in this discussion. However, the discussion of Kriegler J of the limitation clause (section 36 of the Constitution) includes a few observations regarding the current crime situation in South Africa which I find problematic.

2 Facts

This judgment relates to various aspects of the South African law governing bail (specifically certain subsections of s 60 of the Criminal Procedure Act 51 of 1977): the admissibility of the record of the bail proceedings at trial, the test in the granting of bail when a serious offence has been committed and access to the police docket when applying for bail. The four cases were heard at the same time because the arguments in the various cases were interrelated:

2 1 S v Dlamini

This case dealt with the question whether there is a blanket ban on the disclosure of statements made by the accused during a bail application, at the subsequent trial of the accused.

2 2 S v Schietekat

The same issue arose as in *Dlamini*, as well as the possible unconstitutionality of section 60(4)–(9) and section 60(11B)(c) of the Criminal Procedure Act. The argument was raised that section 60(4)–(9) impermissibly prescribes to courts when bail should and should not be granted. Section 60(11B)(c) states that the record of the bail proceedings forms part of the record of the trial, with the proviso that, should an accused choose to testify during the bail hearing, the presiding magistrate or judge must warn him that his statements may be used against him at the subsequent trial. All of these provisions were found by the court *a quo* to be unconstitutional. The state appealed against the finding.

2 3 S v Joubert

Section 60(4)–(9) and section 60(11B)(c) were found to be unconstitutional as in *Schietekat,* and the matter was referred to the Constitutional Court to confirm, vary or set aside the finding of unconstitutionality as prescribed by sections 167(5) and 172(2)(a) of the Constitution.

2 4 S v Dladla

This case involved an application (which was procedurally defective) for direct access to the Constitutional Court to attack the validity of section 60(11)(a), 60(11B)(c) and 60(14) of the Criminal Procedure Act. Despite the procedural shortcomings of the application, the court decided to hear the matter in the interests of justice.

3 Judgment

An argument was raised and accepted by the court *a quo* in *Schietekat* that section 60(4)–(9) conflicts with the principle of separation of powers. The argument was that these provisions prescribe to courts how they should go about their business when deciding bail applications. It is not for Parliament to decide these issues, but for the courts, the argument went. The Constitutional Court disagreed. It found that these provisions merely provided a list of factors or guidelines that courts should take into account. The eventual decision is still left in the hands of the court.

The words "interests of justice" appear several times in section 60(4)–(9). The court found its usual meaning to be "fair and just to all concerned" but noted that this meaning does not fit section 60(4), (9) and (10) and that the phrase should carry the meaning "interests of society" in these subsections. The overriding question remains: "Is it in the interests of justice (in its usual meaning) to release the accused?"

Section 60(4)(a) was attacked because it allegedly permits preventive detention. The court agreed that paragraph (a) differs from paragraphs (b)–(d) in section 60(4), but noted that this factor was recognised in our common law and that it is constitutionally permissible to take account of it. The court also remarked that this remained *a* factor in the decision whether to release the accused on bail or not.

As to section 60(14), the court said that this subsection should not be read to amount to a blanket ban on access to the police docket for purposes of the bail application. Section 60(11) provides that an accused must be provided with a reasonable opportunity to adduce evidence to satisfy the court that he should be released on bail. This "reasonable opportunity" will sometimes entail that a court will order the prosecution to make certain information from the docket available to the defence.

The court also found no fault with section 60(11B)(c). In terms of this provision, any evidence that the accused chooses to present at the bail hearing will be admissible against him at the trial, if he was warned of this possibility at the bail hearing. The court noted that a wide degree of freedom exists when conducting an accused's defence and that difficult choices have to be made. The accused cannot be forced to testify but, once he chooses to do so, and if the decision is an informed one, he has to abide by the consequences of his decision. Put in blunt terms, to allow an accused to testify with impunity at a bail hearing will allow that accused to lie. The right to remain silent does not include the right not to make a choice. The common law rule as expounded in *S v Nomzaza* 1996 2 SACR 14 (A) remains valid: if the admission of evidence presented at the bail hearing at the subsequent trial will render the trial unfair, such evidence will be inadmissible. "Fairness" depends on the particular facts of the particular case.

4 Kriegler J's comments on the crime situation in South Africa

The court found that section 60(4)(e), (8A) and (11)(a) infringes the Bill of Rights, but decided that the infringements were justifiable in terms of the limitation clause.

Subsections (4)(e) and (8A) relate to "public order", "public peace", "public security", "shock or outrage in the community", "safety of the accused", "sense of peace and security among members of the public" and "public confidence in the criminal justice system". The court agreed with the argument that these societal factors undermine the accused's interest to be set free on bail. Kriegler J held (my emphasis):

> "Nevertheless, albeit reluctantly and subject to express qualifications to be mentioned shortly, I believe the provisions pass constitutional muster. I do so on the basis that although they do infringe the section 35(1)(f) right to be released on reasonable conditions, they are saved by section 36 of the Constitution. *It would be irresponsible to ignore the harsh reality of the society in which the Constitution is to operate.* Crime is a serious national concern, and a worrying feature for some time has been public eruptions of violence related to court proceedings . . . In my view, open and democratic societies based on human dignity, equality and freedom, after weighing the factors enumerated in paragraphs (a) to (e) of section 36(1) of the Constitution, would find subsections 60(4)(e) and (8A) reasonable and justifiable *in the prevailing climate in the country*."

The court found these subsections justifiable based on the following considerations:

- awaiting trial detention is of temporary nature;
- maintaining public peace is a compelling interest;
- a close relationship exists between a temporary detention and the unrest that would follow the release of a particular accused; and
- subsection (4)(e) becomes relevant only "in exceptional circumstances". The factors listed in subsection (9) must also be weighed before bail is denied under subsection (4)(e). The impugned subsections will therefore be used only in very limited circumstances.

Section 60(11)(a) makes it very difficult for certain categories of prisoners to obtain release on bail. An accused on a charge listed in Schedule 6 must show "exceptional circumstances" why he should be released. The court found this requirement to be in conflict with the minimum standard laid down in section 35(1)(f) of the Constitution. The "exceptional circumstances" test is more stringent than the "interests of justice" test laid down in the Constitution. However, the court found that this limitation is justifiable under the limitation clause. Kriegler stated the following in this regard (my emphasis):

> "[*O*]*ver the last few years our society has experienced a deplorable level of violent crime*, particularly murder, armed robbery, assault and rape, including sexual assault on children. Nor can there be any doubt that the effect of widespread violent crime is deeply destructive of the fabric of our society and that accordingly all steps that can reasonably be taken to curb violent crime must be taken. *Mr D'Oliveira was correct when he argued that it is against this background that we should assess the provisions of section 60(11)(a).* Although *the level of criminal activity is clearly a relevant and important factor in the limitations exercise* undertaken in respect of section 36, it is not the only factor relevant to that exercise. One must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights. It is well established that section 36 requires a court to counterpoise the purpose, effects and importance of the infringing legislation on the one hand against the nature and importance of the right limited on the other. Parliament enacted section 60(11)(a) with the clear purpose of deterring and controlling serious crime, an indubitably important goal. Its effect is to limit, to an appreciable extent, the right of an arrested person to bail if the interests of justice permit. The question we need to answer is whether the extent of that limitation is justifiable."

The court found the infringement justifiable on the following grounds:

- Many democratic countries have enacted laws that limit bail. The court referred to the United Kingdom, the United States of America, Canada and Australia;

- section 60(11)(a) does not automatically deny bail to accused persons charged with Schedule 6 offences. The "exceptional circumstances" criterion allows the judge leeway;
- under section 60(11)(a), *courts* decide whether bail should be granted or not.
- the entire bail process takes place under judicial control;
- the "exceptional circumstances" criterion is not invalid because of vagueness. On the contrary, it allows wide scope to an accused to bring any number of factors before the court to show that he should be released on bail; and
- the "exceptional circumstances" criterion may also mean "ordinary circumstances" to an exceptional degree. These "exceptional circumstances" therefore need not fall outside the factors listed in section 60(4)–(9).

5 Critique

My only (but serious) concern with this case involves the emphasised quotations as set out above: "[We] would find subsections 60(4)(e) and (8A) reasonable and justifiable *in the prevailing climate in the country*" and "the level of criminal activity is *clearly a relevant and important factor* in the limitations exercise". Kriegler J should have explained what he meant when he said this.

His remarks about the crime situation carry two possible implications:

- Had circumstances been different, namely if South Africa had a "normal" crime rate, the decision could have been different. How else should one read "[I] find subsections 60(4)(e) and (8A) reasonable and justifiable *in the prevailing climate* in the country"? If the above statement is an accurate reading of Kriegler J's judgment, then it might be possible for an Act to have "limping validity", that is, it could be valid today and invalid tomorrow, depending on the circumstances. Assume the crime rate returns to "normal" levels in ten years' time: would it be possible to bring the same bail laws to court again, and argue that the matter needs to be revisited in the light of Kriegler J's comments about the crime situation in South Africa of 1999? If crime was "clearly" a relevant factor in 1999, then it must remain so in 2009 if levels of crime return to normal and the bail laws then appear to be a too powerful weapon against a non-existing threat of crime. This would mean that the defence of *res iudicata* would no longer be valid if an Act that has already been found to be constitutional is challenged again, the second challenge being based on changed circumstances. If Kriegler J did not intend this to happen, why did he mention the current crime situation at all? It would have been sufficient to state that the prevention of crime is a legitimate governmental objective, that the costs of the impugned bail laws do not outweigh the benefits of the legislation, to list the reasons why the costs do not outweigh the benefits and to state that the laws are therefore justified.
- that the judge would discard the defence of *res iudicata* without mentioning it explicitly, seems unlikely. Another possibility exists. His comments could also be read to mean that only circumstances that exist when an Act is passed, may be taken into account when deciding on the constitutionality of an Act. If so, it would not matter if levels of crime drop to normal levels in a few years' time as the Act will remain valid, and the defence of *res iudicata* remains valid.

However, both possible readings of his comments contradict the majority judgment in *The New National Party v The Government of the Republic of South Africa* 1999 5 BCLR 489 (CC) (my emphasis):

> "The circumstances which become apparent at the time when the validity of the provision is considered by a court *are not necessarily irrelevant* to the question of its consequential invalidity. However, *a statute cannot have limping validity*, valid one day, invalid the next, *depending upon changing circumstances*" (498H–I)

and

> "*a constitutional defect* in a statutory provision is not always readily apparent at the time of its enactment, but *may only emerge later* when a concrete case presents itself for adjudication (499c)".

If Kriegler J meant to overturn *New National Party* he should have done so expressly. The result of his remarks is uncertainty regarding the range of factors that may be presented in defence of an Act of Parliament that *prima facie* infringes the Bill of Rights: *New National Party* states that changed circumstances may influence the court's decision, *Dlamini* seems to suggest that only the circumstances that existed when the Act was passed will be relevant.

I am simply pleading for consistency. The court needs to spell out its approach to a limitation inquiry and the factors that it regards as relevant in such an exercise. There are a few possible approaches that the court could follow:

- An *ad hoc* approach to constitutional interpretation and litigation: each specific case calls for a specific solution. Allow parties to argue that a particular Act needs to be revisited based on changed circumstances, and do away with the defence of *res iudicata* in these circumstances. *New National Party* explicitly states that an Act does not have limping validity. *Dlamini* possibly implies that a particular provision that has passed constitutional scrutiny may be challenged again.
- The alternative would be to state that each case calls for a specific answer but that the constitutionality of a particular provision of a particular Act will be decided only once, and that thereafter it will be *res iudicata* and for the legislature to make provision for changed circumstances. Courts adapt and change the common law on a continuous basis based on, *inter alia,* changing circumstances. For the sake of legal certainty, the Constitutional Court should pronounce once and for all on the constitutionality of *legislation. New National Party* and *Dlamini* seemingly approve of this approach.
- As to the factors that may be used to justify a *prima facie* infringement of the Bill of Rights, either:

(a) allow parties to refer to a wide as possible array of factors and circumstances as they existed at the time of the promulgation of the Act and that come to the fore at a later stage; or

(b) restrict parties to factors as they existed at the time when the legislation was passed and do not allow them to base their arguments on circumstances that developed after the Act came into force.

It would appear as if *New National Party* favours the approach set out in (a), and *Dlamini* the approach set out in (b).

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BOEKE

BUSINESS TRANSACTIONS LAW

by ROBERT SHARROCK

Fifth Edition; Juta & Co Ltd Cape Town; xxiv and 681 pp

Price R190,00 (Soft cover)

Thirteen years after its first edition, this well-known textbook has been released in its fifth edition. The book is still going strong, and not without reason. Much of its staying power can be attributed to the clear and concise style of writing, making it an accessible book to students, paticularly non-law students or, as is explained in the preface, "students encountering business law for the first time". The target audience of the book is and has been the professional business sector. The book is written to cover much of the syllabus suggested by the South African Institute of Charted Accountants. Having said that, and given the new LLB structure and the present state of education in South Africa, it may also fruitfully serve as a reference text for students struggling to come to terms with more complicated books in their fields of study.

The seven parts of the book are made up as follows: PART ONE: Introduction. PART TWO: Formation of the Contract – covering the following topics: Contractual Capacity; Agreement; Intention to Create Obligations; Certainty; Lawfulness and Possibility of Performance; Formalities; Agreement based on an Incorrect Assumption; Voidable Contracts and Agency. PART THREE: Effect of the Contract (General) covers: Contents of the Contract; Interpretation of Written Contracts; Co-Parties; Performance; Miscellaneous Provisions; Cession; Variation and Termination by Agreement. PART FOUR: Effect of the Contract (Miscellaneous Contracts) covers: Contracts Relating to Offers; Sale; Lease; Credit Agreements; Loan for Consumption; Employment; Service Contracts; Carriage and Storage; Insurance; Partnership; Cheques. PART FIVE: Non-Performance of the Contract (covering the topics of Excuses for Non-Performance; Remedies for Breach; Arbitration). PART SIX: Security. PART SEVEN: Insolvency (covering Sequestration and its Immediate Consequences; Collection and Distribution of the Estate Assets; Rehabilitation).

A good addition to the appendix of the fifth edition is an outline of certain aspects of the law of property. Other appendices cover stamp duty (which has featured in every edition), the Employment Equity Act, featuring the Code of Good Conduct for sexual harassment cases and also Statutory Protection of Housing Consumers.

It is a pity that there is nothing in the book about the Internet, given the large surge in business transactions taking place over the Internet. Other standing criticisms, which remain unchanged from the first edition, relate to the inclusion of

a chapter on partnerships only. In the face of only scant reference to other business entities, this may create in the mind of the student, a false impression about the standing of partnerships in the world of commerce. Surely there is a need at least to discuss close corporations and companies as well? Similarly, there seems little to justify a focus on cheques when there are other, equally important (and more frequently used) methods of payment, such as credit cards.

Over the years the book has grown almost doubling in size since 1985 when it was a (mere) 385 pages to the healthy 681 pages in this edition. Much of this increase may be attributed not so much to the growth of the chapters as to the addition of a further 150 cases. Each edition has expanded further the number of cases discussed. These discussions are short summaries, often in only a few lines or a paragraph. The inclusion of cases has been both criticised and praised by reviewers of previous editions. (For those in favour see Hawthorne 1987 *THRHR* 504; Mischke 1994 *THRHR* 719; and for those against see Havenga 1993 *SA Merc LJ* 258.) I must side with the former as the cases do provide practical insight for students, set in a context of real events, even if there is the risk at times to confuse students with complicated facts in which principles are applied. What is more, the book includes Constitutional Court cases, allowing students to gain insight into the new jurisprudence emerging under the Constitution.

Another growth, which is more an indictment on the state of the economy over the past decade, is the increase in the price – from R29.95 for the first edition, the price has increased sixfold for the fifth edition. It seems that law was cheaper, in 1985, during the apartheid era. But for students living under the luxury of a post-apartheid constitutional democratic state, the price of law will set them back the not-so-insignificant sum of R190.00.

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The question "which equality?" will never be answered simply by insisting on equality . . . Intellect resists equality by counterposing rival ideas such as efficiency, freedom and order. Actuality is smarter, for it chooses the one idea that is more powerful than order or efficiency or freedom in resisting equality. That idea is, of course, equality itself.

D Rae Equalities (1981) 189.

EDITORIAL COMMENT

HOW TO FIND THE LAW?

One of the dominant features of life for the South African lawyer over the past twenty years or so has been an enormous explosion of information about the law. This is particularly true of reported judgments, which have proliferated to such an extent that practitioners and academics now have to read two general series of law reports (*The South African Law Reports* published since 1947 by Juta & Co, Ltd and the *All South African Law Reports* published since 1996 by Butterworths) and several series of specialist reports (on such subjects as tax law, labour law, criminal law, constitutional law, commercial law and damages in personal-injury cases – this list is not exhaustive), not to mention a torrent of academic comment on the decisions in those reports, if they wish to remain up to date with all the developments in case law and with the latest trends in legal thought. Practitioners (be they members of the Bar or of the attorneys' profession) cannot possibly hope to read and absorb this vast body of material – they would probably have to devote almost two weeks of their working time each month to doing so, and no successful practitioner can afford to spend anywhere near that amount of time on keeping pace with the law. (I wonder how many members of the Bar heed the advice given by the late Eric Morris SC in his book *Technique in litigation* 4 ed (1993) 26. He tells neophyte advocates: "As each monthly instalment of the law reports appears, or weekly instalments of reports published weekly, note every case in your textbook which covers the subject-matter of the case. In this way you will be enabled to start your preparation of a case from a textbook that is completely up to date.") Not even legal academics, who are supposed to be professional researchers, can keep up with the developments in all branches of South African law – they are pressurised by increasing teaching loads, exhorted to publish ever greater numbers of articles in journals accredited by the Department of Education so as to earn higher research subsidies for their universities, and badgered to undertake administrative work that would, in an ideal university, be left to non-academic staff. Small wonder, then, that a well-known figure in South African law-publishing circles commented to me over lunch a few months ago that the days of reading the law reports from cover to cover are a thing of the past. Indeed, this was recently recognised by a member of the South African Bench, Mr Justice Basil Wunsh of the Witwatersrand Local Division, in *Ex parte Hay Management Consultants (Pty) Ltd* 2000 3 SA 501 (W) 506C–E. He remarked:

> "While counsel and attorneys may not be expected to read the law reports as they are published and recall their contents or effect, if they have to present argument on a matter, the least that is expected of them is to consult the relevant textbooks, the consolidated indexes of and noters-up to the ordinary law reports and the indexes of and noters-up in weekly or monthly reports which have been published after the effective date of the latest consolidated index and noter-up. I do not mention the computer services that are available to retrieve material."

As Judge Wunsh recognises in the above passage, the impracticability – nay, impossibility – of keeping abreast of the rush of new material has created the need for professionally published indexes that are extremely comprehensive and absolutely accurate. Unhappily, the indexes that South African lawyers have available to them are neither – probably because the law reports themselves are not indexed in relation to every point of law mentioned in every reported judgment, and because (as any experienced legal editor in this country will know) our reference

checkers (should any such functionaries exist) are notoriously inaccurate. Both shortcomings are to be greatly lamented. Where a case is not indexed on an important point of law, it can result in the judgment being overlooked and subsequent decisions being handed down in ignorance of a governing precedent. (A well-known example of poor indexing is the report of *S v Henckert* 1981 3 SA 445 (A), the flynotes to which will lead all but the most careful reader to think that the decision has no relevance beyond the law pertaining to mines and minerals. In fact, the decision is an important one on the law of contract, as pointed out by MCJ Olmesdahl "Unheralded demise of Wolmer versus Rees" 1984 *SALJ* 545, who rescued Henckert from oblivion by drawing attention to the fact that it authoritatively applied the information theory (rather than the expedition theory) to contracts concluded over the telephone.) Errors in referencing are unlikely to produce such dire results, although they are capable of causing monumental frustration to members of the judiciary, practitioners and academics in their attempts to ascertain what the citation ought to be. (Try, eg, to find the decision of the Court of Appeal in *Copeland v Smith*, referred to by Wunsh J in the *Hay Management Consultants* case, at 2000 2 All ER 457. That is where the reader is told by the editors of the *SALR* – in three places, no less – that the decision may be found. It isn't there. One can ascertain easily enough that the *SALR* citation of Copeland's case is wrong – but where is the judgment in Copeland reported? It would be a fair guess to assume that the year given in the citation is correct (not so for years of citation beginning "19", when the third or fourth digit could have been incorrectly typed), but is the volume number wrong, or the page number, or perhaps both? Alternatively, could the wrong law report altogether have been referred to? (For an example of confusion between two different publications, see "The riddle of the two tydskrifte" 1985 *SALJ* 728, where I pointed out that Van den Heever J (Fagan J concurring) in *Hare's Brickfields Ltd v Cape Town City Council* 1985 1 SA 769 (C) 781E–F had erred in consulting 1976 *THRHR* instead of 1976 *TSAR*.) I refrain from giving the correct citation of *Copeland*'s case so that readers of this editorial may experience for themselves the delights of trying to find a report of a decision when they know only that the citation they have been given is wrong.)

What is one to do in order to eliminate faults of the above kinds, and thus improve the law reports and the published indexes so that the law becomes easier to find? For a start, practitioners and academics who come across errors or omissions should write to the publisher concerned and complain. Letters from one or two individuals who repeatedly draw attention to mistakes might perhaps be dismissed (unjustifiably) as the work of pedants, but when publishers are flooded with as many grumbling letters as their errors in the law reports and/or in published indexes, they are likely to do something about the problem – for instance, employ additional staff to check references or to assist in compiling indexes, train existing staff better, or pay their editorial staff more, so as to attract individuals who display higher levels of clerical accuracy and more sophisticated levels of lateral thinking in the compilation of indexes. Users of the law reports and of published indexes can, however, do more than merely nag the publishers to provide a better product: if they discover that a reference is wrong, or think that a particular decision might usefully be indexed beneath some heading other than the one(s) under which it has been catalogued, they can assist the entire profession by bringing the matter to the attention of the publisher concerned and indicating (if they can find it) what the correct citation is or (as the case may be) under what other heading(s) the decision in question may be indexed. The publisher will then be in a position to put the matter right by means of a list of corrigenda (which should be published in

consolidated form from time to time), by correction of the electronic databases containing the law reports, and/or by rectification of the text in a subsequent edition (in the case of indexes that are supplemented and then republished in their entirety, as was done in relation to Gracie *Butterworths Index and Noter-Up to the South African Law Reports* some five years ago). It is, of course, a distraction from one's work to write to publishers drawing attention to editorial and indexing deficiencies, but if everyone did so, the technical quality of our legal publications would surely, in the course of time, be considerably improved, to the benefit of the entire profession.

MERVYN DENDY

Discretionary powers of the judge in South Africa*

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OPSOMMING

Diskresionêre bevoegdhede van die regter in Suid-Afrika

Daar word algemeen aanvaar dat die begrip "judisiële diskresie" beperk moet word tot omstandighede waar 'n regter 'n keuse tussen twee alternatiewe kan uitoefen. Sodanige diskresie is nie onbeperk nie en moet uitgeoefen word vir die doel waarvoor dit toegestaan is, ooreenkomstig toepaslike regsbeginsels en met inagneming van al die feite.

Drie kategorieë van judisiële diskresie word onderskei. Die eerste hiervan, die uitoefening van die diskresie ten opsigte van die materiële reg, is te omvangryk om in hierdie artikel te behandel en daar word volstaan met 'n paar opmerkings oor die rol van 'n regter by die uitleg van wetgewing.

Die ander twee kategorieë is die diskresie in prosesaangeleenthede en dié by die beoordeling van die feite van die saak, wat nou saamhang met die regter se prosesdiskresie ten opsigte van bewysmateriaal.

Die diskresie in prosesaangeleenthede sluit in 'n diskresie om jurisdiksieaangeleenthede te bepaal. Hier verleen die hof se inherente jurisdiksie aan hom die gesag om sy eie proses te reël en misbruik daarvan te verhoed. Alhoewel die begrip *forum non conveniens* nie as sodanig in Suid-Afrika geld nie, verleen die hof se inherente jurisdiksie ook aan hom die diskresie om een bevoegde hof bo 'n ander uit te wys om 'n saak aan te hoor.

Die tweede prosesdiskresie behels die bestuur van verrigtinge. Die tradisionele opvatting van partybeheer oor die verrigtinge, met 'n passiewe regbank, verleen min geleentheid vir die uitoefening van 'n judisiële diskresie. Die moderne neiging na saakbestuur ("case management") verleen egter meer geleentheid vir deelname deur die regbank.

Die derde prosesdiskresie is dié by bewysaangeleenthede. Daar word gekyk of daar enige ruimte vir judisiële diskresie bestaan by die reëls wat die toelaatbaarheid van getuienis reël en wat die gewig wat aan getuienis verleen moet word, beheer.

Die laaste tipe prosesdiskresie is ten opsigte van die toekenning van gedingskoste, wat in die geheel binne die hof se diskresie val.

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* This article is based on a report on the discretionary powers of the judge in South Africa which we submitted to an international congress on procedural law held in Ghent from 2000-04-25 to 28 under the auspices of the International Association of Procedural Law. A broad outline of issues to be addressed was provided to us and the article retains this outline.

Voorts word gekyk na die judisiële diskresie by bepaalde verrigtinge. Die bestaan en omvang van 'n diskresie word oorweeg by onder andere verrigtinge in howe vir klein eise, die toestaan van interdikte, die oorplaas van verrigtinge na ander howe, die inroep van deskundige advies, arbitrasie, onbestrede litigasie en eksekusieverrigtinge.

Die perke van judisiële diskresie word bespreek. Artikel 34 van die 1996-Grondwet verleen as basiese reg, die reg om 'n geskil by wyse van 'n "billike openbare verhoor" te laat bereg, onderworpe aan die algemene beperkingsklousule. Laastens word die remedies vir die oorskryding van judisiële diskresie by wyse van hersiening of appèl bespreek.

Ten slotte word daarop gewys dat kontinentale en Anglo-Amerikaanse regstelsels nader aan mekaar begin beweeg op hierdie gebied deur die ontwikkeling in stelsels van judisiële aktivisme en die algemener gebruik van skriftelike prosedures.

1 INTRODUCTION

The concept of judicial discretion covers a wide spectrum of judicial activity and cannot be discussed in all its manifestations within the confines of a single article. Given, further, the limitations created by the imposition of a prescribed outline for purposes of the original report, we have confined our article to the main features of this phenomenon in South African civil proceedings and have focused mainly on proceedings in the High Court.[1]

It should be noted, at the outset, that the South African legal system has a hybrid character. This is due to the respective influences of the Dutch, who governed the Cape from its founding in 1652 to the end of the 18th century, and the English, who ruled the Cape for most of the 19th century. Substantive law derives mainly from the Roman-Dutch law of the 17th century. And, despite changes brought about by legislation and the influence of English law, it remains essentially a civil-law orientated system. Procedural law, on the other hand, owes its origin to the common-law procedural model, which was imported into the Cape by the English rulers during the early part of the 19th century. Although this model has been modified by legislation in the course of the 19th and 20th centuries, it still resembles the English system in material respects.[2] The result is that the role of the South African judge conforms in all essential respects to that of his English counterpart.

In true common-law tradition, our system gives full recognition to the principle of party control, which assigns a passive role to the judge and an active role to the parties (legal representatives). In accordance with the English model, this principle governs all stages of the proceedings in South Africa. This is especially evident during the pre-trial phase. It is for the parties to take all the necessary steps to initiate the action and to prepare the case for trial, while the function of the judge is merely to consider requests for interim relief by the parties. But even at the trial the parties play a leading role. They determine what evidence is to be presented to the court and they conduct the examination (questioning) of the witnesses. The function of the court is to ensure that the proceedings are conducted in accordance with the prescribed procedure and to deliver a judgment at the conclusion of the proceedings.

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1 The nature of this contribution does not allow extensive references to authority. We have, therefore, restricted footnotes to the minimum.

2 On this development, see Hahlo and Kahn *The South African legal system and its background* (1968) ch XVII; De Vos *Grondslae van die siviele prosesreg* (1988 thesis) ch 3 par 1. We are aware of major reforms in the English system in the wake of the Woolf report – cf Erasmus "Civil procedural reform – Modern trends" 1999 *Stell LR* 1 6.

The South African law of procedure, like that in other common law systems, distinguishes clearly between the pre-trial and the trial stages. The pre-trial phase is characterised by the exchange of pleadings between the parties and certain procedures, such as the discovery of documents, whereby they prepare themselves for the trial. The trial, in turn, is a continuous process which is characterised by the immediate (direct) and mainly oral presentation of evidence.[3]

2 THE NOTION OF JUDICIAL DISCRETION

The word "discretion" is a common, yet imprecise and slippery,[4] concept used to describe the powers of a judge in many different respects. For the sake of completeness, it should be noted that the term has both a general meaning and a more specific legal meaning.

2 1 The notion of discretion in general

According to Pattenden, the word in common parlance "describes the mental quality of prudence and circumspection".[5] This is in accordance with the saying, "discretion is the better part of valour".[6] The term is also given the meaning of "freedom to decide for oneself what should be done".[7] The latter meaning, which implies a power to make a certain choice, comes close to the legal meaning ascribed to the concept.

2 2 The specific notion of judicial discretion

2 2 1 Defining the concept

Although the concept of judicial discretion has been in use in legal literature for several hundred years,[8] it still defies easy definition. The difficulty, no doubt, is caused by the fact that the term is used to describe so many different powers of the judge. It is no wonder that some commentators have given up this task in despair, whilst others have denounced the concept as an arbitrary mechanism. A famous statement in this regard is that of Lord Camden who said:

> "The discretion of a Judge is the Law of Tyrants; it is always unknown; it is different in different Men; it is casual and depends on Constitution, Temper, and Passion. In the best it is often times Caprice, in the worst it is every Vice, Folly, and Passion to which Human Nature is liable."[9]

Despite these negative sentiments, the terminology has become embedded in legal systems generally. We therefore suggest that the concept should be accepted as an integral part of any given legal system, and we shall define and analyse it in this spirit.

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3 For a detailed discussion of this subject, see De Vos *Grondslae van die siviele prosesreg* ch 3 par 3 5; cf also De Vos and Van Loggerenberg "The activism of the judge in South Africa" 1991 *TSAR* 592.

4 Cf Pattenden *Judicial discretion and criminal litigation* (1990) 1 (hereafter *Judicial discretion*).

5 *Ibid.*

6 Which means that reckless courage is often self-defeating – *The concise Oxford dictionary* (1990) 334.

7 *Oxford advanced learner's dictionary* (1993) 343.

8 Pattenden *Judicial discretion* 1.

9 *Doe d Hindson v Kersey* (1765) Lincoln's Inn Library Trial Pamphlet No 204 fo 128, quoted by Pattenden *Judicial discretion* 11–12.

The general opinion seems to hold that the concept "judicial discretion" should be confined to situations where the judge is empowered to exercise a choice between alternative courses of action.[10] It follows that, where the judge is obliged by law to decide on a certain course of action, there is no room for discretion. De Smith states succinctly in this regard: "If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty."[11]

Outside the confines of strict duty, where choice arises, one enters an amorphous area where the concept of discretion is used to describe a wide variety of judicial powers. In the South African context, the sources of these discretionary powers include the Constitution,[12] legislation and the Rules of Court,[13] the common law[14] and the inherent jurisdiction of the High Court.[15] Although these powers all have the common denominator of choice, they differ significantly in their scope. Some are wide and give the judge almost a free hand, whilst others restrict him to a consideration of certain specified factors.[16] In view of these considerations, we suggest that it will not serve a useful purpose to try to define the concept judicial discretion with more precision. Suffice it to say that any judicial discretion – be it wide or restricted – must be exercised within certain legal limits. Pattenden remarks aptly: "No judicial discretion is unlimited. An unbridled discretion is inconsistent with the idea of the Rule of Law."[17]

The idea of a limited discretion finds expression in the saying that it must be exercised *judicially*. In general terms this means that the judge must exercise the discretion for the purpose for which it was conferred, in accordance with relevant legal principles and with due regard for all the relevant facts of the matter.[18]

The distinction between the court's discretionary and non-discretionary powers is not only necessary for purposes of a good theory. It is also of practical importance, especially in the context of appeal proceedings. One of the outstanding features of the appeal process in the English-orientated system is that an appeal court will generally be reluctant to interfere with the exercise of a discretion by the trial judge. The appeal court will not upset an exercise of discretion merely because it would have exercised the discretion differently.[19] The narrow grounds upon which a South African appeal court will be prepared to intervene are set out as follows in an authoritative source:

> "Where a lower court has given a decision on a matter within its discretion, the [appeal court] will interfere only if it comes to the conclusion that the court *a quo* has not exercised a judicial discretion, sc it has exercised its discretion capriciously or upon a wrong principle, has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons."[20]

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10 See Pattenden *Judicial discretion* 1 and the authorities cited there.
11 *Judicial review of administrative action* (1995) 296.
12 The Constitution of the Republic of South Africa Act 108 of 1996 ch 8.
13 Notably the Supreme Court Act 59 of 1959 and the Uniform Rules of Court.
14 Eg the discretion to exclude improperly obtained evidence, which is derived from the English-orientated common law of evidence – see *Motor Industry Fund Administrators (Pty) Ltd v Janet* 1994 3 SA 56 (W) 63H; Schwikkard, Skeen and Van der Merwe *Principles of evidence* (1997) 50 *et seq.*
15 Taitz *The inherent jurisdiction of the Supreme Court* (1985) 1.
16 Cf Pattenden *Judicial discretion* 7, who distinguishes between an overt and a concealed discretion.
17 *Idem* 26.
18 *Idem* 27; Wiechers *Administrative law* (1985) 98.
19 Pattenden *Judicial discretion* 16.
20 Van Winsen, Cilliers and Loots *Herbstein and Van Winsen The civil practice of the Supreme Court of South Africa* (1997) 918, hereafter Herbstein and Van Winsen.

2 2 2 Scope of judicial discretion

The instances where the judge is vested with discretionary powers cover the whole area of judicial activity. For the sake of convenience three broad categories of judicial discretion can be distinguished.

(a) Judicial discretion in procedural matters

Under this heading all the discretionary powers of the judge in regard to the pre-trial and trial procedures come up for discussion. This important topic will be dealt with in a separate paragraph below.[21]

(b) Judicial discretion concerning substantive law

The discretionary powers of the judge, pervading the different spheres of substantive law, are too comprehensive to analyse in this article. Suffice it, therefore, to make a few remarks about the general function of the judge to interpret the law.

According to our judicial tradition the function of the judge is to express or declare the law and not to make law – *iudicis est ius dicere sed non dare*.[22] However, this declaratory theory of the judicial function was the subject of severe criticism in the past, since it did not reflect the reality. Today it is generally accepted that, in cases of ambiguity in the wording of a statute, the judge has a discretion to choose one interpretation over another, and there can be no doubt that he creates law in exercising this choice. Dugard, a leading proponent of this argument, adds:

> [I]n exercising this choice, in making this selection, a judge is inevitably influenced by his own perception of the needs of social policy, of the expectations of society and, perhaps, by inarticulate, subconscious factors which constitute part of the make-up of each judge."[23]

The manner in which South African judges exercised their choices during the notorious apartheid era came in for sharp criticism. The gist of the criticism is that, in cases where there was a choice between competing statutory interpretations, the courts often chose an interpretation favouring the executive, rather than a construction upholding individual rights and liberties.[24] The most plausible reason for this attitude is probably that judges were subconsciously influenced by the emergency-type situation prevailing at the time. Fortunately, there were also cases decided during this period, where the judiciary showed greater concern for basic human rights and adopted a bolder approach against the executive.[25]

The function of the judge to find and apply the common law equally implies a discretionary power to create law. His duty in this regard is not simply to declare the law, but also to develop the law to keep pace with changing conditions in our society.[26] A famous South African judge gave an eloquent description of this phenomenon:

> "There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of

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21 See par 4 *infra*.

22 Steyn *Uitleg van wette* (1981) 14–16.

23 *Human rights and the South African legal order* (1978) 303.

24 For a more detailed discussion, see De Vos "The role of the South African judiciary in crisis periods" 1986 *TSAR* 281 286 and 1987 *TSAR* 63. Eminent critics of judicial behaviour in this era include Dugard *Human rights and the SA legal order*; Mathews *Law, order and liberty in South Africa* (1971) and Forsyth *In danger for their talents* (1985).

25 Eg *Hurley v Minister of Law and Order* 1985 4 SA 709 (D); Cf De Vos 1986 *TSAR* 291.

26 Dugard *Human rights and the SA legal order* 367.

> legal ideas and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the legislature."[27]

The new constitutional dispensation, which commenced in 1994, after the demise of apartheid, brought about drastic changes to the judicial function in South Africa.[28] The main features of the new system are a Bill of Rights entrenching fundamental rights and freedoms[29] and a process of judicial review of legislation and other forms of state action.[30] For the purpose of this function an additional court, the Constitutional Court, with the final say on all constitutional matters, was established.[31] The function of judicial review in terms of the Constitution clearly involves the exercise of choices in cases where the court is called upon to interpret ambiguous legislative provisions.[32] And this is simply the exercise of a judicial discretion. Curiously, the Constitution also makes explicit mention of the courts' inherent power to "develop the common law, taking into account the interests of justice".[33] This is clearly a constitutional recognition of the judicial discretion concerning the common law, which has been mentioned above.[34]

(c) Judicial discretion concerning the facts of the case

Discretion in this context involves the function of the judge to find the facts.[35] Since this aspect is closely related to the judge's discretion concerning evidentiary material (proofs), it will be discussed in the latter context.[36]

3 PARTY CONTROL OF THE PROCEEDINGS AND JUDICIAL DISCRETION

Although the principle of party control, alluded to above,[37] enjoins the judge to play a passive role in the proceedings, it should not be given an extreme meaning. The orderly conduct of litigation requires that the judge should exercise a measure of control over the proceedings. In an oft-quoted English case[38] Lord Denning emphasised the important role of the advocates in the presentation of their respective cases and he warned that the judge should not intervene unduly in this conflict, since his vision might become clouded by the dust of the conflict.[39] However, he added:[40] "[A] judge is not a mere umpire to answer the question 'How's that?' His object, above all, is to find out the truth, and to do justice according to law."

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27 Innes CJ in *Blower v Van Noorden* 1909 TS 890 905.
28 This development occurred in two phases, namely the interim phase introduced by the Constitution of 1993 and the final (permanent) phase governed by the Constitution of 1996.
29 Constitution of 1996 ch 2.
30 Ch 8.
31 S 167.
32 Cf s 172.
33 S 173. These courts are the Constitutional Court, the Supreme Court of Appeal and the High Courts – *ibid;* cf Devenish *A commentary on the South African Constitution* (1998) 229.
34 See fn 28 *supra.*
35 Cf Pattenden *Judicial discretion* 3.
36 See par 4 3 *infra.*
37 Par 1 *supra.*
38 *Jones v National Coal Board* 1957 2 QB 55.
39 63.
40 *Ibid.*

The court further pointed out that the judge is free to ask questions of witnesses to clear up obscure points and is duty-bound

> "to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies".[41]

The supervisory role of the judge in regard to the conduct of the proceedings clearly involves a range of discretionary powers to decide upon alternative courses of action. It is, therefore, a procedural matter and falls to be discussed under the next paragraph.

4 PROCEDURAL DISCRETION OF THE JUDGE

Under this heading the following aspects have been identified for discussion.

4 1 Discretion concerning jurisdictional issues

The general or innate jurisdiction[42] of the high court to adjudicate causes of action is determined by several sources. The creating statute is most important, since it undoubtedly sought to establish a supreme court of justice "to the fullest possible extent".[43] Another important source is a body of rules and principles that derive from our common law, that is, the Roman-Dutch law. It is interesting to note that, although the Roman-Dutch litigation process in Southern Africa was replaced by the English model, certain Roman-Dutch remedies and procedural rules, notably in the sphere of jurisdiction, were retained.[44] In addition there are statutes imposing certain limitations on the high court's jurisdiction,[45] and the Constitution, regulating jurisdiction regarding constitutional matters,[46] that must be taken into account.

4 1 1 Inherent jurisdiction

Generally speaking, the application of the rules determining the jurisdiction of the courts to adjudicate causes of action, involves factual findings by the judge and leaves little room for the exercise of a judicial discretion. It should be noted, however, that part of the high court's innate or general jurisdiction entails the power to ensure that it functions effectively and fairly as a supreme court of justice in the English mould.[47] And in this context it seems that there is more scope for the exercise of a judicial discretion. This power, which may be called the "inherent jurisdiction" of the court, enables it to regulate and control its own process and to prevent an abuse of this process.[48] The sphere within which the court can invoke this

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41 64. This case was cited with approval by the highest court in South Africa – *Hamman v Moolman* 1968 4 SA 340 (A) 344.

42 The word "innate" was used by Flemming J in *Chunguete v Minister of Home Affairs* 1990 2 SA 836 (W) 843H.

43 Cf *Chunguete v Minister of Home Affairs supra* 842I.

44 839B–E; Herbstein and Van Winsen 51 *et seq*; Forsyth *Private international law* (1996) 149 *et seq.*

45 Cf Herbstein and Van Winsen 40.

46 Constitution of 1996 ch 8.

47 Cf *Chunguete v Minister of Home Affairs supra* 840I–841A. For a contrary view, see Taitz *The inherent jurisdiction of the Supreme Court* 4.

48 *Chunguete v Minister of Home Affairs supra* 840 847F–H; Herbstein and Van Winsen 38–39; Taitz *The inherent jurisdiction of the Supreme Court* 14 *et seq.* Opinions differ about the meaning of the concept "inherent jurisdiction" in the South African context. Taitz 4–5 sees it as a

continued on next page

inherent power – appropriately called the "procedural field" in a recent case[49] covers a variety of situations. Thus, for example, the court can make an appropriate order or take the necessary steps to prevent vexatious litigation; to punish persons for the impairment of its dignity and the failure to comply with an order of court; to discipline officers of the court for unprofessional conduct; and to sanction any procedure not falling under the Rules of Court or in conflict with them if required by the exigencies of the situation.[50] It should be mentioned, however, that the power of the courts to sanction a deviation from the rules is rather limited, since these rules regulate the litigation process quite comprehensively. The general approach of the courts is, therefore, to reserve this power for exceptional circumstances.[51]

4 1 2 Forum non conveniens

Forsyth, a leading authority on private international law in South Africa, defines this concept as follows:[52]

> "[T]he doctrine of *forum non conveniens* operates to allow a court of competent jurisdiction to decline to hear a matter, thus limiting the freedom of the plaintiff (as *dominus litis*) to select any competent forum. The defendant pleads that a just determination of the matter requires that the case be heard before another court (which also has jurisdiction)."

It seems rather obvious that this decision involves the exercise of a judicial discretion. The judge in effect, selects one forum above another.

Although this doctrine is recognised in most English-orientated procedural systems, it seems doubtful whether it forms part of South African law. Forsyth shows that factors of convenience are taken into account by the courts in determining the question of jurisdiction, but in his view "[a]ll this falls short of a doctrine of *forum conveniens* proper".[53]

Despite this conclusion, it seems arguable that the inherent jurisdiction of the high court provides a basis for the development of the doctrine of *forum non conveniens* in South Africa. This suggestion is not only applicable to the relationship between the different high courts in South Africa, but also to that between local courts and foreign courts.[54]

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separate source of the high court's general jurisdiction, which includes a variety of powers, *inter alia* the power to regulate its own process and the power to review the proceedings of lower courts and administrative bodies. Herbstein and Van Winsen 37–39 use the term to denote *inter alia* the power of the court to adjudicate a matter and to control its own process. Flemming J, in *Chunguete*'s case 844G and 847C–E, concluded that the term "inherent jurisdiction" is part and parcel of the high court's innate or general jurisdiction and that it should appropriately be confined to describe the powers of the court in the "procedural field". The judge's analysis is thorough and persuasive and we have adopted the essence for purposes of our discussion.

49 Per Flemming J in *Chunguete v Minister of Home Affairs supra* 847B.

50 See *idem* 847F–848E; Herbstein and Van Winsen 38–40; Taitz *The inherent jurisdiction of the Supreme Court* 14–26.

51 Cf *Krygkor Pensioenfonds v Smith* 1993 3 SA 459 (A) 469 G–J; *Chunguete v Minister of Home Affairs supra* 848E.

52 *Private international law* 162.

53 *Idem* 163–164.

54 Cf *idem* 165. The author relies in this regard on Taitz "Jurisdiction and forum conveniens – A reply" 1981 *THRHR* 372 379.

4 2 Discretion concerning the management of the proceedings

4 2 1 The traditional position

Traditionally, the principle of party control, as exemplified in the Rules of Court and other rules of practice, leaves only limited scope for the recognition of a judicial discretion concerning the management of the proceedings. This is especially evident during the pre-trial phase, which is almost exclusively under the control of the parties. The only discretionary powers worth mentioning in this context are those that come into play in the case of requests for interim relief. There are many examples of such powers during the rather involved pre-trial phase, which may be divided into the pleading stage and the preparation for trial stage. To some extent the Rules of Court give explicit recognition to these discretionary powers, but since they are not in the nature of a codification, the common law and inherent jurisdiction of the high court must be regarded as important additional sources.

By way of illustration we mention the following discretionary powers of the judge that have a bearing on the management of the pre-trial phase:

(a) the power to order a *peregrinus* of the country (foreigner), who initiates proceedings in a local court, to furnish security to the defendant for his/her costs;[55]

(b) the power to allow a party to an action to amend his/her pleadings[56] or a party in motion proceedings to file further affidavits;[57]

(c) the power to grant a commission *de bene esse* for purposes of obtaining evidence that cannot be presented in the normal way;[58]

(d) the power to set aside an irregular step;[59]

(e) the power to extend or abridge any time prescribed by the rules or by an order of court; to condone any non-compliance with the rules; and to order the removal of bar;[60]

(f) the power to order the production by any party to the action of any relevant document or tape recordings in his/her control.[61]

During the trial phase, the supervisory role of the judge leaves more room for the exercise of a judicial discretion in the management of the proceedings. In brief, the court has the power to ensure that the advocates conduct themselves in a professional manner and present their respective cases in accordance with the prescribed procedure.

Various situations may arise in the course of the trial, requiring the judge to exercise a discretion concerning the management of the proceedings. These powers are only cursorily dealt with by the rules,[62] with the result that the court's inherent jurisdiction plays an important role in this context.[63]

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55 This discretion is derived from the common law – *Magida v Minister of Police* 1987 1 SA 1 (A) 12B; cf also rule 47.
56 Herbstein and Van Winsen 514; rule 28(10).
57 Rule 6(5)(e).
58 Herbstein and Van Winsen 634; rule 38(3). This power can also be exercised during the trial – Herbstein and Van Winsen 643.
59 Herbstein and Van Winsen 560; rule 30(3).
60 *Idem* 548–557; rule 27. These matters clearly also fall within the ambit of the court's inherent jurisdiction – see par 4 1 1 *supra.*
61 Rule 35(11); Erasmus *Superior court practice* (1994 loose-leaf) B1–260.
62 Cf Rule 39.
63 See par 4 1 1.

The following instances serve as examples of the exercise of such a discretion:

(a) the power to order the consolidation of actions or the separation of trials;[64]

(b) the power to postpone the trial;[65]

(c) the power to direct that the proceedings must take place *in camera*;[66]

(d) the power to order that an inspection *in loco* is to take place;[67]

(e) the power to allow a party who has closed his case to reopen it;[68]

(f) the power to make any order with regard to the conduct of the trial, thereby varying any procedure laid down by the rules,[69] if it appears convenient to do so;[70]

(g) the discretion in the case of the motion process, where a dispute of facts has arisen on the affidavits, to give an appropriate order as to the future course of the proceedings.[71]

4 2 2 The new trend – case management

Experience has shown that an excess of party control is not conducive to expeditious proceedings. In recent years the idea has, therefore, gradually gained acceptance world-wide – as part of the access to justice philosophy – that it would be in the interests of effective access to justice to provide for a certain degree of judicial control over the proceedings. In the Anglo-American systems this strategy is commonly referred to as "case management".[72] It is an involved process and it can take various forms. But in essence, case management means judicial involvement in the pre-trial progress of a civil case and judicial intervention in the trial process with a view to promoting the efficient resolution of the dispute.[73]

The South African system has recognised a procedure known as the pre-trial conference for more than three decades. The initial aim of this process was to curtail the trial by means of agreement between the parties on certain issues. But, mainly because there was no provision for meaningful judicial participation in the deliberations of the legal representatives, this objective was not realised in practice.[74]

This situation has been remedied to some extent by recent modifications of the rules of court. The rule applicable to the general practice of the high court now provides for judicial participation in the pre-trial conference, but such involvement is at the judge's discretion.[75] A more significant procedure is the pre-trial conference

64 Herbstein and Van Winsen 653–655; rules 10 and 11.
65 *Idem* 666.
66 *Idem* 659.
67 Herbstein and Van Winsen 670–671.
68 *Idem* 674.
69 Rule 39.
70 Rule 39(20).
71 Herbstein and Van Winsen 383; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 3 SA 1155 (T) 1162 1168.
72 See Erasmus "Civil procedural reforms – modern trends" 1999 *Stell LR* 3 11–13; Andrews *Principles of civil procedure* (1994) 31.
73 Cf Erasmus 1999 *Stell LR* 12–13, "'Much ado about not so much' – or the excesses of the adversarial process" 1996 *Stell LR* 114 117; Marnewick "Civil procedure: Access to justice" 1999 *Consultus* 29 30.
74 See De Vos "'n Kritiese beskouing oor die voor-verhoorsamespreking" 1989 *TSAR* 585 587 with reference to the former rule 37.
75 Rule 37.

introduced in the Cape High Court on an experimental basis.[76] Although this process cannot be regarded as a fully-fledged civil case management system, it provides for meaningful judicial intervention in the pre-trial progress of a case. In brief, this elaborate procedure calls for the intervention of a judge at certain crucial stages between the close of pleadings and the trial to ensure a satisfactory progress of the case. If the parties co-operate, this intervention will be limited, but if they fail to comply with the judge's directions, he is empowered to monitor the progress of the case more closely and to impose penalties.[77]

4 3 Discretion concerning the proofs

In accordance with the English-orientated approach, the South African law of evidence makes a clear distinction between the rules regulating the admissibility of evidence and the rules governing the evaluation (weight) of evidence.[78] The question therefore arises whether these rules leave any room for the exercise of a judicial discretion.

4 3 1 Admissibility of evidence

Generally speaking, the application of the rules regulating the admissibility of evidence involves a factual finding by the judge and not the exercise of a judicial discretion. Thus if the admissibility of certain evidence is in dispute, the judge will consider whether the requirements for admitting the evidence have been met. In this regard it is interesting to note that the rules governing the admissibility of evidence are generally framed in a negative form, namely as exclusionary rules. The most well-known of these is perhaps the rule against hearsay evidence.[79]

However, in certain instances the judge is vested with a discretion to exclude evidence on certain grounds, even though it complies with the strict rules of admissibility. An example in the context of civil proceedings is the discretion of the judge to exclude illegally or improperly obtained evidence, despite its relevance to the matter. This discretion, which is derived from our common law of evidence, is exercised on the basis of public policy.[80]

In the case of hearsay evidence the opposite applies. As a rule hearsay evidence is inadmissible, but by virtue of a statutory provision the judge has a discretion to admit such evidence, if he is of the opinion that it will be in the interests of justice. However, before the judge can come to this conclusion he must consider certain specific factors and any other factor that should in his opinion be taken into account.[81] This is, therefore, an example of a limited ("guided")[82] discretion.[83]

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76 Rule 37A.

77 Eg by removing a case to the "not ready [for trial] list" and, in exceptional cases, by dismissing the action – cf Erasmus *Superior court practice* B1–274K 274N, "Case management moves ahead" 1998 *De Rebus* 27–28; rule 37A(14)(j) and 37A(15)(f).

78 Schwikkard, Skeen and Van der Merwe *Principles of evidence* (1997) 18 (hereafter *Principles of evidence*).

79 See *Principles of evidence* 155 *et seq.*

80 *Motor Industry Fund Administrators (Pty) Ltd v Janet* 1994 3 SA 56 (W) 63H; *Principles of evidence* 50.

81 Law of Evidence Amendment Act 45 of 1988.

82 *Principles of evidence* 158.

83 See par 2 1 1 *supra*.

4 3 2 The evaluation of evidence

Once all the admissible evidence has been received, it is the task of the court to evaluate it in order to determine the facts involved in the dispute. The rules governing this process are less elaborate than those regulating admissibility, perhaps because Anglo-American lawyers were preoccupied with the rules of exclusion.[84] It is not clear to what extent the concept of judicial discretion can be applied in this context. In theory, the relevant principles and the judge's intellect should lead him/her to the correct factual finding and discretion should not play a role. However, in practice the determination of facts on the basis of evidence – "possibly incomplete, often conflicting, submitted by witnesses of varying degrees of veracity whose memory and perception may be imperfect"[85] – can be a minefield, even for experienced judges. Pattenden therefore suggests:[86]

> "A finding of fact is an informed guess and in many trials there is room for legitimate differences of opinion as to the facts which have been proved by the evidence."

In our view the concept "informed guess" is rather extreme and could be misleading. But perhaps the author's suggestion means no more than that judges do not mechanically reach the correct factual findings. What is involved, in our view, is that the judge must exercise a choice between alternative propositions. There are certain broad principles to assist the judge in this task, such as the cautionary rule regarding certain evidence,[87] but in the end the judge must choose between two conflicting versions. We suggest that, in a practical sense, this is nothing else but the exercise of a discretion.[88]

4 4 Discretion concerning the allocation of costs

The award of costs in civil proceedings is a matter "wholly within the discretion of the court".[89] Although this is a wide discretion, it is a judicial discretion – like the other discretionary powers – and it must be exercised judicially.[90] In brief, this means that the judge must exercise his discretion within the limits of certain guiding principles and with due consideration of all the circumstances of the case.[91] Among these principles are the general rule that the successful party is entitled to his costs, and the opposite rule that the court may for good reason deprive a successful party of his costs, in whole or in part.[92]

5 JUDICIAL DISCRETION IN SPECIFIC PROCEEDINGS

Under this heading the following procedures have been identified for consideration.

5 1 Small claims courts

Small claims courts were first introduced in South Africa in 1985, with the aim of providing a speedy, inexpensive, consumer-oriented court to the public. These

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84 Cf *Principles of evidence* 370, with reference to Maguire *Evidence: Common sense and common law* (1947) 10. It is well known that the jury played an important role in this development – *Principles of evidence* 5.
85 Pattenden *Judicial discretion* 4.
86 *Ibid.* Cf also *Principles of evidence* 370.
87 *Idem* 388.
88 It is interesting to note that, as in the case of a proper discretion, an appeal court is generally reluctant to interfere with a trial court's factual findings – Herbstein and Van Winsen 916.
89 *Idem* 703. For a comprehensive work on the subject, see Cilliers *Law of costs* (1997 loose-leaf).
90 Herbstein and Van Winsen 703–704.
91 *Idem* 704.
92 *Ibid.*

courts are not courts of record and hear matters with a very low financial limit. Legal representation is not allowed and the judicial officer is a member of the legal profession acting in a voluntary capacity as commissioner of the court. The procedure followed in these courts is inquisitorial, unlike that in other South African courts where the accusatorial (adversarial) system is used. In addition, the rules of evidence followed in other courts do not apply here. For these reasons, the discretion granted to the judicial officer in such courts is extremely wide.

Section 26 of the Small Claims Courts Act 61 of 1984 provides that the rules of evidence do not apply to proceedings in these courts, and that a court may ascertain any relevant fact in such manner as it deems fit.[93] The commissioner has a free hand in deciding how he wishes to obtain information, how much information he wishes to hear before reaching a decision, and the manner in which it must be presented. In particular, evidence is obtained by the commissioner questioning the parties and their witnesses, not by party cross-examination, and a party may put a question to another party or witness only at the discretion of the commissioner.[94] Evidence may be submitted in writing or orally.[95]

It is clear from the above that the judicial officer exercises a wider discretion regarding procedure and evidence, and plays a more active role in small claims court proceedings, than in other courts in the South African legal system. This is because these courts are seen to fulfil a more community-oriented function than other courts, and are intended to be more accessible to the general public. The commissioner is expected to guide the parties through the presentation of evidence, and is not limited in the manner by which he obtains this evidence.

5 2 Provisional and protective measures

The primary provisional and protective measures which are available in South Africa are all forms of interdict (injunction). The discretion available when a final interdict is granted, after a full determination of rights, will be dealt with first. Next, the discretion exercised in respect of an interim interdict, which is granted or refused without the presentation of detailed factual and legal information to assist the judicial officer, is considered. Finally, a new and interesting form of protective measure, the Anton Piller order, and the court's discretion to grant or refuse it, is dealt with.

5 2 1 Interdicts (injunctions)

5 2 1 1 Final interdicts

A court may grant both final and interim interdicts. A final interdict presupposes that a judgment is given after full argument on all the factual and legal issues by all parties to the action. It is usual for a final interdict to be granted after trial, unless no material dispute of fact exists, when it can be granted on application.

Because of the completely different nature of the evidence that is heard before a final – as opposed to an interim – interdict is granted, the judicial discretion exercised when a final interdict is in issue is much more limited.

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93 S 26(1).
94 S 26(3).
95 S 26(2).

It has been held that if a plaintiff has satisfied the court that the three requirements for the granting of a final interdict are present, the court has no general discretion whether or not relief should be granted, and that any discretion the court has relates solely to whether another remedy will adequately protect the rights of the party seeking relief.[96]

5 2 1 2 Interim interdicts

An interim interdict preserves or restores the *status quo* pending the final determination of the rights of the parties. It does not affect the final determination of these rights.

The following requirements must be satisfied before an interim interdict will be granted:

(i) The applicant's right must be clear, or, if not clear, *prima facie* established, though open to some doubt.

(ii) If the right is only *prima facie* established, there must be a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he succeeds ultimately in establishing his right.

(iii) The balance of convenience should favour the granting of an interim interdict.

(iv) The applicant should have no other satisfactory remedy.[97]

Even when these requirements have been satisfied, the court retains a general discretion to decide whether to grant or refuse a temporary interdict. In *Beecham Group Ltd v B-M Group (Pty) Ltd*[98] Franklin J stated that questions relating to the applicant's prospects of success in the action and to whether he would be adequately compensated by an award of damages at the trial are merely factors to be taken into account in the exercise of this discretion. These factors should not be considered in isolation, but together with factors such as the balance of convenience, the preservation of the *status quo*, the relative strength of each party's case, the so-called uncompensatable disadvantages to each party, and the respective prejudice that would be suffered by each party as a result of the grant or refusal of the interdict. Once all of these factors have been considered, the final step is the exercise of a judicial discretion when these factors are weighed up and a decision made.[99]

5 2 3 Anton Piller orders

An interdict, whether final or interim, is granted only once both parties have been heard. While a limited judicial discretion exists when a final interdict is sought, because the issues have been fully canvassed, a much broader discretion is given to a judge asked to grant interim relief, precisely because a decision is taken without a full consideration of the issues. What kind of discretion is then exercised when a final order is granted without notice to the affected party?

A legal remedy developed initially in England but now frequently used in South Africa, in particular in proceedings relating to intellectual property rights, is the Anton Piller order. The original Anton Piller order, in both England and South

96 See *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 4 SA 343 (T) 346.

97 *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 2 SA 256 (C) 267.

98 1977 1 SA 50 (T) 54.

99 *Knox D'Arcy Ltd v Jamieson* 1995 2 SA 579 (W) 639.

Africa, comprised an *ex parte* order in the form of a mandatory injunction coupled with an inspection order and an order for delivery or disclosure and is a remedy which is aimed particularly at acquiring or conserving information for purposes of a subsequent action.

The great value of this remedy is that it is brought as an *ex parte* application without prior notice to the other party, so that the latter is caught unawares, before he has time to destroy or dispose of his infringing stock or incriminating papers. The remedy in its original form was granted in this country in several cases, in none of which its validity in our law was questioned. However, in a subsequent series of decisions the courts strongly condemned this type of remedy, on the basis that the relief, other than the order authorising the search for and attachment of property in the possession of the defendant to which the plaintiff has a real or personal right, was not based on the principles of Roman-Dutch law.[100]

The Appellate Division (now the Supreme Court of Appeal) subsequently held that a more limited version of the Anton Piller order, for the search for and attachment of documents and other material, to which the plaintiff has no right but for the purpose of preserving it as evidence, is indeed part of our law.[101]

This remedy may be brought as an *ex parte* application without prior notice to the respondent. To obtain such an order, the applicant must *prima facie* establish the following:

(a) that he has a cause of action on the ground of infringement against the respondent which he intends to pursue;

(b) that the respondent has in his possession specific and specified documents and other material which are of vital importance to his subsequent action; and

(c) that there is a real and well-founded apprehension that this evidence may be destroyed or disposed of before the subsequent action comes to trial or before the stage of discovery.[102]

The court has a discretion to grant the remedy. In exercising this discretion, the court will have regard to the following factors, *inter alia*:

(a) the cogency of the applicant's *prima facie* case as set out in his application;

(b) the potential harm that would be suffered by the respondent if the order is granted as compared to the potential harm that would be suffered by the applicant if the order is refused; and

(c) the terms of the order. These should not be more onerous than is necessary to protect the interests of the applicant.[103]

This discretion does appear to differ a great deal from that exercised by a court when granting an interim interdict. This is possibly so because, although the relief granted is effectively final in nature, it is viewed as procedural rather than substantive relief, which merely preserves existing evidence and may not be used to found or substantiate a cause of action.

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100 See *Economic Data Processing (Pty) Ltd v Pentreath* 1984 2 SA 605 (W) and *Cerebos Food Corp Ltd v Diverse Foods SA (Pty) Ltd* 1984 4 SA 149 (T).

101 *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift: Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg* 1995 4 SA 1 (A).

102 *Shoba v Officer Commanding supra* 15.

103 16.

5 3 Complex litigation

No specific provisions exist which typify litigation as simple or complex. Any type of litigation may be simple or complex, and, if complex, either factually complicated or involving complex issues of law.[104] It follows that no measures exist which make provision for the exercise of a judicial discretion specifically with reference to complex proceedings. However, three instances of discretionary decision may relate to the issue of complexity: the transfer of proceedings to another court; expert assistance for the presiding officer; and the hearing of a matter before more than the usual number of judges.

If a judicial officer feels that a matter can be more appropriately heard by another court, various options exist, depending on the court concerned. In the magistrates' courts, the court may transfer proceedings to any other magistrate's court, but only with the consent of the parties.[105] Provision is also made that the defendant may request that proceedings be transferred to a high court; in this instance, provided that the defendant has complied with the statutory requirements, the magistrate's court has no discretion but must order transfer.[106]

The high court cannot *mero motu* order the removal of proceedings from one division to another, but does have a discretion to order removal to another high court on application by one of the parties.[107] A court will not easily order removal, and will usually only do so after hearing both parties and ascertaining that there is a balance of convenience in favour of removal.[108]

If a matter is factually complex, it is also possible for a court to obtain some form of expert assistance. In the high courts, a court may refer a matter to a referee for enquiry and report, and retains a discretion whether to adopt the report, wholly or partially and with or without modifications. The consent of the parties is needed for referral, and referral is usually ordered in respect of matters which require extensive examination of documents or scientific, technical or local investigation which the court is of the opinion it cannot conveniently conduct, or which relate to accounts.[109] Thus, while the court does not have a great measure of discretion when deciding whether a matter should be referred to a referee,[110] it can exercise a discretion when deciding what weight to give to the referee's report.

In the magistrates' courts, the court itself has no discretion to appoint what is known there as an assessor, but may, at the request of a party "summon to its assistance one or two persons of skill and experience" who then act in an advisory capacity.[111] As these persons have no say in the judicial decision, the court clearly has a discretion whether or not to accept their advice.

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104 Eg class actions, which have been fully considered by the SA Law Commission (Project 88 Report: *The recognition of class actions and public interest actions in South African law*) but not yet introduced here, will usually be viewed as "complex" litigation. See in this regard De Vos "Reflections on the introduction of a class action in South Africa" 1996 *TSAR* 639.

105 S 35(1) Magistrates' Courts Act 32 of 1944.

106 S 50.

107 S 9 Supreme Court Act 59 of 1959.

108 Erasmus *Superior court practice* A1–9.

109 S 19*bis* Supreme Court Act 59 of 1959.

110 See *Montres Rolex SA v Kleynhans* 1985 1 SA 55 (C) 69 where the court suggested that its power should be extended so that it could call for a referee without the consent of the parties.

111 S 34 Magistrates' Courts Act 32 of 1944.

Provision also exists, in both the Supreme Court of Appeal and the high courts, that a matter may be heard before a greater number of judges than would usually sit "in view of its importance".[112] While importance has not been defined, it has been suggested that it includes cases where the issue is *res nova*, where it is of great significance for a particular group or sector of the community, or where there are conflicting decisions.[113] The concept clearly includes matters which are of great legal complexity.

The discretion of a court to order that a matter be heard by a court consisting of more judges can, when a matter comes before a high court as court of first instance, be exercised by the judge hearing the matter. Where the matter comes before a court on appeal, the senior judge of the division exercises this discretion.

5 4 Arbitration and ADR

5 4 1 Arbitration

It has been suggested that current legislation governing arbitration no longer meets the objectives of modern arbitration and a discussion paper on proposed new arbitration legislation was released recently by the South African Law Commission.[114] Because it is clear that legislation governing this topic will be amended, both the current statute and the proposed bill will be considered.

Under the current Arbitration Act 42 of 1965, the court has a discretionary power at three stages during an arbitration process: before commencement, when approached to decide whether an arbitration agreement is binding,[115] and whether legal proceedings should be stayed if an arbitration agreement exists;[116] during the course of arbitration proceedings, when approached to make certain orders;[117] and after arbitration, when approached to enforce or set aside an arbitration award.[118]

In instances when a court is asked either to stay court proceedings to allow arbitration to proceed, or to set aside an arbitration agreement, the courts have held that the onus on a party seeking to avoid arbitration is not easily discharged, and that a party must make out a strong case before a court will exercise its discretion to exclude arbitration.[119] This discretion which a court currently enjoys to set aside or refuse to enforce an arbitration agreement "on good cause shown"[120] has been omitted from the draft bill. In its place, specific protection for consumers who sign contracts containing arbitration clauses has been suggested.[121] However, the discretion to stay legal proceedings has been retained, although in a limited form. The existing Act provides that a court may stay proceedings if satisfied that there is "no sufficient reason" why the dispute should not be referred to arbitration.[122] The draft bill[123] provides that a court must stay proceedings unless satisfied that the agreement is "null and void, inoperative, or incapable of being performed".

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112 S 12(1)(c), 13(1)(b) and 13(3) Supreme Court Act 59 of 1959.
113 Erasmus *Superior court practice* A1–14
114 Discussion Paper 83: Project 94 *Domestic arbitration.*
115 S 3(2) Arbitration Act 42 of 1965.
116 S 6.
117 S 20 21.
118 S 31 33.
119 Butler and Finch *Arbitration in South Africa* (1993) 65.
120 S 3(2).
121 Cl 55 draft bill.
122 S 6(2).
123 S 8(2).

The court has a general discretion under section 21 to make certain procedural orders relating to security for costs, discovery, interim relief and evidence. While the power to order security and discovery have been omitted from the draft bill, a court may grant more extensive interim relief. Once again, the discretion of the court has been curtailed. The current statute gives a court the same discretion to grant the various orders as it has in any other proceedings before the court – the draft bill states that the court "must not" grant the various orders until certain conditions have been met.[124]

The current statute gives a court a discretion to make an award an order of court,[125] to enforce such an award which has been made a court order,[126] and to set aside an arbitration award.[127] The draft bill once again severely limits this discretion: section 49(2) provides that an award may be set aside only in certain specific instances and section 50 (2) provides that an award must be made an order of court unless the same instances are present.

Clearly, the whole tenor of the draft legislation is to limit the court's discretion to interfere with arbitration proceedings and to enhance the concept of party autonomy.

In contrast, current legislation gives the court a wide discretion whether to order enforcement of an arbitration agreement and whether to order compliance with an arbitration award.

5 4 2 Alternative dispute resolution (ADR)

In South Africa, the generally recognised forms of alternative dispute resolution that is non-litigious resolution of disputes, are mediation, conciliation, negotiation and arbitration.[128] Only the last-mentioned involves adjudication by a third party, and court involvement in this process has been discussed at 4 1 above. The other forms of ADR all involve private decision-making by the parties and so make no provision for any involvement by formal court structures. No provision exists for any judicial discretion within the context of ADR – it is only if the parties decide not to use ADR procedures, or are dissatisfied with the outcome of such procedures, that they might approach a court for assistance, when the usual principles would apply.

5 5 Non-contentious litigation

Litigation may be viewed as non-contentious, to a greater or lesser degree, in various circumstances. First, the rights of only the applicant may be affected, in which case an *ex parte* application is launched. Secondly, it may occur that parties to a dispute are in full agreement about the facts of a case but differ as regards the legal conclusions which may be drawn from these facts. Here the parties may submit a special case to the court for a decision. Finally, the court may be approached to make a declaratory order about a future right.

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124 S 38(2).
125 S 31(1).
126 S 31(3).
127 S 33.
128 See in general Pretorius *Dispute resolution* (1993) 3 *et seq.* The limited effect of the Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991 will not be considered here. See De Vos 1992 *TSAR* 381.

When an application is brought without notice because no-one other than the applicant is affected by the order, the requirement that all material facts must be disclosed and that the utmost good faith is required from the applicant applies, and the court may refuse relief, or rescind relief already granted, if the applicant has not made full disclosure. The court has a discretion whether or not to deny relief if there has been non-disclosure, and takes the following into account: the extent and reasons for non-disclosure, the influence that proper disclosure would have had on the court's decision, the consequences of denying relief and the effect on innocent third parties.[129]

The second example of non-contentious litigation is the statutory provision for instances when the parties are in sufficient agreement about the facts in issue that they can draft a statement of facts in the form of a special case for adjudication by the court.[130] The court has no discretion here on the form and contents of the special case and is obliged to hear the special case as formulated by the parties.[131]

In the third instance,[132] statutory provision is made that a court may

> "in its discretion, and at the instance of any interested party, enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination".[133]

Once an applicant has satisfied the court that he is an "interested" person, the court then decides if the matter is a proper one for the exercise of its discretion. When reaching this decision, the following are taken into account:

- an existing dispute is not necessary – if the legislature had intended this to be a requirement, it would have made the necessary statutory provision;[134]
- the court will not deal with hypothetical or academic questions and it is not the court's function to act in an advisory capacity;[135]
- there must be a right, even if only conditional, which attaches to the applicant at the time the application is launched;[136] and
- there must be interested persons on whom the declaration is binding, although it is not a prerequisite that an applicant must have an opponent.[137]

The court considers all the above before exercising its discretion and deciding whether or not it is prepared to make a declaratory order.

5 6 Execution

5 6 1 High courts

Once a high court has pronounced judgment, the judgment is put into immediate effect unless the judgment debtor notes an appeal or requests suspension. The

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129 *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd* 1981 2 SA 412 (W) 414.
130 Rule 33(1).
131 Erasmus *Superior court practice* B1–233; *Sibeka v Minister of Police* 1984 1 SA 792 (W) 795.
132 While this is not always a true instance of non-contentious litigation in that more than one party may take part in the proceedings or be affected by the outcome, it is nevertheless discussed here. See Herbstein and Van Winsen 1062.
133 S 19(1)(a)(iii) Supreme Court Act 59 of 1959.
134 *Ex parte Nell* 1963 1 SA 754 (A) 760.
135 *Ibid.*
136 *Family Benefit Friendly Society v CIR* 1995 4 SA 120 (T) 125.
137 *Ibid.*

common-law rule of practice is that the execution of a judgment is automatically suspended upon noting an appeal,[138] and this is confirmed in the rules, which provide that, pending a decision on appeal, both the operation and the execution of an order are suspended "unless the court which gave such order, on the application of a party, otherwise directs".[139] Here the court has a discretion whether it will permit execution to take place, and if so, subject to what conditions. When exercising this discretion, the court considers matters such as the potential of irreparable harm to either party if the order is executed or suspended, the prospects of success on appeal, and the balance of convenience.[140]

The converse occurs when no appeal is noted, or an appeal has been finalised. Then the rules[141] provide that a high court may suspend the execution of any order for whatever period it may deem fit. This rule has never been applied in a reported decision,[142] because, apart from the rule, the courts also have an inherent discretion to order the stay of a writ of execution.[143] This discretion must be exercised judicially but is not otherwise limited.[144] The courts will grant a stay if the underlying *causa* of the debt is disputed or not longer exists, or if execution is levied for an ulterior purpose, such as to put an end to litigation.[145] However, the court cannot stay or interfere with execution if it has already taken place, unless there has been a reviewable irregularity which prejudiced the judgment debtor, since the rights of other parties are also affected at this stage.[146]

5 6 2 Magistrates' courts

Magistrates' courts have a discretion whether or not a judgment will be executed or execution suspended pending a decision on appeal, and, if executed, subject to what conditions.[147] This discretion is exercised in accordance with the high court principles set out above.[148]

A magistrate's court may also stay a writ of execution "on good cause shown".[149] This has been defined as any fact or circumstance that would make it just or equitable as between the parties that execution should be stayed,[150] and the guidelines laid down by superior courts in reaching such a decision are followed by these courts.

The Magistrates' Courts Act also makes provision for a debt-collecting procedure, in terms of which a judgment debtor who cannot pay the full amount immediately may be summoned to appear before a magistrate who decides on a monthly instalment which the debtor must pay, or which must be deducted from his salary.

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138 *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 3 SA 534 (A).
139 Rule 49(11).
140 Erasmus *Superior court practice* B1–370.
141 Rule 45A.
142 It has been held that it is unnecessary to consider the scope and effect of the statutory provisions because of this inherent discretion: *Whitfield v Van Aarde* 1993 1 SA 332 (E) 337.
143 *Whitfield v Van Aarde* 1993 1 SA 332 (E) 335 and cases cited there.
144 337.
145 339.
146 *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1997 2 SA 411 (T) 413.
147 S 78 Magistrates' Courts Act 32 of 1944.
148 See Erasmus and Van Loggerenberg *Jones and Buckle The civil practice of the magistrates' courts in South Africa* (1996 loose-leaf) vol 1 Act 329.
149 S 62 Magistrates' Courts Act 32 of 1944.
150 Erasmus and Van Loggerenberg *Jones and Buckle* Act 253.

The court has a limited discretion here, in that the Act prescribes the considerations that influence the determination of the amount to be paid.[151]

5 6 3 Small claims courts

If a small claims court commissioner gives judgment for the payment of money, he is obliged to find out whether the person against whom the order was made, is able to comply with the order immediately. If he is not able to comply with the order, the commissioner may conduct an inquiry into the debtor's financial position, and after such inquiry, order payment in instalments or suspend the order.[152] The position is similar to that regarding debt-collection in the magistrates' courts, in that the court has a discretion how to ensure that the judgment debtor complies with its order.

Thus as regards execution, all courts are given some discretion to decide whether and when enforcement of their orders must take place.

6 LIMITS OF JUDICIAL DISCRETION AND REMEDIES

6 1 The constitutional right to be heard and the fair trial principle

In the past, procedural rights or guarantees had no constitutional significance. They simply formed part of the ordinary law – either in the form of explicit provisions or by way of inference from specific rules.[153] The Constitution of 1996 broke with the past with the following provision:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."[154]

We suggest that this section gives recognition to four broad procedural guarantees, namely access to justice; a public hearing; a fair hearing (trial); and an independent and impartial court (tribunal).[155]

While all these guarantees are essential in a developed procedural system, the right to a fair trial is of particular importance. It constitutes the very core of procedural justice in civil litigation and provides the basis for more specific guarantees.

In our view there are two instances where the application of the Bill of Rights will involve a judicial discretion.

6 1 1 The content of rights

In order to give effect to any right contained in the Bill of Rights in a specific situation, the court must, of course, determine the content of the right in question. If it is a flexible right that is broadly framed, the court is clearly vested with a wide

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151 S 65D(4)(a) and (5) Magistrates' Courts Act 32 of 1944.

152 S 39 Small Claims Courts Act 61 of 1984.

153 On this subject and the impact of the new constitutional dispensation, see De Vos "The impact of the new Constitution upon civil procedural law" 1995 *Stell LR* 34; "Civil procedural law and the Constitution of 1996: An appraisal of procedural guarantees in civil proceedings" 1997 *TSAR* 444.

154 S 34.

155 De Vos 1997 *TSAR* 451 *et seq*. It is interesting to note that this provision bears a striking resemblance to 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

discretion to decide on its specific meaning. The discretion must be exercised judicially and the judge must therefore have regard to the guiding principles of the Constitution[156] and all relevant circumstances. Where the Constitution merely proclaims the right and refrains from giving concrete meaning to it, the court will have recourse to the common law and rules of practice to determine its content. This is evidently the case with the right to a fair trial. The courts have not yet been called upon to give practical content to this broad principle, but we submit that it includes a number of specific guarantees, such as the right to be heard; the right to legal representation; the right not to be confronted with illegally obtained evidence;[157] and the right to be furnished with reasons for judgment.[158]

6 1 2 The limitation of rights

The right to a fair public hearing in terms of the Constitution is limited by the general limitation clause, which provides that fundamental 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".[159]

This section proceeds to enumerate a number of factors that a court must consider when exercising a discretion as to whether a limitation is reasonable. These include the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.[160] When considering the limitation clause in the 1993 interim Constitution, the court described the exercise of its discretion as follows: "The limitation . . . involves the weighing-up of competing values, and ultimately an assessment based on proportionality . . . there is no absolute standard."[161]

It is clear from the above that the Constitution, while articulating and entrenching procedural guarantees in South African law, has also given the courts a wide discretion in the application of these guarantees, as regards both the contents of the rights and the possibility of their limitation.

6 2 Remedies against abuses of judicial discretion

In this regard a dissatisfied litigant has two possible remedies: if the matter was heard by a lower court, he can note an appeal or apply for review, depending on the circumstances. If the matter was heard by a high court, the only remedy is that of appeal.

6 2 1 Review

A person may apply for the review of proceedings of a lower court by a division of the high court on various grounds. The most relevant in the context of the abuse of judicial discretion are interest in the cause, bias, malice or corruption on the part of the judicial officer, gross irregularity in the proceedings and the admission of

156 Cf s 8(3) which prescribes the role of the common law in giving effect to any right.
157 Cf *Motor Industry Fund Administrators (Pty) Ltd v Janet* 1994 3 SA 56 (W) 634.
158 For a detailed discussion, see De Vos 1997 *TSAR* 454–461.
159 S 36(1) Constitution of 1996.
160 *Ibid.* See for a general discussion De Waal *et al The Bill of Rights handbook* (1999) 143 *et seq.*
161 *S v Makwanyane* 1995 3 SA 391 (CC) quoted with approval in respect of civil proceedings in *Ex parte Dabelstein v Hildebrandt* 1996 2 All SA 17 (C) 41.

inadmissible evidence or the rejection of competent evidence.[162] The first ground is also a reason for requesting the recusal of the presiding officer. If the latter refuses to accede to such a request, when the said circumstances are present, it would, in our view, amount to an abuse of the discretion to decide this issue. A "gross irregularity" has been described as an irregular act or omission on the part of the presiding officer which is of so gross a nature that it is calculated to prejudice the litigant.[163] Clearly such acts could also constitute an abuse of the court's discretion.[164]

6 2 2 Appeals

The other general remedy is that of appeal. The principles applicable to appeals against the exercise of a discretion in civil proceedings can be summarised as follows:[165] When an appeal is noted against the exercise of a discretionary power by the court of first instance, the first task of the court of appeal is to determine whether its function is to re-examine an aspect which the parties seek to re-argue on the existing record, or whether its function is limited to an enquiry whether the court of first instance exercised its discretion judicially. There are at least two categories of discretionary power: the first comprises matters so essentially to be determined by the court of first instance that it would be inappropriate for the court of appeal to substitute its own discretion for that of the trial court. In such instances, the court of appeal will interfere in such a matter only if it is found that

> "the Court *a quo* has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons".[166]

The second category relates to matters which can be determined by either court; in such instances, the court of appeal may substitute its own discretion without first having to decide that the court of first instance did not act judicially, but may interfere purely on the basis that it considers its own exercise of the discretionary power to be wiser or more appropriate.

The majority of appeals on matters of discretion fall into the first category; thus the court of appeal will interfere only if the discretion of the court *a quo* was not exercised judicially.[167]

7 CONCLUDING REMARKS

It is appropriate, in our view, to conclude with a few remarks on the world-wide picture regarding judicial discretion that emerged at the congress. Needless to say, it is not possible to encapsulate the wealth of scientific information contained in the five regional reports and two general reports, as well as the oral interventions, which formed part of the proceedings. Suffice it to comment briefly on some converging trends within the broad Western adversarial system, which includes both the common-law model and the continental process.

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162 S 24(1) Supreme Court Act 59 of 1959.
163 Erasmus *Superior court practice* A1–71.
164 For a discussion of acts or omissions that have been viewed as gross irregularities, see *idem* A1–72 – A1–74.
165 See *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd* 1989 4 SA 31 (T) 36.
166 *Ex parte Neethling* 1951 4 SA 331 (A) 335.
167 See also Herbstein and Van Winsen 918.

Given the nature of the adjudication process, it is not surprising that the concept of judicial discretion is recognised by all developed legal systems. However, the great divide between certain legal cultures, such as the English and the French, naturally gave rise to the development of important differences regarding the scope of judicial discretion in the different systems. This is exemplified by the different traditional approaches of the common law and continental judges in exercising their discretionary powers in the context of substantive law and procedural law. In the context of substantive law, the common-law judge appears to have wide discretionary powers to adapt and evolve the law, whilst his continental counterpart is obliged to apply the law in a more restricted framework. In the field of procedural law, their roles are reversed. The common-law judge is enjoined to play a passive role, thus leaving the parties in control of the development of the proceedings and the presentation of their respective cases. The continental judge, on the other hand, enjoys wide powers and is called upon to play an active role in the development of the case and the gathering of evidentiary material.

Against this background, it was interesting to take note at the congress of a converging trend in the area of procedural law. The former European socialist countries have abandoned the inquisitorial features of their systems and have subscribed to the central European philosophy once again. This means that they give recognition to the principle of party control (adversarial process), but qualify it by providing for a significant degree of judicial activism. The trend towards judicial activism has recently also gained acceptance in the Anglo-American world. This is especially evident in the area of complex litigation, where the concept of "case management" is used to describe the active role of the judge.

Another trend in the common-law world, which also emerged at the congress, is the movement in the direction of written procedures. In other words, oral procedures in the presentation of evidence are abandoned or restricted to make way for a paper-orientated approach. One commentator called it "a movement in the direction of a paper trial". (The United States of America, with its constitutionally entrenched jury trial, is a notable exception to this trend.) This development also represents a converging trend, since the predominance of the written element at the final hearing in continental civil proceedings is a well-known phenomenon.

Finally, the proceedings also bore witness to the strong trend in both continental and common-law systems to constitutionalise civil procedural guarantees, such as the right to a fair trial. From a South African perspective one can, therefore, take comfort in the fact that our Constitution is not behind the times in this regard.

The struggle between religion and politics is age-old. Both are about power, though not necessarily the same kind of power. But their roles as they deal with human affairs have always been overlapping. Both often vie for the same territory. This contest varies in nature and intensity from time to time and from country to country. Both religion and politics can make absolutist claims. Both can be totalitarian.

Ninan Koshy Religious freedom in a changing world 58.

Democracy and rights: Constitutional interpretation in a postrealist world*

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OPSOMMING

Demokrasie en regte: Grondwetuitleg ná die realiste

Die vraag na die legitimiteit van grondwetlike hersiening is 'n brandpunt in lande met oppermagtige grondwette. In hierdie artikel word twee breë benaderings tot dié vraagstuk ondersoek. Die liberale benadering berus op die idee dat daar duidelike grense bestaan tussen die individu en gemeenskap, asook tussen die regmatige funksies van die wetgewende en regsprekende gesag. Die kommunitêre benadering, daarenteen, fokus op die onderlinge verbondenheid van die individu en gemeenskap, en benadruk die feit dat regters lede is van 'n gemeenskap van uitleggers. Beide benaderings is problematies. Die pogings van liberale denkers om grondwetlike beregting op 'n objektiewe grondslag te plaas, is uiters problematies in die lig van die kritiese nalatenskap van die Amerikaanse realiste. Kommunitêre denkers is weer geneig om die gemeenskap te verskraal tot 'n bepaalde groep of instelling. Ek argumenteer dat nóg die liberale nóg die kommunitêre benadering ons in staat stel om die spanning tussen demokrasie en regte op te los. Dié spanning is konstitutief van die nuwe grondwetlike orde, en moet lewend gehou word.

1 INTRODUCTION

In countries with supreme, justiciable constitutions, the question of the legitimacy of judicial review seems to be an intractable problem, which continues to plague judges and constitutional theorists. The power of unelected judges to declare laws enacted by democratically accountable legislative assemblies unconstitutional and therefore null and void, raises fundamental questions about the relation between democracy and rights, and between popular sovereignty and constitutionalism. The question whether constitutional review is essentially an undemocratic (or "countermajoritarian")[1] institution, or whether it can be reconciled with the sovereignty of the people, has been the subject of a vast body of academic treatises and articles,

* This is an extended version of a paper read at the Fifth World Congress of the International Association of Constitutional Law in Rotterdam on 1999-07-13. Most of the ideas expressed in this article have been shaped during discussions with Danie Goosen, Wessel le Roux, André van der Walt, Johan van der Walt and Karin van Marle. However, responsibility for errors is my own.

1 The "countermajoritarian difficulty" was first formulated by Alexander Bickel, the American constitutional theorist. Bickel wrote: "[W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of the . . . people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it." Bickel *The least dangerous branch: the Supreme Court at the bar of politics* (1962) 16–17.

while the dividing line between legitimate exercises of constitutional review and judicial usurpation of legislative authority features in virtually every constitutional judgment.[2]

In this article, I examine two broad responses to the problem of the legitimacy of constitutional review. I call these the "liberal" and "communitarian" responses.[3] The *liberal* approach (which is discussed and criticised in 2 below) seeks to mediate the tension between democracy and rights, or between the legislature and the courts, with reference to clear *boundaries* between the individual and collective. There are certain zones of intimacy beyond which no majority may reach; similarly, there are limits to what a court may legitimately do in exercising its review power. Judges can avoid overstepping the dividing line between legitimate exercises of the review power and judicial usurpation of the legislative function by adhering to a neutral and objective legal method. What judges do, the argument goes, is – or at least should be – fundamentally different from what legislators do. Judges are further removed from the ordinary political process; and are not as susceptible to the pressures of party politics or the demands of interest groups. Moreover, their command over legal materials places them in a unique position to guard over the long-term commitments embodied in a constitution. Judges are trained to take decisions on the basis of legal rules and principles, not on grounds of political expediency. Their task is not to sit in judgment over the political wisdom of legislative choices – that would amount to a breach of the separation of powers – but to test legislation against the objective demands of the Constitution. Of course, most commentators would agree that judges often get it wrong and, as a result, either usurp legislative power or fail to provide adequate protection to individuals and minorities. However, they claim that that is the result of an unprincipled approach – if only judges applied the correct method or followed the right theory of constitutional interpretation, their decisions would be reasoned, principled, objective and neutral. What the correct method or right theory of interpretation consists of, is, however, the topic of endless debate.

By contrast, the *communitarian* approach (which is discussed in s 3 and criticised in s 4) focuses less on the tension between democracy and rights, and more on the ways in which collective and individual identities are entwined with each other. It is argued that we should not think of rights as prepolitical entitlements or wall-like boundaries between the individual and society, but rather as a political vocabulary

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2 I believe that this problem is bound to appear, in one form or another, in all countries with justiciable bills of rights. See eg Davis, Chaskalson and De Waal "Democracy and constitutionalism: the role of constitutional interpretation" in Van Wyk *et al* eds *Rights and constitutionalism: the new South African legal order* (1994) 1–130 for a comparative overview of the way the tension between democracy and rights is experienced and managed in the United States, Canada, India and Germany respectively. However, my characterisation of different responses to this problem draws heavily upon the American literature. That is not to say that I regard the experience of the United States as somehow universal. My reasons for focusing on the US experience are, rather that (1) American scholars, for a variety of reasons, have spent more time and energy in analysing this problem than scholars anywhere else; and (2) time constraints, combined with my inadequate understanding of the often subtle differences between constitutional systems, do not allow me to undertake anything but the most superficial comparative study.

3 My distinction between liberal and communitarian approaches roughly corresponds to Tushnet's distinction between "formalist" solutions to the counter-majoritarian difficulty, and "anti-formalist" attempts to displace the question. See Tushnet "Anti-formalism in recent constitutional theory" 1985 *Michigan LR* 1502.

that enables us to articulate what kind of relationships we should like to structure. Rights talk does not foreclose democratic debate, but is a means of facilitating it. The individual and political community are no longer in diametrical opposition, as both are seen to be products of the same discursive process. Similarly, it is argued that fundamental rights adjudication is never simply an expression of the preferences and idiosyncrasies of an individual judge. The judge, as member of an interpretive community, is always constrained by the background assumptions inscribed in the social practice of adjudication. The traditional fear of judicial subjectivity is, therefore, vastly exaggerated.

However, neither of these approaches solves the counter-majoritarian problem. The traditional, liberal view of the counter-majoritarian difficulty uncritically equates democracy with the representative institutions found in modern Western states, and thus blinds theorists to the often tenuous link between these institutions and the people. Moreover, the attempt to ground adjudication in a neutral and objective method fails to come to terms with the realist insight that judges do make law, and inevitably rely on ethical and political considerations in doing so. On the other hand, the attempt to overcome the counter-majoritarian difficulty by emphasising the communal nature of rights and adjudication has authoritarian implications, as it tends to restrict the interpretive community to a single body or institution, and therefore fails to take social dissent seriously. It also fails to acknowledge the politics of legal interpretation – the fact that the constraints to which judges are subject, are themselves inscribed in particular power relations.

I argue (in 5 below) that a classical-liberal understanding of democracy, rights and the judicial function is particularly ill-suited to the interpretation of the South African Constitution. The Constitution makes it clear that rights are not to be regarded as trumps or boundaries, but are, rather, a political vocabulary that enables us to deliberate about the public good. It recognises that constitutional adjudication does not consist in the mere application of determinate rules or standards, but requires judges to become active participants in a democratic debate over the meaning of individual autonomy and the bounds of the political community.

I then consider (in 6 below) the nature and role of the constraints to which judges are subject. I argue that, while it is true that judges are constrained by the background assumptions inscribed in the social practice of adjudication, the Constitution reminds us of the social and historical contingency of these assumptions and practices, and requires us to subject them to a transformative critique.

Finally (in 7 below), I examine attempts by South African constitutional scholars to resolve (or at least negotiate) the counter-majoritarian difficulty. These attempts rest either upon the formalist belief in the availability of a legal method which makes adjudication politically neutral and objective, or upon the idea that judges are constrained by adjudicative habits or reflexes, or upon the idea that rights talk facilitates democratic debate. I argue that none of these approaches resolves the counter-majoritarian problem. The tension between democracy and rights is constitutive of our new constitutional dispensation. Any attempt to overcome this tension smacks of authoritarianism, and must be resisted.

2 THE QUEST FOR JUDICIAL OBJECTIVITY AND NEUTRALITY

There are a number of reasons why modern constitutional theory is so obsessed with the counter-majoritarian difficulty. In the first place, constitutionalism is premised on the assumption that judges can set limits to government power. This presupposes that judges are themselves constrained by legal rules and/or principles,

and that their exercise of the review power will not merely reflect their own political agendas or subjective preferences. However, the idea that legal rules and judicial precedent predetermine the outcomes of cases, was shattered by the American legal realists during the first few decades of the century. Since then, every attempt to ground the objectivity and political neutrality of adjudication has come up against the central insight of the realists: that judges do make law, and that their choices are invariably influenced by ethical and policy considerations.[4] This realisation has raised the spectre of judges who override the decisions of democratically accountable government institutions for no better reason than that they disagree with the policy choices expressed in them.

A second – closely related – reason for the anxiety created by the counter-majoritarian dilemma, has to do with the complexity of modern life, and the extent to which governments – and other institutions, like big corporations – have become involved in the daily lives of citizens. Today, every area of human life is regulated – even those we regard as belonging to the most intimate sphere. It is therefore no longer possible simply to demarcate areas in which the state may legitimately interfere, from those in which it may not. The distinction between the public and private spheres, or between legitimate exercises of the state's police power and the sphere of individual autonomy is, as Justice Oliver Wendell Holmes reminded us, a question of degree, not of kind. It is therefore up to the judge to draw the line between individual rights and the public interest in every case before her – a line that is constantly shifting as social conditions change and new policy considerations come to light.[5] In short, there are no brightline boundaries to guide judges in adjudicating conflicting interests.

Modern constitutional theories respond to the counter-majoritarian problem by attempting to demonstrate how the discretion of judges can be limited, and how constitutional adjudication can be made principled, reasoned, objective and politically neutral. If constitutional adjudication can be shown to be principled and objective, the reasoning goes, it would be possible to justify judicial review against the charge that it is undemocratic. For then legislation and adjudication would be qualitatively different; and would derive their legitimacy from different sources. Whereas legislation is legitimate to the extent that it reflects the will of the majority of the people, as expressed through their elected representatives, judicial decisions would derive their legitimacy from their reasoned and principled character. Judges would no longer substitute their own will for that of the legislature, but would test majoritarian decisions against objective and rational criteria.

Let us examine, for a moment, the premises on which this (fairly standard) view of the counter-majoritarian difficulty rests. The first premise is that the counter-majoritarian problem is indeed a problem; that the power of unelected judges to review majoritarian decisions calls for some kind of justification. The second premise concerns the type of justification that must be offered. It is believed that the counter-majoritarian problem will be solved if it can be shown that the activity of judging is – or at least, could become – fundamentally different from that of legislating. If

4 See eg Singer "Legal realism now" 1988 *California LR* 467; and Horwitz *The transformation of American law, 1870–1960* (1992) on the critical legacy of the realists.

5 See eg Holmes J's judgment in *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) (recognising that there is no clear boundary between takings of property and exercises of the police power, and that it must be established on an *ad hoc* basis whether a regulation does not go too far, and therefore constitutes a taking).

adjudication can be shown to be reasoned and principled, and therefore unlike legislation, which expresses the subjective – and often irrational – preferences of legislative majorities, the pieces of the puzzle would come together. Legislation and constitutional adjudication would be allies, rather than adversaries; the one lending democratic legitimacy to the scheme of government of which they both form part, the other ensuring a degree of rationality in political decision-making.

There are a number of assumptions underlying these premises. In the first place, the view that the institution of judicial review is in need of some kind of justification rests upon a particular conception of democratic legitimacy. It is assumed that the legitimacy of law rests upon the consent of the people – and that such consent is ordinarily expressed through the election of democratic representatives. Legislation adopted by democratically elected institutions is, for this reason, regarded as the touchstone of legitimacy. Any institution that detracts from the sovereignty of parliament is, in the words of Bickel, a "deviant institution" in a democracy.[6]

While I do not wish to question the belief that judicial review needs to be justified, I find it a pity that a similar challenge is not extended to the authority of the legislature. As a rule, no normative justification of representative democracy is advanced, nor is empirical evidence offered to substantiate the claim that legislatures are indeed representative of the people, or that legislation expresses the will of the majority. It is assumed that the representative institutions to be found in modern industrial societies function reasonably well, and that their only real flaw lies in their occasional insensitivity to individual and minority interests. The focus on the need for the constitutional protection of minorities, on the one hand, and the counter-majoritarian problem, on the other, blinds most theorists to the possibility that current distributions of wealth and power may effectively cut off the majority of citizens from any meaningful participation in the political process.[7] Problematic features of "democratic" institutions – the distance between the electorate and their representatives, the role and hierarchical structure of political parties, the power of state bureaucracies and large corporations, the privatisation of public functions, and the strong linkage between economic and political power – are largely glossed over. Democracy is defined in negative and elitist terms: negative, because it is seen as a mere means to prevent those in government from abusing their power; and elitist, because no attempt is made to resist the power of elites to determine the political agenda.

Secondly, the view that constitutional adjudication can be made to rest upon principled and objective reasoning and can, on that basis, be distinguished from legislation, evokes all the dichotomies characteristic of liberal thought. It is assumed that legislation represents the *will* of the people engaged in the pursuit of their economic, social and political interests, while adjudication expresses the *reasoned* elaboration of fairly detached observers. It is the task of the legislature to register the *subjective* preferences of legislative majorities and powerful interest groups; it is the function of the courts to develop and apply *objective* legal standards. Moreover, judges must protect the sanctity of the *private* sphere against the collective, and in the process, help to preserve the integrity of the *public* sphere by invalidating decisions that rest upon subjective beliefs and preferences that are properly matters

6 Bickel *The least dangerous branch* 18.

7 See Parker "The past of constitutional theory – and its future" 1981 *Ohio State LJ* 223 for a critique of the way political process theory blinds us to this possibility.

of private choice, not public deliberation. This introduces a further assumption: that it is possible to make a principled distinction between matters that should be kept private, and matters that are the legitimate concern of legislative majorities.

It may be objected that I present a far too homogeneous picture of the existing literature; that I overemphasise the similarities between different responses to the counter-majoritarian problem, and ignore the considerable differences between the various approaches. It may be argued, for instance, that not all approaches share the optimism of my straw constitutional theorist in the availability of an objective method that would enable judges to adjudicate between conflicting interests, without becoming enmeshed in politics. After all, proponents of a plain meaning approach to constitutional interpretation, and of originalism, and of political process theory are sceptical about the ability of judges to adjudicate value conflicts in an objective manner. They argue for judicial deference to the legislature, except in cases where the legislation in question is clearly at odds with the plain meaning of the words of the Constitution or the original intent of the framers, or where it is unduly restrictive of the democratic process. However, the point is that these theorists, like proponents of a value-orientated approach, are confident about the availability of some objective source or method through which the discretion of judges can be limited. They all argue that judges must stick to what they can do neutrally and objectively – whether it be the determination of the plain meaning of the Constitution;[8] or the intent of the framers;[9] or the purpose of a constitutional provision;[10] or the elaboration of process, not substantive values;[11] or of principle, not policy.[12]

The assumption that adjudication can be made objective and politically neutral is, of course, highly problematic in view of the realist critique. The realists, we have seen, shattered the formalist assumption that general propositions can generate determinate answers to concrete legal problems. They insisted that judges have to choose, and that the validity of their choices depends on the cogency of their policy and value judgments.[13] Judges can therefore never claim that they are merely following the rules laid down in the Constitution or in case law. The attempts of post-realist constitutional scholars to answer controversial legal questions with reference to supposedly noncontroversial propositions represent, to some extent, a return to the formalism of classical legal thought.[14] These scholars overestimate the determinacy of the guiding principles on which they rely, and fail to see that their choice of a specific interpretive approach itself rests upon controversial value choices.

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8 See eg Fagan "In defence of the obvious – ordinary meaning and the identification of constitutional rules" 1995 *SAJHR* 545. But see also Davis "The twist of language and the two Fagans: please sir may I have some more literalism!" 1996 *SAJHR* 504.

9 See eg Bork "Neutral principles and some first amendment problems" 1971 *Indiana LJ* 1. But see also Brest "The misconceived quest for the original understanding" 1980 *Boston Univ LR* 204.

10 See eg Davis, Chaskalson and De Waal "Democracy and constitutionalism" 122–130; and Hogg "The Charter of Rights and American theories of interpretation" in Devlin ed *Constitutional interpretation* (1991) 7. But see also Du Plessis and Corder *Understanding South Africa's transitional bill of rights* (1994) 85.

11 See eg Ely *Democracy and distrust: a theory of judicial review* (1980). But see also Tribe "The puzzling persistence of process-based constitutional theories" 1980 *Yale LJ* 1063.

12 See eg Dworkin *Taking rights seriously* (1977).

13 See eg Felix Cohen "Transcendental nonsense and the functional approach" 1935 *Columbia LR* 809.

14 See Singer 1988 *California LR* 516–528.

Moreover, the assumption that judges can separate public from private matters without resorting to controversial value judgments runs directly counter to the realist insight into the coercive nature of "private" relationships. The realists rejected the classical belief that the market was "self-regulating", and that the unequal bargaining power of, say, the parties to a contract was simply a function of their different abilities and bargaining skills, which had nothing to do with the state. They demonstrated that legal rules structure power relations within the market, and institutionalise the coercion of the weak by the strong.[15] Their critique had serious implications for the public/private distinction: the law of contract and property now appeared as species of public law which, far from merely allowing individuals to interact freely or enjoy the fruits of their own labour, delegated state power to individuals to coerce others into keeping an agreement, or to exclude others from their property.[16] The decision to enforce a contract never simply flows from the nature of the free market, but always involves a choice to favour certain values over others: contractual freedom over the state's interest in protecting workers, women or children from exploitation, or the freedom of trade of a prospective competitor over the property rights of an established business, etcetera.

Today, most legal theorists accept that individual rights are not natural or pre-political entitlements, and that the state has a legitimate interest in regulating the private sphere. However, the public/private dichotomy is recreated in a number of ways. For instance, liberal theorists argue that certain types of beliefs and interests are not legitimate reasons for government action.[17] This reasoning reinforces the kind of dichotomised thinking that identifies the private sphere with the freedom to do as one pleases (even if it is irrational), and that associates the public sphere with the need for rational justification of government action. The result, as feminist and minority scholars have pointed out, is to conceal the (state-backed) coercion inherent in the private sphere, and to deny the legitimacy of the concerns of women, children and other groups that have difficulty in entering public life.[18]

The insistence that judges should not create new, legally protected interests, but should leave it to legislatures to change the law or the Constitution, is yet another example of the recreation of the public/private dichotomy. In the words of Joseph Singer:

> "This argument rejects the realists' insight that courts must decide the case somehow and whatever they decide, they are creating law ... The idea that judges can act passively – that they can dispose of a lawsuit without making law – presupposes that there is some neutral background set of entitlements to which they can refer that they are not responsible for having created. This perspective assumes the existence of a private sphere in which the state is not implicated."[19]

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15 See Hale "Coercion and distribution in a supposedly non-coercive state" 1923 *Political Science Quarterly* 470.

16 See Morris Cohen "The basis of contract" 1933 *Harvard LR* 553; "Property and sovereignty" in Macpherson ed *Property: mainstream and critical positions* (1978) 153.

17 Cf Rawls *A theory of justice* (1971) 136–138 (arguing that the parties to the original position during which the principles of justice are chosen, must be ignorant of what their needs, wants and conception of the good will be); Ackerman *Social justice in the liberal state* (1980) 10–11 (religious beliefs and other comprehensive worldviews should not be relied upon in political debate).

18 See eg Young "Impartiality and the civic public" in Benhabib and Cornell eds *Feminism as critique* (1987) 56.

19 Singer 1988 *Calif LR* 528.

3 THE TURN TO COMMUNITY AND INTERPRETATION

I have argued in the previous section that the attempts of modern constitutional theorists to mediate the conflict between democracy and rights have failed for a number of reasons. In the first place, these theories are informed by a shallow conception of *democracy*, which is largely unconcerned with issues such as the distance between voters and representatives, or the quality of political participation, or the educative role of democratic politics. Because democracy is reduced to the aggregate satisfaction of voters' interests, the opposition between the majority and dissenting individuals or minorities seems to be incapable of resolution through democratic dialogue – unless, of course, the majority or minorities can be persuaded that they are mistaken about their own interests! If politics is just a matter of the competitive pursuit of individual and group interests, democracy is bound to be perceived as a perpetual threat to individual rights, and rights are likely to be seen to frustrate majority rule.

Secondly, these theories evince an understanding of *rights* as boundaries between the individual and collective. This is at odds with the realist insight that there are no brightline boundaries between the public and private spheres, and that individual rights exist by virtue of collective decisions, rather than having a prepolitical status. The continued use of boundary imagery helps to explain the modern preoccupation with the counter-majoritarian difficulty. As long as rights are conceived as boundaries beyond which the majority may not step, or as trumps over collective interests, rights adjudication is bound to be perceived as undemocratic. For these metaphors allow very little scope for democratic deliberation over the proper reach of state action: once it has been established that a right has been infringed, it is the end of the discussion. The persistence of this conception of rights signals the failure of post-realist legal scholars to "construct a new vocabulary and stance towards normative legal argument".[20] In the absence of a normative vocabulary to discuss questions of the individual's relationship to society, legal theorists cling to the essentialism of eighteenth-century natural rights theory – and then have to devise all kinds of institutional and procedural qualifications to avert the charge that they are supporting an essentially counter-majoritarian institution.

Recent years have, however, witnessed a shift away from the negative and elitist conception of democracy, and the prepolitical notion of rights described above. Political theorists have started exploring the possibility of deeper, more participatory forms of democracy. The rediscovery of civic republicanism as an alternative to the liberal political tradition prompted numerous critiques of liberal democratic institutions, as well as attempts to combine liberal and republican elements in a radical theory of democracy. Constitutional theorists who have turned to a civic republican understanding of law and politics, have shifted their focus from an exclusive concern with the counter-majoritarian nature of judicial review, to the problem of how we can best promote the constitutional commitment to both individual and communal self-realisation. In this view, the meaning of neither rights nor democracy is self-evident, as the identity of both the individual and political community is shaped through an ongoing political dialogue.

Apart from civic republicanism, a wide range of other theoretical developments has enabled legal theorists to reconceive rights in a more relational and less essentialist or antidemocratic manner. Recent developments in areas as diverse as psychoanalysis,

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20 Id 532.

linguistic theory, hermeneutics, cognitive theory, neo-pragmatism and feminism suggest that all identities are relational, and that the Western conception of the autonomous individual is possible only within a network of social relations and cultural understandings. The idea that our legal and political values are contingent upon the linguistic or interpretive communities in which we find ourselves, has appealed to constitutional theorists wishing to overcome the dichotomy between the one and the many which has plagued constitutional theory for so long. If constitutional values and principles can be grounded in a community which is not determined by geographical, ethnic, lingual or religious factors, but is, rather, discursively constituted,[21] the diametrical opposition between individual and community dissolves. Neither individual nor community has priority over the other, since both are created and maintained through "a single, ongoing, historically situated discourse".[22] The protection of individual rights and freedoms is no longer viewed as an illegitimate constraint on the democratic process, nor is the coercive authority of majoritarian political structures seen as incompatible with the ideal of individual autonomy. Democracy and rights are internally connected: they are aspects of the same discursive process, which constitutes the horizon for the creation of both individual and communal identities.[23]

The idea that both individual and community are discursively created, entails a rejection of the liberal-pluralist reduction of the public order to the coordination of conflicting private interests. Political discourse, for the liberal pluralist, is a strategic process, aimed at the maximisation of private interests. In this view, the democratic process is merely instrumental to the protection of private freedom. However, once we grasp that private interests do not exist prior to politics, but are shaped and protected though the political process, it becomes difficult to sustain this conception of democracy. It makes more sense, then, to embrace a republican conception of democracy. Republicans and other communitarian thinkers argue that political deliberation has constitutive value. Participation in the political process is regarded as an important source of social integration, because it involves citizens in the articulation and pursuit of the common good. It is through political deliberation that citizens become aware of their dependence on one another and learn to respect each other's viewpoints.

Moreover, deliberation about the common good enables citizens to engage on a path of moral self-discovery, as the focus of participants on what is in the public interest, will often give rise to a reconsideration of their private beliefs and attitudes. Political deliberation presupposes "an attitude of openness to ethical evolution through political engagement";[24] a willingness on the part of all participants to undergo "a dialogic modulation of one's understandings", under conditions in which such a dialogical modulation "is not considered or experienced as coercive, or invasive, or otherwise a violation of one's identity or freedom".[25]

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21 See Kahn *Legitimacy and history: self-government in American constitutional theory* (1992) 171. See also Winter's definition of community as a "shared way of living in and understanding a world". Winter "Contingency and community" 1991 *University of Pennsylvania LR* 963 1002.

22 Kahn *Legitimacy and history* 171.

23 See Habermas *Between facts and norms: contributions to a discourse theory of law and democracy* (1996) ch 3.

24 Michelman "Conceptions of democracy in American constitutional argument: voting rights" 1989 *Florida LR* 443 450.

25 Michelman "Law's republic" (1988) 97 *Yale LJ* 1493 1527.

This has important implications for fundamental-rights litigation and adjudication. Communitarian thinkers believe that rights do not exist prior to and independently of the political process; their definition and elaboration are, rather, part and parcel of a deliberative process which aims at the maximisation of the public good. Rights are not conceived as trumps held by strategically minded actors, but as "a relationship and a social practice", and therefore "an expression of connectedness".[26] In this view, the constitutionalisation of rights does not insulate certain interests from political debate, but rather institutes a dialogue over the social relations we should like to structure.

The alternative normative vision provided by the "new communitarians" is attractive for a number of reasons. In the first place, it rests upon a much thicker conception of democratic legitimacy than traditional liberal theory. The legitimacy of the legal order is not grounded in the hypothetical consent of individuals who have alienated their sovereign power to the state, but is dependent on actual civic participation in the political process; on the ability of a plurality of perspectives to be heard; on the question whether political deliberation truly centres on the common good, as distinguished from private interests disguised as the common good.

Secondly, the new communitarians provide a far more sophisticated justification of constitutional constraints on the majoritarian decision-making process than anything offered by traditional constitutional theory. Rights are construed not as an external limit or impenetrable wall beyond which the community may not transgress, but as something embedded in communal relations and practices – something to be continually redefined and re-affirmed by the community. This does not imply that rights are at the mercy of legislative majorities. Once we have grasped that individual and communal identities are both being shaped by the same discursive process and that democracy and rights are internally connected, it becomes possible to conceive of rights as something historically and culturally contingent and yet, at the same time, as something to be protected and treasured, since it provides us with a language to affirm both our autonomy and interconnectedness, and spells out the conditions under which we may be said to be self-governing.

Thirdly, the new communitarians offer a more realistic account of the constraints to which judges are subject. These theorists are generally quite prepared to concede that there is often more than one plausible answer to a legal question, and that judges are invariably influenced by their own political and moral values. However, they believe that even in the absence of a neutral and objective legal method which is supposed to yield determinate answers to legal problems, we need not fear that judges will simply give effect to their subjective beliefs and preferences. Judges are themselves members of an interpretive community, and are constrained by the background assumptions inscribed in the social practice of adjudication.

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26 Michelman "Justification (and justifiability) of law in a contradictory world" in Pennock and Chapman eds *Justification in law, ethics and politics* (1986) 71 91. See also Nedelsky "Reconceiving rights as relationship" 1993 *Rev of Constitutional Studies* 1; "Reconceiving autonomy: sources, thoughts and possibilities" in Hutchinson and Green eds *Law and the community* (1989) 219; Minow "Interpreting rights: an essay for Robert Cover" 1987 *Yale LJ* 1860 1876 (describing rights as "the language we use to try to persuade others to let us win this round").

4 AUTHORITY AND COMMUNITY

It is tempting to conclude that the turn to community in contemporary legal theory enables us to overcome the counter-majoritarian problem. It has, for instance, been argued that the view of constitutionalism as an intergenerational project of republican self-government explains the legitimacy of judicial review,[27] or that judges' membership of an interpretive community ensures the bounded – and therefore objective – nature of judicial interpretation.[28] However, I would like to argue that the communitarian insight into the interconnectedness of individual and communal identities does not solve the counter-majoritarian problem. The tension between democracy and rights remains; the one cannot and should not be simply collapsed into the other. Moreover, the turn to community does not establish the determinacy or political neutrality of law. I argue, however, that the communitarian turn in constitutional theory allows us to reconsider what it means to say that law is political, and at the same time affords us the opportunity to resist the politics of legal interpretation.

4 1 The limits of republican deliberation

Republican constitutional theorists attempt to show how the idea of public deliberation about the common good can be institutionally realised in law. Forging a link between the ideal of a self-governing political community and existing institutions is, of course, a highly ambitious project. Modern democracies are characterised, if anything, by a lack of community,[29] and the ideal of deliberative democracy can hardly be said to be descriptive of the political institutions in these societies.

But even if it is possible to locate the self-governing dialogic community of republican theory in a particular institution or institutions, that does not yet explain the legitimacy of constitutional review. Republican theorists have argued that the courts exemplify the possibility of a dialogic community,[30] or that the legislature is the locus of democratic deliberation, and that the role of the judiciary is merely to police the deliberative process in the legislature,[31] or that it is the task of the courts to preserve norms emanating from past moments of constitutional politics, when "the people" redefined their collective identity and hammered out new principles of public life through sustained political engagement.[32] None of these constructions succeeds in reconciling the republican ideal with actual political institutions.[33] Even if it is true that the national legislature or the highest court is a self-governing dialogic community, that does not validate its decisions in the eyes of citizens outside that community. Judges or legislators may experience the law they generate as non-coercive, as a law they give to themselves through a deliberative process, but

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27 See eg Ackerman *We the people, vol 1: Foundations* (1991); Rubenfeld "Freedom and time" 1998 *Acta Juridica* 291.

28 See eg Fiss "Objectivity and interpretation" 1982 *Stanford LR* 739 (judges are constrained by "disciplining rules" that are recognised as authoritative by the legal community).

29 Cf J van der Walt and H Botha "Democracy and rights in South Africa: Beyond a constitutional culture of justification" 2000 *Constellations* 341 350–354.

30 Michelman "The Supreme Court 1985 term – Foreword: traces of self-government" 1986 *Harvard LR* 4.

31 Sunstein "Interest groups in American public law" 1985 *Stanford LR* 29.

32 Ackerman *Foundations*.

33 See Kahn *Legitimacy and history* 172–189; and Christodoulidis *Law and reflexive politics* (1998) 42–51 for a critique of the institutional solutions proposed by civic republican theorists.

citizens who are not members of the relevant institution are bound to experience the outcomes of such deliberations as external restraints on their freedom. The idea that judges must preserve the dialogic achievements of a national discursive community is equally problematic. The assumptions that past constitutional achievements were authored by "the people", that "the people" constitutes a single, historically continuous discursive community, and that the judiciary can rightfully claim to speak on behalf of the people, do not stand up under critical scrutiny.

The inability of republican thinkers to reconcile republican theory with actual institutions, points to a contradiction between authority and community. Republican deliberation presupposes plurality, a radical openness, a readiness to challenge orthodox ideas, a postponement of any final decision regarding the foundations of the polity or the political community. It is difficult, if not impossible, to square this image with the authoritativeness of law, the finality of court decisions, and institutional restraints on access to the decision-making process.[34]

4 2 Constitutional interpretation between authority and anarchy

The realisation that judges are members of an interpretive community, that they are constrained by the background assumptions inherent in legal culture, and that adjudication is therefore never simply a matter of judges giving effect to their subjective beliefs and preferences, does not solve the counter-majoritarian problem either. In the first place, these assumptions are not determinate enough to dictate specific outcomes. Their presence does not diminish the responsibility of judges to make choices.[35] Secondly, the assumptions informing judicial interpretation are themselves not neutral, but always reflect a given hegemony.[36] It is true that certain attitudes and assumptions are so deeply ingrained in the judiciary and legal profession that they appear completely commonsensical. But that is not to say that they would be accepted by people outside the elite to which lawyers belong. It may even be that these attitudes and assumptions would be challenged by lawyers themselves if only they were conscious of the ways in which they operate. For instance, progressive lawyers and judges may cling to modes of thinking that are obstructing social justice, because their legal training has made it virtually impossible for them to see that such habits are the contingent products of past experience – that things could be different. The powerful hold of these habits over lawyers, consists precisely in the fact that they are not reflected upon – their presence is not even consciously noted.

The realisation that judges are constrained by the background assumptions inherent in legal culture, therefore does not make law politically neutral. However, it allows us to reconsider the meaning of the politics of law. The politics of legal interpretation does not consist in the danger that judges, unless constrained by an objective legal method, will hand down judgments which merely express their own subjective preferences. It consists, rather, in the fact that the constraints to which judges are subject – those "commonsense" assumptions and professional attitudes which make it highly unlikely that a judge will simply be guided by her own preferences and idiosyncrasies – are not as politically innocent as they appear to "insiders" to legal culture.

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34 See Christodoulidis *Law and reflexive politics* 73–224 for a systems-theoretical critique of republican constitutionalism.

35 See Winter "An upside/down view of the countermajoritarian difficulty" 1991 *Texas LR* 1881 1925.

36 See Coombe "'Same as it ever was': rethinking the politics of legal interpretation" 1989 *McGill LJ* 603.

Is it possible to resist the way professional attitudes and cultural background assumptions block the emergence of imaginative alternatives to current social arrangements? Or are all strategies of resistance premised on the individualistic fallacy that it is possible to step outside one's culture and to reconsider current assumptions without being affected by the thought structures embedded within the practice or tradition one sets out to criticise?[37]

It is beyond the scope of this article (and my capacities!) to analyse these questions in any depth. However, I believe that the interpretive turn in legal theory suggests ways in which the politics of interpretation can be resisted. For if we recognise that there are no ultimate foundations in law, that current notions of right and wrong or lawful and unlawful are contingent upon the practices and assumptions of interpretive communities, we have to identify which community/ies have the capacity to create legal meaning. Some writers, like Owen Fiss, insist that legal meaning is defined exclusively by the legal profession.[38] They claim that this is the only way to establish legal objectivity: if it were any different, there would be as many correct interpretations as there are interpretive communities. However, contrary to what Fiss believes, this only shows that there are constraints upon judicial interpretation, not that adjudication is legitimate. It is, for instance, entirely conceivable that the legal community may be constrained by practices that are out of step with the values of the larger community – in which event the objectivity of interpretation would appear arbitrary to those outside the professional legal community. In the words of Rosemary Coombe:

> "The meanings of the legal system's practices to persons who are privileged enough to participate in them are not the same meanings as those which these practices have to persons who merely endure their omnipresence . . . [T]o solely accept the standards of those who stand within this charmed circle and dismiss all criticism engendered elsewhere as non-legal (and implicitly non-legitimate) is to accept that 'might is right'."[39]

In contrast to Fiss, Robert Cover has argued that an insular community "creates law as fully as does the judge", and that the meaning judges give to the law "is not privileged, not necessarily worth any more than that of the resister they put in jail".[40] According to Cover, law is intelligible only to the extent that it draws upon the cultural meanings that are produced through a radically uncontrolled process by which communities attempt to integrate legal precepts, narratives and commitments. Judges depend on the meaning generated within the lifeworld, but at the same time have to control the anarchy of multiple legal interpretations. They do this by denying the legitimacy of some interpretations. The power of courts to privilege certain interpretations over others does not, however, stem from their superior hermeneutic prowess. There is nothing in the realm of meaning that marks the legal profession off from other interpretive communities. The power to contain the

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37 This is what Stanley Fish would have us believe. See Fish "Dennis Martinez and the uses of theory" 1987 *Yale LJ* 1773.

38 "There can be many schools of literary interpretation, but . . . in legal interpretation there is only one school and attendance is mandatory." Fiss 1982 *Stanford LR* 746.

39 Coombe 1989 *McGill LJ* 641.

40 Cover "The Supreme Court 1982 term – Foreword: nomos and narrative" 1983 *Harvard LR* 4 28, 60. See also Häberle *Verfassung als öffentlicher Prozeß* (1978) 121–154; Du Plessis "Legal academics and the open community of constitutional interpreters" 1996 *SAJHR* 214 (referring approvingly to Häberle's concept of an open, inclusive community of constitutional interpreters, which transcends the bounds of the legal profession).

process through which law is created, is necessary from the point of view of state authority, but from an interpretive viewpoint, appears violent and arbitrary.

The turn to community and interpretation, then, does not establish the political neutrality and objectivity of constitutional adjudication. On the contrary, it alerts us to the fact that all interpretation is inscribed within a culture which, because it has been shaped by particular experiences and political struggles,[41] favours some ways of seeing and thinking about the world over others. However, Cover's insight into the uncontrolled process through which law is created, suggests ways in which we can resist the violence of official interpretation. If we listen carefully enough to the stories of people outside the professional legal community, we may become aware of the contested nature of some of our assumptions. This may induce us, in the words of Cover, to "stop circumscribing the *nomos*" and to "invite new worlds".[42]

5 RIGHTS, DEMOCRACY, AND TRANSFORMATION: THE NEW SOUTH AFRICAN CONSTITUTION

A number of commentators have argued that it would be inappropriate to interpret the South African Constitution in terms of a classical-liberal conception of democracy, rights and the judicial function. Instead, these authors propose a "postliberal",[43] "creole-liberal",[44] "transformative",[45] "justificatory",[46] "civic-republican"[47] or "deconstructive-republican"[48] reading of the Constitution.

It is argued, in the first place, that the Constitution envisions a vibrant, participatory form of *democracy*, and that it would be inappropriate to interpret constitutional guarantees of political rights and the democratic process in terms of the shallow conception of democracy characterising liberal political theory. The Constitution contains a commitment to open, transparent and accountable government,[49] and to public participation in governmental decision-making.[50] It seeks to

41 See Heyns "On civil disobedience and civil government in South Africa" in Soeteman and Karlsson eds *Law, justice and the state* (1995) 133 on the historical relation between human rights and popular resistance and struggle.

42 Cover 1983 *Harvard LR* 68.

43 Klare "Legal culture and transformative constitutionalism" 1998 *SAJHR* 146. See also H Botha "The values and principles underlying the 1993 Constitution" 1994 *SAPR/PL* 233 238–241 (arguing that the interim Constitution incorporates liberal, socialist, communitarian and traditional values, and constitutes a site of conflict between different values).

44 Woolman and Davis "The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism and the application of fundamental rights under the interim and final Constitutions" 1996 *SAJHR* 361.

45 Klare 1998 *SAJHR* 146; Albertyn and Goldblatt "Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality" 1998 *SAJHR* 248.

46 Mureinik "A bridge to where? Introducing the interim bill of rights" 1994 *SAJHR* 31.

47 H Botha "Civic republicanism and legal education" May 2000 *Codicillus* 23.

48 JWG van der Walt *The twilight of legal subjectivity: towards a deconstructive republican theory of law* unpublished LLD thesis, RAU (1995) ch XVII.

49 See eg ss 32 (access to information), 33 (just administrative action), 34 (access to courts) and 41(1)(c) (all organs of state within all spheres of government must "provide effective, transparent, accountable and coherent government for the Republic as a whole").

50 The Constitution provides that the rules and orders of the National Assembly, the National Council of Provinces and provincial legislatures must have due regard to "representative and participatory democracy, accountability, transparency and public involvement" (ss 57(1)(b), 70(1)(b) and 116(1)(b)); and that these institutions must facilitate public involvement in their

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infuse the market, workplace and family with democratic norms and values.[51] It also embraces multiculturalism and diversity, and expressly promotes the rights of vulnerable and victimised groups and identities, such as gay people, the disabled, the elderly and children.[52]

Secondly, it is claimed that the Constitution rejects the liberal image of *rights* as boundaries between the individual and collective. The Constitution guarantees economic, social and cultural rights[53] alongside civil and political rights, embraces a substantive vision of equality,[54] imposes positive or affirmative duties on the state to promote social welfare and to assist individuals in the exercise of their rights,[55] and provides for the application of the rights in the Bill of Rights to "private actors".[56] In the light of these features, it can hardly be argued that the rights in the Bill of Rights serve as a "shield" against government intrusion into the private sphere, or constitute "trumps" over collective interests. The inclusion of a general limitation clause[57] in the Bill of Rights further indicates that rights are not absolute, that their meaning shifts over time, and that the validity of a limitation should be determined not with reference to some bright-line boundary, but with regard to the values underlying a free and democratic society, as well as the broader social context within which a dispute arose.

Thirdly, it is argued that the Constitution requires us to discard traditional assumptions about the nature and limits of the *judicial function*. Judges are no longer allowed to hide behind maxims like *iudicis est ius dicere, sed non dare*, but are constitutionally required to shape law in accordance with constitutional values. The broad application provisions in the Bill of Rights, the imposition of affirmative duties on the state, the inclusion of a general limitation clause, and the instruction to judges to promote the values that underlie an open and democratic society based

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processes, and hold their sittings in public (ss 59, 72 and 118; see also s 160(7) in connection with municipal councils). The Constitution further states that the public must be encouraged to participate in policy-making, and that the public administration must be accountable, and must provide the public with timely, accessible and accurate information (s 195(1)(e)–(g)).

51 S 8(2) provides that the provisions in the Bill of Rights bind private parties "if, and to the extent that it is applicable". S 9(4) bars private parties from engaging in unfair discrimination, and also mandates the adoption of national legislation to prevent or prohibit unfair discrimination. See also ss 8(3), 32(1)(b) and 39(2).

52 See eg ss 9(3) (outlawing unfair discrimination on the grounds of inter alia sexual orientation, age and disability); and 28 (rights of children).

53 See ss 23 (labour relations), 26 (housing), 27 (health care, food, water and social security), 29 (education), 30 (language and culture), and 31 (cultural, religious and linguistic communities).

54 S 9(2), which authorises affirmative action, makes it clear that measures designed to protect or advance persons or categories of persons previously disadvantaged by discrimination should not be seen as an exception to the anti-discrimination provision in s 9(3), but as a means of ensuring equality. See also Albertyn and Kentridge "Introducing the right to equality in the interim Constitution" 1994 *SAJHR* 149.

55 S 7(2) requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights". The state is also required to take reasonable legislative and other measures to: protect the environment (s 24(b)); foster conditions which enable citizens to gain access to land on an equitable basis (s 25(5)); and achieve the progressive realisation of the right of access to adequate housing (s 26(2)) and health care, food, water and social security (s 27(2)). National legislation must also be enacted to give effect to the right of access to information (s 32(2)) and just administrative action (s 33(3)). The state is under an obligation to assign a legal practitioner to an accused person, at state expense, if substantive injustice would otherwise result (ss 28(1)(h) and 35(2)(c)).

56 See fn 51 *supra*.

57 S 36.

on human dignity, equality and freedom[58] make it clear that judges are expected to play a far more activist role than has previously been the case.[59]

The Constitution, then, requires us to reconceive democracy, rights and constitutionalism in a non-essentialist manner. It recognises that individual and collective identities are subject to a process of constant renegotiation; are always open to the possibility of dialogic modification. This implies the absence of absolute foundations:[60] if neither the individual nor the community is a fixed point of reference, notions like the plain meaning of words, the will of the people, the intention of the authors of the Constitution, rights as trumps, and public values lose their capacity to ground the objectivity of legal meaning.[61] In the absence of any meta-theory which is supposed to make constitutional meaning self-evident, judges must take responsibility for their decisions;[62] they need to become active participants in a "dialogue of democratic accountability".[63]

In short, the Constitution eschews the idea of objective foundations, and recognises its own historical contingency. Far from having fixed, once and for all, the foundations of the legal order, it requires us to institutionalise a debate about the meaning of those norms and values which, to paraphrase Arendt, simultaneously separate us and keep us together.[64]

6 RESISTING OLD HABITS

Liberal scholars are likely to object to the idea that judicial interpretation of the South African Constitution is part and parcel of a democratic debate about the meaning of constitutional norms and commitments. They may argue that a "postliberal" reading of the Constitution blurs the distinction between constitutionalism and

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58 S 39(1) and (2). See also s 1 (values upon which the Constitution is based).

59 See CJ Botha "Maatskaplike geregtigheid, 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.

60 Cf Klare's claim that the Constitution is "*self-conscious* about its historical setting and transformative role and mission . . . The Constitution does not even purport to present itself as timeless and metahistoric, coming down from on high. It rejects the fiction that the political community is founded at a single magic moment of 'social contract', thereby ratifying the pre-existing hierarchy and distribution of social and economic power. It evinces an understanding that legal and political institutions are chosen, not given, that democracy must be periodically reinvented, and that the Constitution itself is the contingent (even fragile) product of human agency" 1998 *SAJHR* 153 155.

61 Davis, drawing on Hanna Pitkin's definition of a constitution as the action or activity of founding something anew, argues that the South African Constitution aims to constitute a new society, and that any attempt to develop a single correct method of constitutional interpretation is at odds with the Constitution's celebration of the human capacity to innovate. Moreover, any such attempt ignores the contested nature of constitutional meaning. "Democracy and integrity: making sense of the Constitution" 1998 *SAJHR* 127.

62 See Froneman "The constitutional invasion of the common law: can the judges be controlled?" in Carpenter ed *South Africa in transition: Focus on the Bill of Rights* (1996) 6 16–17 (arguing that the recognition that there are no final, objective answers to constitutional questions, forces judges to take moral responsibility for their decisions).

63 To borrow a phrase coined by Jennifer Nedelsky 1993 *Rev of Const Studies* 2.

64 Arendt *The human condition* (1958) 53. See also H Botha *The legitimacy of law and the politics of legitimacy: beyond a constitutional culture of justification* unpublished LLD thesis, UP (1998) 412 (arguing that constitutional decisions do not simply reflect the choices made by the people at some historical moment, or the moral consensus of the people at present, but are partly constitutive of the way we perceive ourselves and define the bounds of the political community).

democracy, subordinates the rule of law to political objectives, and threatens to sacrifice individual rights in the name of the greater social good.

However, the analysis in section 3 above suggests otherwise. The recognition that rights are shaped through political dialogue, does not imply that they are simply at the mercy of legislative majorities. Rights can still constrain majoritarian decision-making, even if we recognise that they are culturally and historically contingent. Similarly, the absence of a clear dividing line between law and politics does not mean that judges simply give effect to their subjective beliefs and preferences. Judges, as members of an interpretive community, are always constrained by the background assumptions inscribed in the social practice of adjudication.

Despite the radical premises of the Constitution, judges continue to be constrained by assumptions about the nature and limits of the judicial function, the distinction between substance and procedure, the distinction between the public and the private, the distinction between facts that are legally relevant and facts that are not, and the distinction between case law which has a bearing on the present case and case law which is inapplicable. And herein lies the paradox: on the one hand, the legitimacy of constitutional adjudication depends (to some extent) on the capacity of these assumptions to constrain judicial decision-making, while, on the other hand, the Constitution requires us to subject these assumptions to a transformative critique.

Putting it somewhat differently, the Constitution does not abolish the public/private distinction, or the rule that applicants must have standing, or the distinction between facts that are legally relevant and facts that are not. It does, however, require us to reconsider our understanding of these concepts and principles in the light of the Constitution. It confronts us with the insight that legal concepts and categories are human constructs which always arise within a specific historical context, that they reflect a partial understanding of the social universe, and often blind us to more humane alternatives.

Examples abound of the discrepancy between lawyerly and judicial attitudes, on the one hand, and the Constitution's transformative aspirations, on the other.[65] For instance, the conceptualism and privatism which are so deeply ingrained in the civil-law tradition,[66] have also infiltrated constitutional interpretation. This has resulted in a return to classical-liberal modes of constitutional analysis, which seek to define fundamental rights in terms of a brightline boundary between the public and private spheres. Of course, this type of analysis negates both the critical legacy of the realists and the Constitution's message that rights are discursively created. If, for instance, the right of privacy is socially constructed, it makes little sense to ask whether the respondent in a constitutional case *really* infringed the privacy of the applicant, as if the scope of the right and the legitimacy of government intrusions into the private sphere can be determined with reference to a brightline

65 See Klare 1998 *SAJHR* 166–187.

66 André van der Walt has demonstrated in numerous articles how private-law conceptualism blinds us to the way in which private-property discourse privileges our private existence over our interdependence and public responsibilities, and thus stands in the way of imaginative solutions to land reform and other pressing social issues. See eg Van der Walt "The fragmentation of land rights" 1992 *SAJHR* 431; "Tradition on trial: a critical analysis of the civil-law tradition in South African property law" 1995 *SAJHR* 169; and "Un-doing things with words: the colonization of the public sphere by private-property discourse" 1998 *Acta Juridica* 235.

boundary that exists independently of our legal constructions.[67] Posing the question like that, is to mask moral and political choices behind a veil of objectivity and impartiality, and to frustrate the Constitution's transformative aspirations. The Constitution requires us to justify collective decisions with reference to the substantive moral and political values contained in it. This, in turn, presupposes a debate about the meaning of our constitutional commitments, not the monologue of a superjudge who has access to a reality unmediated by language, or who is able to deduce the right answers from legal rules and concepts.

The assumption that clear boundaries exist between the public and private spheres, is also evident from a number of attempts to insulate the "private" sphere from the transformative effect of the Constitution. For instance, the Constitutional Court's decision in *Du Plessis v De Klerk*,[68] in which it was decided that the interim Constitution did not have "direct horizontal application", as well as a number of High Court decisions in which a restrictive interpretation was given to the term "organ of state" in the interim and final Constitutions,[69] seem to rest upon the belief that there exists a sphere of human interaction in which the state is not implicated.[70] This assumption runs directly counter to the realist insight into the ways in which the law structures power relations within the private sphere. It also disregards the Constitution's radical message: that, in order to transform society, we need to subject legal concepts and categories to a transformative critique.

7 THE COUNTER-MAJORITARIAN DIFFICULTY REMAINS

Since the adoption of the interim Constitution, South African constitutional scholars have spent considerable time and energy trying to reconcile democracy and constitutionalism. Some scholars have drawn upon the *liberal image of boundaries*

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67 For such a claim, see Neethling "Die reg op privaatheid en die Konstitusionele Hof: die noodsaaklikheid vir duidelike begripsvorming" 1997 *THRHR* 137 138. Neethling argues that the right to privacy protects an interest that has an objective existence in reality, and that it is therefore possible to determine the scope of the right through empirical observation. However, the Constitutional Court has rejected such a conceptualist approach. In *Bernstein v Bester NO* 1996 4 BCLR 449 (CC), Ackermann J held that the scope of the right to privacy has to be demarcated with respect to the rights of others and the interests of the community: "Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space diminishes accordingly" (par 67). In *S v Baloyi* 2000 1 BCLR 86 (CC), the court recognised the "complex private/public character of domestic violence", and stated that the concept of privacy or personal autonomy is often used "to protect the abusive husband from the actions of the state, but not the abused wife from the actions of the husband" (par 16). The constitutionality of legislative attempts to protect the wife should therefore be determined not with reference to an objective boundary between the public and private spheres, but rather by balancing the constitutional duty of the state to protect persons from domestic violence, with the rights of the accused (par 26).

68 1996 5 BCLR 658 (CC).

69 See eg *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting* 1996 3 SA 800 (T); *Korf v Health Professions Council of South Africa* 2000 3 BCLR 309 (T).

70 This is true of both the majority judgment of Kentridge AJ and the dissenting opinion of Kriegler J in *Du Plessis*. See Woolman and Davis 1996 *SAJHR* 361 for a critique of the classical-liberal conception of law and politics underlying Kentridge AJ's opinion; and JWG van der Walt "Perspectives on horizontal application: *Du Plessis v De Klerk* revisited" 1997 *SAPR/PL* 1 for a critique of Kriegler J's assumption that there are instances in which private transactions are not governed by law.

between the legislative and judicial functions, to demonstrate that the power of constitutional review can be exercised in a manner which does not encroach upon the functions of the legislature. For instance, Davis, Chaskalson and De Waal argue that fidelity to the constitutional text, combined with deference to the legislature, can help us "build an objective form of judicial review", which will provide "a workable solution to the countermajoritarian difficulty".[71] In their view, "the courts must defer to the legislature" whenever "there is any uncertainty in the meaning of a constitutional provision".[72] They thus assume that it is possible to distinguish clear constitutional provisions from ones that are ambiguous; that the making of such a distinction stands outside the interpretive process, and therefore need not be affected by the politics of legal interpretation. Decisions to defer to the legislature are deemed to be "apolitical"; judges are thought to act "passively", as if they can dispose of a case without making law. Constitutional adjudication is effectively reduced to the resolution of easy cases, as judges use the power of review only to give effect to the clear meaning of the Constitution, while deferring to the legislature whenever a hard case comes along.

Other scholars have attempted to ground the legitimacy of constitutional review in *judicial attitudes and practices*. Consider, for instance, Iain Currie's defence of the Constitutional Court's strategy of "judicious avoidance" or "decisional minimalism". Currie defines decisional minimalism as "the making of decisions that are shallow and narrow (minimally theorised and minimal in impact on future decisions) rather than deep and wide (highly theorised and with maximal impact on future decisions)".[73] Constitutional judges, according to Currie, are well advised to hand down incompletely theorised decisions and decisions which leave as much as possible undecided. Such an approach enables judges to stay clear of controversial theoretical issues, in cases where it is not strictly speaking necessary to engage these issues. This strategy has a number of advantages. First, it makes it easier for judges to reach consensus, as it is easier to agree on "the shallow issue of outcome", than on "the deep issue of the theoretical justification for that outcome".[74] Secondly, it promotes value pluralism: instead of taking sides in debates between proponents of incommensurable comprehensive ideas of the good, judges can base their decisions on narrower grounds. And thirdly, a strategy of decisional minimalism or judicious avoidance

> "provides a means of negotiating the problem of counter-majoritarianism. Avoidance is one way of keeping out of the way of democratic institutions. Minimalism is a recognition that the democratic institutions rather than the courts are the most appropriate 'forums of principle' in society and, particularly on issues of great public controversy, should be given room to make wide-ranging rules and to debate the substantive principles underlying those rules."[75]

Note that Currie does not deny that judges are sometimes faced with hard choices. He does not offer a theory or set of uncontroversial principles from which judges can simply infer answers to constitutional questions. He describes minimalism as "a reflex, an adjudicative habit, inclination, style or strategy", not "an implacable rule for correct judging".[76] He recognises that this reflex or strategy will not always be

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71 Davis, Chaskalson and De Waal "Democracy and constitutionalism" 22.
72 Id 19.
73 Currie "Judicious avoidance" 1999 *SAJHR* 138 147.
74 Id 148.
75 Id 150.
76 Id 159.

appropriate; that occasionally, cases may arise in which it is desirable to engage controversial theoretical issues.

Currie can be called a legal realist to the extent that he recognises that ethical and political choices cannot be eliminated from adjudication. He is also a communitarian to the extent that he recognises that the range of options available to judges is limited by certain adjudicative habits or reflexes. However, Currie's realism is watered down by his assumption that the majority of constitutional cases are easy ones which can be decided on noncontroversial grounds. This assumption rests on a further assumption: that judges can trust their instincts; that, as a rule, they need not subject their own assumptions, habits and reflexes to the critical light of theory. Currie therefore underestimates the contested nature of those "commonsense" assumptions that sometimes give judicial decisions an air of inevitability. His defence of minimalism is at odds with the Constitution's radical, transformative message to the extent that it encourages judges simply to do "what comes naturally".[77]

Finally, we have seen attempts to ground the legitimacy of constitutional review in the communitarian insight that *fundamental-rights adjudication is part of a broader democratic debate* about the relationship between the individual and collective, and institutes a dialogue between courts and legislatures. Etienne Mureinik has been the most eloquent and influential South African exponent of this idea. According to Mureinik, the interim Constitution marked the substitution of a culture of justification for the old culture of authority.[78] It subjected all organs of state, including Parliament, to the demand for the justification of its actions. Constitutional rights, according to Mureinik, are not immutable boundaries between the individual and collective, but are standards against which the government must justify its actions. By inquiring into the justifiability of government action, judges promote the democratic values of accountability and participation. However, it is not the function of judges to substitute their own views on substantive issues for those of the legislature or the state administration. Judges should, rather, inquire into the soundness of the *process* that went into a decision.

David Dyzenhaus has argued that Mureinik's idea of law as justification reconciles the constitutional commitments to democracy and rights.[79] Mureinik, in his view, has shown how judges, through the exercise of constitutional review, can facilitate democratic deliberation without challenging the wisdom of legislative or executive choices. Johan van der Walt and I have argued elsewhere[80] that this attempted reconciliation of democracy and rights, rests upon the assumption that a commitment to certain procedures can guarantee a substantive harmony between the will of the majority and individual interests. It assumes the existence of a single,

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77 See the reference to Stanley Fish in fn 37 above. Of course, Currie is right that it is often advisable for judges to decide cases on narrow and shallow grounds. However, that does not mean that, in such cases, judges can simply avoid difficult theoretical issues. As Roederer "Judicious engagement: Theory, attitude and community" 1999 *SAJHR* 486 492 points out: "[I]n order to judiciously avoid deep theory and broad and comprehensive decisions, one should judiciously engage theory at the level of judgement. If this is not done, it is not possible to distinguish judicial avoidance of issues, controversies, and deep theoretical exposition for appropriate and responsible reasons, from doing the same for political expediency, cowardice, or just plain laziness."

78 1994 *SAJHR* 31.

79 Dyzenhaus "Law as justification: Etienne Mureinik's conception of legal culture" 1998 *SAJHR* 11.

80 2000 *Constellations* 341.

authoritative community, and denies the legitimacy of social dissent. Against this view, we argue that constitutional review cannot and should not be justified in the name of a common moral commitment or the general will of the people. On the contrary, constitutional review reminds us of the reality of social dissent, and thus discloses the lack of community which characterises modern societies.

The tension between democracy and rights reflects the divisions and faultlines that continue to characterise South African society. This tension is not something to be resolved or overcome, as it is constitutive of the new constitutional dispensation. Every attempt to heal the divisions of the past, or to strengthen the bonds of the political community, must therefore resist the temptation to collapse democracy and rights into each other in the name of an impossible unity.[81] South African constitutional lawyers must learn to live with the faultlines and frayed edges of their tradition, and to utilise them in a manner that continues to open up new avenues of transformative critique.

The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.

Advisory opinion of the Supreme Court of Canada in Reference re Secession of Quebec, 1998 [1998] 2 SCR 217 251, *quoted by James T McHugh* 2000 ICLQ 445 457.

81 Nedelsky *Private property and the limits of American constitutionalism* (1990) 273, 274 argues that "the collective is a source of autonomy as well as a threat to it", and that even though the democratic process is a prerequisite for the effective protection of human freedom, "democracy is not itself sufficient to ensure autonomy".

Regulating the baby market

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OPSOMMING

Regulering van die babamark

Mense wat ouers wil word deur die aannemingsproses word soms desperaat en voel genoop om op te tree op maniere wat in beskaafde regstelsels ongewens is. Sulke mense kan miskien kinders koop of selfs steel. Die regulering van aanneming is noodsaaklik om die regte en belange van die betrokke kinders te beskerm. Dit is uiters belangrik in gevalle waar kinders van een land aangeneem word deur ouers in ander lande. Die Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption van 1993 poog om sulke aannemings te reguleer. Ongelukkig is hierdie konvensie nog steeds redelik onbekend en word dit in baie min lande toegepas.

Die doelwitte van die konvensie is van so 'n aard dat dit noodsaaklik is dat alle lande hierdie poging om kinders te beskerm, ondersteun om te verhoed dat hulle uitgebuit word. Westerse lande is skuldig daaraan dat hulle voordeel trek uit die probleme wat ontwikkelende lande ondervind. Vir sommige kinders in sulke lande bly internasionale aanneming die enigste opsie as hulle enige vooruitsig op 'n normale lewe wil hê, maar vir baie sou die verspreiding van hulpbronne om ontwikkeling in hierdie lande te bevorder 'n ander moontlike oplossing bied.

1 INTRODUCTION

The world is increasingly becoming a global village and cosmopolitanism is the norm. A consequence of the changing face of the world is that ethnic and cultural diversity is more readily embraced today than it was a decade or two ago. Tolerance has become a buzzword. Members of modern Western societies are encouraged to seek an understanding and appreciation of other cultures and heritages. This development has had important implications for adoption and, more particularly, for trans-racial and inter-country adoption.

Despite a shift away from gender stereotypes, many women continue to define their femininity with reference to motherhood. The result is that women who are without children often feel that they are unfulfilled.[1] The supply of healthy babies to meet the demand for adoptable infants is simply insufficient. This is especially so in relation to the demand for non-relation adoptions of Caucasian babies into middle-class Caucasian families living in the wealthier Western societies such as the United States of America.

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1 Valentine (ed) *Infertility and adoption: A guide for social work practice* (1988) 5–20.

Career women often postpone starting their families until their careers are established and they are older. A consequence of this is an increase in the number of women who are experiencing difficulties in falling pregnant when they wish to. Increased infertility amongst both men and women has compounded the inadequacy of the supply of babies to meet the demand for non-relative adoptions. Greater acceptance of unwed mothers, contraception and abortion has decreased the availability of babies to meet the demand.[2] There is hope that advances in medical technology will facilitate the fulfilment of the desperate desire of childless couples to become parents.[3] In the meantime, however, middle-class Caucasian couples are searching further and further afield to find a supply of healthy babies to meet their needs.

The decline in the availability of Caucasian babies for adoption into middle-class Caucasian households has led to an increase in adoptions of children previously regarded as less desirable candidates for adoption. These include children with special needs, older children, and children of colour.[4] The problems associated with the diminishing supply of babies have been exacerbated by the modern emphasis upon the re-unification of children with their birth families. Difficulties in terminating parental rights often lead to children remaining in care for lengthy periods of time, forcing desirable adoption candidates into the less attractive category of older children. Long-term institutionalisation of children has serious developmental implications. A balance must therefore be found between the desire to reunite children with their birth families and the need to free them for adoption into permanent, nurturing families as early as possible.[5] Kidsave International is one of a number of organisations dedicated to eliminating the harmful long-term institutionalisation of children. Their aim is to create families for orphaned and abandoned children and so to afford them the opportunity for a healthy, productive life. They start from the premise that every child needs a family. They first promote all preventative efforts, then re-unification with the family. This re-unification is subject to the proviso that support exists to provide a nurturing environment. Domestic adoptions are supported as an alternative to re-unification where that is impossible and only if no prospects for domestic adoption exist, does Kidsave support intercountry adoption.

Desperation prevails among many would-be adoptive parents who sometimes feel driven to act in a manner that may well be considered undesirable in civilised legal systems. Such persons have been known to abduct or buy babies.[6] Regulation of adoptions is essential to protect the rights and interests of the children involved, especially where children from one country are adopted into families in other countries. The Hague Convention on Inter-Country Adoption[7] attempts to regulate such adoptions. This Convention was inspired by the United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children and the United Nations Convention on the Rights of the Child.[8]

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2 Simon and Altstein *Transracial adoptees and their families* (1987) 133.
3 Bean (ed) *Adoption* (1984) 176ff.
4 Simon and Altstein *supra* 121 ff; Bean *supra* 229ff.
5 Forum on adoption issues 1999-04-14 Columbia University School of Business: www.adoptioninstitute.org/proed/forum.html accessed 1999-07-28).
6 See eg the baby-market in Romania: www.adoption.com/library/articles/romania.shtml. (accessed 1999-10-20)
7 1993.
8 Adopted by the General Assembly of the United Nations on 1989-11-20, ratified by South Africa on 1995-06-16 and in force here since 1995-07-30.

2 INTERNATIONAL ADOPTIONS

2 1 Sources

After the Second World War, most international adoptions into the United States of America, the United Kingdom and other Western countries were from Europe. They were adoptions of children from similar socio-economic backgrounds to the adoptive parents.[9] This picture changed in the nineteen-fifties when Japan and South Korea began meeting the demand for babies. The 1950 Korean War, which lasted three and a half years, left a vast number of orphans. Economic growth in the 1960s led to a movement of youth to the cities and the traditional family structures collapsed. In Korean society, children born out of wedlock and those orphaned are subject to discrimination because of their lack of patriarchal kinship.[10] The Korean government had to make provision for home-placement of a growing number of homeless children. It created four inter-country adoption agencies that were mandated to concentrate their efforts first on intra-country adoption. In Korea the continuation of the bloodline remains the most important reason for adoption; therefore, despite an increase in non-relation adoptions as a consequence of the campaign of these agencies, related adoptions and adoption of healthy male children remained the norm. Biological parents in Korea had one year within which to withdraw their consent to the adoption.[11]

International adoption of Korean children dates back to 1954 when Yangyeonhwe was established to assist in the adoption of Amerasian children by the father's family. The large number of homeless children was, and still is, beyond the financial capabilities of the social welfare budget, although the financial position has improved somewhat. All placements of Korean children are made by four agencies to eleven countries.[12] A major disadvantage of such adoptions is the dislocation of the child's culture and race.

The economic upturn in Korea has slowed the supply of babies and by the nineteen-eighties and nineties would-be parents increasingly targeted underdeveloped countries.[13]

In the Philippines there are tens of thousands of children in difficult circumstances. These circumstances are the result of, *inter alia*, armed conflicts and a growth in the numbers of street children. Thousands of children are institutionalised as they have no parents or their families are unable to cope with their needs.[14] The Philippine government has undertaken to protect these children and to defend their rights.[15] Adoption of abandoned and parentless children offers one means of ensuring that these children are cared for and restored to a family environment.

Only 18% of Philippine adoptions are foreign, while 32% of such adoptions are to members of the child's extended family.[16] The Philippine Department of Social

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9 Fieweger "Stolen children and international adoptions" 1991 *Child Welfare* 288; Simon and Alstein 132ff. For an historical perspective see Joe "In defense of intercountry adoption" 1978 *Social Services Rev* 1.

10 Chun "Adoption and Korea" 1989 *Child Welfare* 255–260 255.

11 *Idem* 256.

12 *Idem* 257.

13 Valentine 92–93.

14 Balanon "Foreign adoption in the Philippines: Issues and opportunities" 1989 *Child Welfare* 241.

15 Balanon 241–242.

16 *Idem* 242.

work began clearing foreign placements in 1968 in circumstances where adoptive homes could not be found in the Philippines. A total of 3231 such placements took place in the period between 1968 and 1987, of which 75% were to families in the United States of America. Bilateral agreements and agency agreements regulated the process.[17] These placements were seen as advantageous in circumstances where long-term institutionalisation was the alternative. Concern for the child's culture and identity existed and openness in adoptions was encouraged.[18]

In 1987, the Philippines introduced a residence requirement for foreign adoptive parents. This changed the position from that under presidential decree 603 of 10 December 1974[19] which permitted non-resident aliens to adopt subject to a six-month trial custody period before finalisation of the adoption.[20] Such adoptions were permitted where the needs of the child could not be met within the Philippines. Between 1976 and 1981, the Philippines concluded bilateral agreements with Australia, Canada, Denmark, the Netherlands, Norway and Sweden.[21] The problem arose that social workers from the Philippines could not conduct home visits or follow up where difficulties were encountered. Private adoptions were rife and neo-colonial attitudes engendered an attitude that foreign adoptive parents were preferable to locals. After the February revolution of 1986, there was a substantial increase in interest in foreign adoptions of Philippine babies, hence the promulgation of Executive Order 91 of 19 December 1986[22] which imposed a residence requirement on foreigners seeking to adopt Philippine babies. Residence in the Philippines for a period of one year was mandatory, as was a six-month trial custody period. Six months later a new Family Code was signed into effect for the Philippines[23] in terms of which foreigners may only adopt Philippine children in the following circumstances:

- where the adoptive parent is a former Filipino citizen seeking to adopt a relative by consanguinity;
- where the adoptive parent seeks to adopt the legitimate child of his or her Filipino spouse; or
- where the alien is married to a Filipino citizen and seeks to adopt jointly, with his or her spouse, a relative by consanguinity of the latter.[24]

Other foreigners wishing to adopt may adopt in accordance with the laws of inter-country adoption provided by law.[25]

Latin America and India also became popular sources of babies in the eighties and nineties. Babies are available in these regions because birth rates remain high and money for social services is extremely limited.[26]

International adoption is a controversial issue in Ecuador and other Latin American countries, especially after the Ecuadorian press exposed a ring of individuals and businesses that were involved in adoptions and who were investigated by the

17 *Idem* 249.
18 *Idem* 246.
19 Which took effect on 1975-06-10.
20 Balanon 244.
21 *Idem* 245.
22 Which took effect on 1987-01-27.
23 Executive Order 209.
24 Balanon 246.
25 *Ibid.*
26 Fieweger 288.

Office of Defense of Children International in 1988. An increasing number of adoptions of such children from a given region, all handled by a small group of lawyers, gave rise to suspicion. It was discovered that in some cases the children had been kidnapped. Poverty-stricken parents were enticed by economic incentives to make their children available for adoption. Some parents were even intimidated into putting children up for adoption.[27]

Since the December revolution of 1989, Romania has had in excess of 100 000 neglected, abused and handicapped children warehoused in institutions. These children are the products of a quarter of a century of totalitarian rule, which fostered population growth while providing inadequate child and health care. Organisations were formed to help Romania's orphans and many childless couples went to Romania to "find" a child. By 1991, Romania was supplying a third of the world's adoptees. There was no effective child welfare system and private adoptions were the norm. The economic upturn, coupled with the establishment of a child welfare system, enabled problems to be identified. Mechanisms were put in place to monitor the adoption process. Today adoption of Romanian children may take place only through international organisations recognised by the government.[28] The new legislation requires that adoptable Romanian children may be sourced only from institutions.[29] The problem with these children is that Hepatitis B and HIV are rife and there are problems relating to delayed physical, intellectual and psychological functioning.[30] Until June 1991, Romanian adoptions were governed by Law No 11/1990 which permitted a huge number of international adoptions by parents who could choose their child freely with the consent of the biological parents.[31] Bribes, black-market dealings and baby selling became common practice and babies were being adopted directly from families. In June 1991, the government called a halt to reorganise and to regulate the practice, and in July 1991, Law 48/1991 was passed, providing that babies could be obtained only from institutions.[32] The Commission for the Protection of Children and the Romanian Committee on Adoption were established. International agencies from several countries were identified and accredited as official entities for adoption of Romanian children. Private adoptions were outlawed.[33] One re-unification of families remains a priority and thus a six-month period of temporary custody is mandatory before the adoption order will be finalised. Follow-up services will be rendered by the internal agency for two years after the adoption.[34]

Statistics for 1995 and 1996 released by the National Council for Adoption reveal a trend that indicates that adoptions into the United States of America from China and Russia are increasing.[35]

Investigation has revealed that America has a history of adopting children from war zones. First there were the Amerasian babies from Korea and Vietnam, children

27 *Idem* 285–291 285–286.
28 Johnson, Edwards and Puwak "Foster care and adoption policy in Romania: Suggestions for international intervention" 1993 *Child Welfare* 72 489–506.
29 *Idem* 494.
30 *Idem* 495.
31 *Idem* 497.
32 *Idem* 498.
33 *Ibid*.
34 Johnson 499.
35 www.adoption.c...brary/articles/international.html. (accessed 1999-10-20).

from Bosnia, and so on. The war in Kosovo also occasioned interest in adoptions from that country. Conditions in war-torn countries make it exceedingly difficult to establish whether a child is truly an orphan or has simply been separated from his or her parents. The American State Department has recently issued a statement indicating that such children cannot be adopted into the United States.[36] The need to treat inter-country adoptions with caution is therefore being taken seriously.

2 2 Transracial adoptions

In the nineteen-fifties, the adoption of children of colour by Caucasian parents, and particularly the adoption of mixed race children by such parents, was frowned upon.[37] In recent times such adoptions have become relatively commonplace, but have nevertheless proved to be extremely controversial. Transracial adoptees have often been subjected to racial prejudice in addition to suffering a loss of ethnic and cultural identity. It is their right to enjoy and practise their own culture, including their own religion and language[38] that has given rise to most objections to transracial adoptions which seemingly erode this right.

Much has been written on the legal and social implications of transracial adoption. I will therefore focus, not on transracial adoptions *per se*, but on international adoptions that are often both transracial and transcultural. Inter-country adoptions are predominantly from developing, Third World, non-white backgrounds.[39] While transracial adoption within the United States has diminished as a result of controversy, intercountry adoptions are on the increase.[40]

2 3 Overview of inter-country adoption

Most children adopted internationally to the USA, the UK and other Western countries today, are children that have been institutionalised in their country of origin and whose prospects of domestic adoption are very slight as a consequence of economic or cultural circumstances prevalent in their country of origin.[41] It would appear that Americans, for instance, opt for international adoptions, not exclusively because of the limited availability of children locally, but also because they perceive these adoptions to be less vulnerable to challenge by the birth parents once the placement has been made.[42] In the USA, inter-country adoptions into the country are subject to rigorous oversight. The adoptive parents must comply with the requirements of their place of residence as well as those of the county of the child's origin. In addition, the preferred visa for an "adoptable orphan" will be issued only if the child is a "true orphan", that is a child who has been unconditionally abandoned or has a sole surviving parent who is unable to provide for him or her.[43] Such adoptions are costly and take some considerable time to finalise after the home study has been

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36 www.travel.state.gov/kosovo-adoption.html.

37 Heim *Thicker than water* (1983) 84.

38 Convention on the Rights of the Child a 30.

39 Simon and Alstein 133.

40 *Idem* 134; Forum on adoption issues 1999-04-14 Columbia University School of Business. http:\\www.adoptioninstitute.org/proed/forum.html (accessed 1999-07-28) In 1997, 14000 children were adopted internationally into the USA, almost 100% more than in 1990. Projected figures for 1998 were around 15000.

41 *Ibid.*

42 *Ibid.*

43 *Ibid.*

completed. Up to 90% of international adoptions to the USA are of children under the age of four years. More than 59% are under the age of one year and twice as many girls as boys are adopted internationally.[44]

Social work reports tend to indicate that the majority of international adoptions are successful; however, there have been reports of abuses, especially in relation to adoptions of children from socio-economically disadvantaged countries.[45] A baby market has arisen in certain of these countries where parents have been found to be selling their children on the streets. This practice continues despite its illegality. Care must be taken to eliminate the perception that babies are a national export from less developed countries to wealthier Western countries. Inefficient bureaucracy in countries supplying babies creates the possibility that adoptive parents may be required to stay in the country of adoption for extended periods without any assurance that their application will ultimately be successful. Kidnapping is therefore an attractive alternative.[46] Illegal international adoptions are beyond the reach of either country's social services and neither assesses the parents nor ensures the wellbeing of the child. By 1987, the State Department of the United States had identified two important problems relating to inter-country adoption: attempts to obtain illegal documents for foreign-born children and illegal practices of persons undertaking to supply foreign-born children for adoption.[47]

Despite this, international adoption is the last hope for many of the world's abandoned children.[48]

3 THE HAGUE CONVENTION ON THE PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTER-COUNTRY ADOPTION

The three main aims of the Convention on Inter-Country Adoption are:

- to protect the rights of the child in the adoption process (the best interests of the child must be the first consideration in any adoption, and children have a right not to be exploited);
- to provide a mechanism to facilitate co-operation between countries; and
- to ensure the recognition of adoptions certified according to the Convention.

The Convention on Inter-Country Adoption resulted from discussions by almost all 38 member states of the Hague Convention, as well as 30 invited, non-member states. Many of the invited states were states that supply babies to the international adoption market.[49] Almost all of the states that participated in the discussions became signatories to the Convention.

The Convention was designed to regulate all adoptions between party states, regardless of the manner in which these adoptions were initiated. Member states remain entitled to add requirements and prohibitions to those entrenched in the Convention.

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44 Forum on adoption issues 1999-04-14 Columbia University School of Business. http:\\www.adoptioninstitute.org/proed/forum.html (accessed 1999-07-28).

45 Parent "Hague Convention to bring worldwide policy" http://family.go.com/Features/fami...ar/char118adopt/char118adopt3.html (accessed 1999-07-28).

46 Fieweger 289.

47 US Senate, Committee on the Judiciary, Subcommittee on Courts, 1984-03-16 47; Simon and Alstein 135.

48 Fieweger 291.

49 Eg Brazil, Costa Rica, Mexico and Romania.

The preamble to the Convention on inter-country adoption recognises that the full and harmonious development of the child's personality requires that he or she grow up in a family environment. Such a family environment may possibly be afforded by inter-country adoption in circumstances where a permanent family may be found overseas, for a child for whom no suitable family can be found in his or her country of origin.

The Convention attempts to ensure that any adoption that takes place is in the best interests of the child and respects the child's fundamental rights.[50] It promotes, *inter alia*, the elimination of the abduction and sale of children by establishing a system for co-operation between contracting states to ensure that safeguards are respected.[51] Finally, the Convention on inter-country adoption also provides for the recognition of adoptions made in accordance with the convention.[52]

The Convention on inter-country adoptions is applicable to all adoptions between contracting states in terms of which a permanent parent-child relationship is created.[53] It ceases to apply in circumstances where the adopted child reaches the age of 18 years before convention steps are taken.[54]

The requirements for inter-country adoption are set out in articles 4 and 5 of the Convention. These provisions determine the duties of competent authorities in both the receiving state and the state of origin. The requirements set out what must be determined or ensured before adoption may take place within the framework of the Convention. Article 4(c) is extremely important and clearly sets out the consents that are required.

Chapter 3 requires contracting states to create central authorities.[55] These authorities are vested with non-delegable, non case-specific functions[56] as well as functions which they may delegate to public authorities or accredited bodies. These functions may relate to inter-country adoptions in general or to specific cases of such adoptions.[57]

Articles 10–12 deal with accreditation and accredited bodies or agencies, the requirements they must meet, and the ability of such bodies to act in another contracting state only when both states have authorised the adoption.[58] Chapter 4, read together with article 22, sets out the procedural requirements for inter-country adoptions in terms of the Convention.

Prospective adoptive parents must habitually reside in one of the contracting states and must wish to adopt a child who is habitually resident in another.[59] Would-be adoptive parents must apply to the central authority in the state where they are habitually resident or, alternatively, in terms of article 22, to an accredited body or agency in that state. A home study on the prospective parents[60] and a report on the child[61] are prepared under the auspices of the state's central authority or the accredited body or agency.

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50 A 1(a).
51 A 1(b).
52 A 1(c).
53 A 2(2).
54 A 3.
55 A 6.
56 A 7.
57 A 9.
58 These articles should be read together with a 32.
59 A 14.
60 In terms of a 15(1).
61 In terms of a 16(a).

Chapter 5 of the Convention deals with the recognition afforded to such adoptions as well as the consequences of the adoptions. Article 23 provides that any adoption certified to have been made in terms of the Convention will be recognised in any other contracting state by operation of law. There is, however, a public policy exception contained in the Convention.[62]

The Convention distinguishes between "simple adoptions", which do not terminate parental rights, and full adoptions, which require recognition in other contracting states.[63] Provision is made for the conversion of a simple adoption into a full adoption.[64]Article 21 of the Convention on the Rights of the Child states that governments must ensure that placements of children do not result in improper financial gain for the parties involved. Sale of children is a clear example of a practice that exploits children.

Article 30 prohibits the adoptive parents and biological parents, or other person(s) entrusted with the care of the child from having direct contact until the article 4 and 5 requirements have been met. This prohibition will not apply in cases where the placement is within the family or the contact complies with requirements of the competent authority of the state of origin. Articles 16 (1)(a), 16(2), 30 and 31 relate to the preservation of and access to information, a controversial issue. The growing trend towards openness in adoptions supports this move wholeheartedly. The Bastard Nations Mission states that these provisions do not go far enough towards fulfilling the rights of the adoptee.[65] The information relating to the child's origins and medical history may later prove invaluable to the child.

Article 41 indicates that the Convention will apply to adoptions where application is made in terms of article 14 after the Convention has come into operation in both the state of origin and the receiving state. Chapter VII contains the technical provisions. It appears that a special supplement will be needed specifically to deal with refugee and internationally displaced children.

The Convention was expanded by the Convention on Jurisdiction Applicable to Law, Recognition and Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children and Decisions on Matters Pertaining to the Conference.[66] There the Convention was extended to include the Islamic Kafala which is used instead of adoption.

The Hague Convention on Inter-Country Adoption was clearly designed to implement global processes and procedures to regulate international adoptions and, by doing so, to protect children.[67] The objective is to offer children the protection envisaged in the Convention on the Rights of Children. In the preamble to that Convention, the states parties agree that the child, by reason of his or her physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.[68]

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62 A 24.
63 A 26.
64 A 27.
65 http://www.bastards.org/activism/hague-resolution.html. (accessed 1999-02-08).
66 18th Session of the Hague Conference.
67 *Ibid.*
68 Adopted by resolution no 44/25 of the General Assembly of the United Nations on 1989-07-20.

4 THE CONVENTION ON THE RIGHTS OF CHILDREN

Article 3 of the Convention on the Rights of Children once again entrenches the paramountcy of the best interests of the child in all actions concerning the child, of whatever nature they may be. This Convention entrenches, *inter alia*, the following rights of the child:

- to preserve his identity, including nationality, name and family relations;[69]
- not to be separated from his parents against his will unless such separation is deemed to be in the best interests of the child according to law and applicable procedures;[70]
- to have his opinions taken into consideration in proceedings relating to him or her.[71] This right to have his or her views considered, is also reflected in article 12(1), which states that where a child is sufficiently mature to form his or her own views, he or she has a right freely to express those views in matters affecting him- or herself. Such views will be taken into account and accorded due weight in accordance with the age and maturity of the child;
- to maintain regular contact with both his or her parents should he or she be separated from them, except if this is contrary to the best interests of the child.[72]

Article 21 deals specifically with adoption and states that states parties to the Convention that permit or recognise adoptions must ensure that the best interests of the child remain paramount. Article 21(a) provides that competent authorities appointed to ascertain that the adoption is permissible must authorise adoptions only if all the necessary consents have been obtained. Article 21(b) states that states parties recognise that inter-country adoption may be considered as an alternative where the child cannot be placed in foster care or an adoptive family or cannot otherwise be suitably cared for in the country of origin.

Article 21(c) calls upon the states parties to ensure that any child involved in an inter-country adoption is subject to the same safeguards as are applied to protect children involved in national adoptions. Article 21(d) prohibits improper gain from intercountry adoptions and article 21(e) calls upon states parties to conclude bilateral and multilateral agreements to promote these aims.

Article 30 protects the rights of the child to enjoy his or her own culture and religion and to use his or her own language in community with other members of his or her group.

Article 35 calls upon states parties to take appropriate national, bilateral and multilateral measures to prevent the abduction of and traffic in children for any purpose or form. South Africa ratified this Convention on 16 June 1995.

Inter-country adoption holds the benefit that it solves the problem of a shortage of children in Western countries, while assisting the homeless and dependent children of another country. It is, of course, not the solution for all homeless children worldwide. Such adoptions have some inherent risks. Social rejection in the adoptive country, as well as potential loss of the child's identity, are real problems. It is also clearly better that the child remain rooted in his or her own race and

69 A 8.
70 A 9(1).
71 A 9(2).
72 A 9(3).

culture. These problems may be addressed by the direction of humanitarian aid to assist needy children in less developed countries.[73]

The Hague Convention on Adoption was designed to implement processes and procedures to regulate inter-country adoptions and, by doing so, to protect children.[74] Thirteen countries immediately signed the Convention, but the passing of legislation to bring national laws into conformity with the Convention takes considerable time and the Convention is not yet in operation in many countries. Some countries have ratified it and have adjusted their domestic adoption laws, among them Australia and the United States of America, but not South Africa. Australia has amended the Adoption Act of 1988 and regulations. Section 7 of this Act provides:

> "In all proceedings under this Act, the welfare of the child to whom the proceedings relate must be regarded as the paramount consideration."

The Australians see adoption as the process by which a permanent family is secured for a child who needs one. The amendments to the legislation focus upon the sharing of information and openness in adoption. The legislation seeks to achieve a balance between the competing rights of all persons with an interest in the adoption, and attempts to comply with the Hague Convention and with the United Nations Convention on the Rights of the Child, especially article 12 of the latter, which provides that a child has a right to express his or her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child. This article is catered for by the amendment permitting the court to establish the opinion of a child over the age of five years and to take that opinion into account in making a determination on a custody matter. The child's opinion is also relevant in relation to the disclosure of certain information relating to the adoption.

The birth father of a child born out of wedlock is now expressly included in the definition of parent, and "birth parent" replaces the term "natural parent".[75]

5 SOUTH AFRICA

South African domestic adoptions are covered by the Child Care Act,[76] as amended.[77] No special provisions are made for international adoptions. Section 18(4)F provides that the children's court, to which the application for adoption is made, will grant such an adoption order only if it is satisfied that if the child is born of a South African citizen; that the applicant, or one of the applicants, is a South African citizen or has the necessary residential qualifications for the granting to him or her (them) of a certificate or certificates of naturalisation as a South African citizen(s);[78] and that application has in fact been made.

These conditions do not apply where the applicant is the spouse of a parent of the child.

There is a cooling-off period provided for in the Act.[79] Section 24 prohibits the giving or receiving of any consideration in cash or kind in respect of the adoption

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73 Balanon 250–252.
74 *Ibid.*
75 http://www.sacentral.sa.gov.au/agencies/dfcadopt.htm (accessed 1999-08-02).
76 74 of 1983 ss17–27.
77 *Inter alia*, by the Adoption Matters Amendment Act 56 of 1998.
78 Under the SA Citizenship Act.
79 S18(8)–(9).

of a child, save as provided for in the Social Work Act.[80] Adoptions are effected by the children's court of the district in which the child resides.[81] The Act requires the court to examine whether the adoptive parents are suitable and whether or not the requisite consents for adoption have been obtained.[82] It also requires the court to have regard to the wishes of the child if the child is over ten years of age. The provisions relating to the consent of natural fathers of children born out of wedlock are new and exciting.[83]

Adoptions of South African children are therefore permitted domestically only.[84] There are no special provisions for adoption of foreign-born children overseas by South African parents. This area of law is therefore unregulated.

6 CONCLUSION

There remain a number of problems relating to adoptions that will require attention in the future. One of the principal questions that only time will answer, is whether the disparity between the supply of and demand for healthy adoptable children, infants in particular, will continue. Whether medical technology will advance to such a degree as to impact on adoption, remains to be seen.

As independent adoptions grow and advertising increases, adoption may well look different in the future. The Internet has certainly already had an impact. It has created the potential to heighten awareness about children and has made information more readily available, which widens the market. There are numerous Internet sites where information on adoption is available,[85] including some on which pictures of children available for adoption are placed in the form of an advertisement.[86] The regulation of such sites, access to them and strict control over the contents of the information made available on these sites should be implemented.

The role of birth fathers in adoptions is still not as well regulated as it could be and will require continued attention.

Openness in adoption remains controversial and the rights of the various parties will require consideration to ensure that the best interests of the child are served. Adopted children often develop a curiosity about their birth families and heritage; this is part of the process of the development of their identity. Article 8 of the Convention on the Rights of the Child safeguards the right of the child to preserve his nationality, identity and name. The child's attempts to establish his identity can be complicated by adoption, as there is often little or no information on his pre-adoption identity. While adoptive parents are increasingly being encouraged to share information with the child, they too often have limited information, especially where such information may be identifying in nature. The "open adoption" is of value in fostering identity. Mutual consent registries for reunions and to assist in independent searches should be established world-wide.

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80 110 of 1978, as amended.

81 Child Care Act 74 of 1983 s 18(1).

82 S 18(3).

83 S 18 (4)(d), amended by, and ss 19 and 19A incorporated by the Adoption Matters Amendment Act 56 of 1998. See too, s 6 of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997.

84 *Fitzpatrick v Minister of Social Welfare and Pensions* 2000 3 SA 139 (C).

85 Eg http://travel.state.gov/adoption-taiwan.html (accessed 1999-08-02); http://www.russian-adoptions.com/process.html (accessed 1999-07-28).

86 Eg, http://www.rainbowkids.com (accessed 1999-08-02).

The role of money in adoption and the determination of what constitutes appropriate expenses require urgent attention. A trade in babies is undesirable and must be avoided. Professional persons involved in adoptions should be remunerated for their services, but remuneration should not be such that the adoption process becomes tantamount to buying a baby. The release of a child by the biological parents for adoption by others should be recognised only where it is clearly in the best interests of the child and is done in accordance with the rights of the child. To this end, the Convention on Inter-Country Adoption prohibits contact between the prospective parents and the person responsible for the child and regulates the cost of the adoption. It expressly prohibits material gain from the adoption. In this way the Convention aims at the elimination of exploitative adoptions where a child is taken from his or her home. Controls and safeguards were needed to stop traffic in children; the question is whether the Convention is able to achieve this goal.

Transracial and inter-country adoptions remain fraught with difficulties, since adoption is an emotional issue and prompts emotional reactions. Often it is not the law that is at fault in frustrating the needs of adoptive parents and adoptees, but the manner in which that law is applied. Many frustrations are experienced because of the ignorance of certain authorities of the law or their failure to buy into what the laws represent. One thing is certain, however: regulation of the baby market is imperative and South Africa must embrace the Convention on Inter-Country Adoption as a first step towards achieving that objective.

Taal – en by name die behoud van Afrikaans – ontlok diepgewortelde emosie. "'n [Artikel 32(c) van die 1993-Grondwet] . . . is en bly . . ." skans teen verswelging van enige minderheid se gemeenskaplike kultuur, taal of godsdiens. Solank 'n minderheid daadwerklik wagstaan oor sy gemeenskaplike erfgoed, solank is dit sy onvervreembare reg om eie onderwysinstellings ter behoud van kutuur, taal of godsdiens tot stand te bring.

'n Gemeenskaplike kultuur, taal of godsdiens met rassisme as 'n wesenselement het [egter] geen konstitusionele aanspraak op die vestiging van afsonderlike onderwysinstellings nie. Die Grondwet beskerm verskeidenheid nie rassediskriminasie nie.

Kriegler R in In re: The School Education Bill of 1995 (Gauteng) 1996 4 BCLR 537 (KH) 556D–G.

Equality: An ethical interpretation

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OPSOMMING

'n Etiese interpretasie van gelykheid

In hierdie artikel ondersoek die skrywer die moontlikheid van 'n etiese interpretasie van gelykheid as alternatief vir die formele asook substantiewe benaderings. Sy identifiseer 'n etiese interseksie tussen publieke spasie (die "politieke"), gelykheid (grondwetlike beskerming) en geregtigheid (die ideaal van geregtigheid). Die skrywer bespreek twee beslissings van die Konstitusionele Hof, *President of the Republic of South Africa v Hugo* en *City Council of Pretoria v Walker,* in die lig van 'n etiese interpretasie van gelykheid.

1 INTRODUCTION

In this article I aim to explore the formulation of an ethical interpretation of equality. I regard the reconstruction and transformation of public space as a precondition for such an ethical interpretation. The intersection between public space, equality and justice is significant for an ethical interpretation of equality.

A significant feature of the reconstruction and transformation of public space is the room it can create for the telling of stories and for the acceptance, even celebration, of human plurality, differences and heterogeneity.[1] This feature of a reconstructed and transformed public space is essential for an ethical interpretation of equality. An ethical interpretation of equality is an interpretation that "radically" acknowledges the inescapable fact of *difference*. An ethical interpretation of equality does not seek to "accommodate" difference. The ethical dimension lies precisely in the understanding that such an accommodation is impossible. Difference cannot be defined and enclosed in a definition or provided for in a specific test. I argue that "substantive" equality, despite the fact that it goes a step further than "formal" equality, disregards the ethical dimension of equality and difference. Through its assumptions of generality and universality, any institutionalised approach to equality aimed at defining difference or providing for difference (eg the *Harksen*[2] test) will fail to prevent the exclusion or the reduction of difference.

An ethical approach to equality needs a "slowness", a "strategy of delay",[3] a careful reading. I understand "ethical" as an openness towards difference and the

1 The Truth and Reconciliation Commission (TRC) created such a space for the telling of stories and celebration of difference. I have elaborated on this in my thesis: *Towards an "ethical" interpretation of equality* Unisa (1999).

2 *Harksen v Lane* 1997 11 BCLR 1489 (CC).

3 See Ijsseling "Jacques Derrida: een strategie van de vertraging" in Widdershoven and De Boer (ed) (1990) *Hermeneutiek in discussie* 9–15.

acceptance of the impossibility of ever fully knowing one another's differences. The ethical imperative demands that we seek the less "violent", in other words exclusionary or reductionist, interpretation of equality, in theory and in practice. The fact that we can never reach perfect equality does not mean that we should abandon the search for it. However, we should realise the limitations of seeking equality in the *economy* of daily life. An ethical understanding of equality demands a double-handed approach, seeking ethical interpretation within the system of rights and law and at the same time realising the impossibility of such an equality. The ethical moment lies outside our current system, beyond our daily economies. The ethical is that which does not exist within the system, that which is almost impossible to describe. I am interested to see whether one can catch glimpses of these ethical moments[4] in an ethical interpretation of equality.

An ethical perspective on equality realises the shortcomings of any attempt to understand or identify difference, and accordingly to address it. This realisation, however, does not imply a nihilistic acceptance of the present situation which entails that we must revert to the neutral assumption of sameness. An ethical perspective on equality insists that we go to trouble with difference, that we seek for answers, that we believe in the ideal of equality and the promise of justice. It forces us to go beyond conventional methods of enquiring and to disregard the limits of present systems. The vision of public space (and community) that I support, is one where human plurality, differences and heterogeneity can appear in a spontaneous and unpredicted manner. The concepts of community and citizenship must continually escape definition and closure to ensure the openness of public spaces. Of course, in present systems – our symbolic order – these visions and concepts are enclosed in definitions. Quite often they become reified.[5] We must expose, undermine and disrupt this reification exactly for what it is, namely *man*-made things. Aspects of the philosophy of deconstruction contain ideas for such a disruption of all present *man*-made systems.[6] Deconstruction considers *justice* as the limit to all present systems. An ethical interpretation of equality is situated at the intersection between public space (political theory, democracy), equality (institutionalised, constitutionalised rights) and justice (memory, forgiveness, promises, truth, reconciliation) and is inspired by the philosophy of deconstruction.

Below I shall discuss two cases that were decided on the equality section of the interim Constitution. The same approach to equality that was developed in regard to the interim Constitution is used in the application of section 9 of the final Constitution. The reason for the fairly elaborate discussion of the cases is to acquire an idea of the court's approach (taking the majority, minority and separate judgments into account). I shall also reflect on the judgments from the perspective of an ethical interpretation of equality.

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4 I view the TRC in a similar way; as a political, public and ethical event with possible traces or spectres of the forgiveness and truth which only exist in the beyond.

5 Eg see Gabel "Reification in legal reasoning" 1980 *Research in Law and Sociology* 17 and "The phenomenology of rights-consciousness and the pact of the withdrawn selves" 1984 *Texas LR* 1563.

6 For a general introduction to deconstruction see among many others Derrida "The deconstruction of actuality" 1994 *Radical Philosophy* 28; Caputo *Deconstruction in a nutshell* (1997); Critchley *The ethics of deconstruction* (1992) and Goosen "Verlies, rou en affirmasie. Dekonstruksie en die gebeure" 1998 *Fragmente* 54.

2 *PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA V HUGO*[7]

Hugo was imprisoned during a time which the former President, Nelson Mandela (in the Presidential Act 17 of 1994) pardoned certain categories of prisoners. One of these categories was all mothers in prison on 10 May 1994 with minor children under the age of 12 years. Hugo, a widower and the father of a son under the age of 12, applied for an order declaring the Presidential Act unconstitutional on the grounds that it discriminated unfairly against him on the basis of *gender.*

The court *a quo* argued as follows:

(i) the phrase "to discriminate" means to make an *adverse distinction* with regard to;

(ii) discrimination appears to be *fundamentally unfair,* so that it is difficult to visualise the notion of discrimination which is not unfair;

(iii) what a respondent must prove in order to discharge the onus of unfairness is that it is *not unreasonable* to discriminate;

(iv) an adverse distinction was made between Hugo, a single parent and any incarcerated mother, whether she is a single parent or not;

(v) the Presidential Act discriminated against Hugo;

(vi) the state did not prove that the discrimination was reasonable and fair.

The majority in the Constitutional Court held that there was *discrimination* against Hugo, but that it was *not unfair.* Mokgoro J, in a separate judgment, held that there was indeed unfair discrimination, but that it was justified in terms of section 33. O'Regan J also handed down a separate judgment, while Didcott and Kriegler JJ gave dissenting judgments. Goldstone J, for the majority, accepted that the appellants relied on a generalisation, namely that women are the primary caretakers of children, and that it will often be unfair for discrimination to be based on that particular generalisation. He said that the fact that the individual discriminated against by a particular action did not belong to a class that had been historically disadvantaged, did not mean that the discrimination was fair. He stated that at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of the new constitutional and democratic order is the establishment of a society in which all human beings will be given equal dignity and respect regardless of their membership of particular groups. Goldstone J argued that the court followed a substantive approach to equality by focusing on the differences between the genders:

> "We need . . . to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."[8]

The court accepted that the President had acted in good faith and did not intend to discriminate unfairly and had in mind the benefit of children. The court noted that this was not enough to show that the discrimination was not unfair. To determine that the impact is unfair, the following factors should be considered: the *group*

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7 *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) 729.
8 *Ibid.*

which has been disadvantaged; the *nature* of the *power* in terms of which discrimination was effected and the *nature* of the *interests* which have been affected by the discrimination.

The court considered the presidential pardon to be in the *public interest*. It argued that because male prisoners outnumber female prisoners, a release of single parent fathers would have implied the release of a very large number of prisoners, which would have caused a considerable public outcry. It would therefore have been unacceptable and impossible for the President to release fathers on the same terms as mothers. It argued that the rights of fathers were not restricted or limited permanently, and that their freedom was curtailed as a result of their conviction and not as a result of the presidential act. This meant, according to the court, that men's rights of dignity or sense of equal worth were not impaired. The court concluded that the impact on the fathers was not unfair and that the respondent had no justified complaint.

In her separate judgment, O'Regan J emphasised two factors that are relevant to the determination of unfairness: the *group* which has suffered discrimination and the effect of the discrimination on the *interests* concerned. In her view, *the more vulnerable* the group adversely affected, *the more likely* the discrimination will be held to be *unfair*. Similarly, *the more invasive* the nature of the discrimination, the more likely that it will be held to be unfair. She argued that even though it would be better for equality if the responsibilities of child-rearing were shared fairly between fathers and mothers, the *reality* at present is and will be in the near future that mothers will bear the primary responsibility. The disadvantage for women does not lie in the President's order, but in the *social reality*. She focused on the fact that the President's reliance upon women's greater share of child-rearing responsibilities in order to offer an advantage to some women, did not cause any significant harm to other women.

Kriegler J, in a dissenting judgment, argued that Hugo had indeed suffered unfair discrimination. According to him, the relevant section of the presidential pardon was inconsistent with the prohibition against gender or sex discrimination and, because it had not been shown to be fair, it was invalid. In his view the notion relied upon by the President, namely that women are to be regarded as the primary care givers of young children, is a root cause of women's inequality:

> "One of the ways in which one accords equal dignity and respect to persons is by seeking to protect the basic choices they make about their own identities. Reliance on the generalisation that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely."[9]

Another aspect Kriegler J mentioned, is that no data had been presented stating how many male prisoners would have been released if the pardon had treated the sexes equally. He focused on the fact that the President relied on an "inherently objectionable generalisation" for the benefit of a particular group of women prisoners, and argued that there was no suggestion in the Presidential Act of compensation for wrongs of the past or an attempt to compensate for past discrimination against women. The primary justification provided for the President's proclamation was the "interest of children". The judge identified two criteria that must be satisfied for a generalisation such as that relied upon in the pardon to be vindicated. There must be a strong indication that the advantages flowing from the perpetuation of a stereotype compensate for "obvious and profoundly troubling disadvantages"; the context would have to be one in which discriminatory benefits were apposite. In terms of the

9 743.

first criterion, he argued that women as a group do not benefit by the perpetuation of the stereotype and in terms of the second he noted that the fact that women suffered discrimination generally does not mean that they suffered in the penal context. He concluded by arguing that sex/gender distinctions can and should be made on occasion but, that such distinction must be shown not to discriminate unfairly, or must be justifiable under the limitations clause.

3 DID THE MAJORITY IN *HUGO* FOLLOW AN "INSTRUMENTAL AESTHETIC"?

Pierre Schlag[10] identifies two dominant "aesthetics" of American legal thought, namely the "analytical" and the "instrumental" aesthetic. He shows how these two aesthetics have enabled American legal thinkers to presume simply that rights have a generally recognisable ontology. The "analytical" aesthetic enacts a "rhetoric of order" where every legal conception has its proper place. The "instrumental" aesthetic enacts a "rhetoric of progress" where the inadequacies of the present can be redressed through change, reform, progress and so on. He places each of these aesthetics in a historical period. The "analytical" aesthetic flourished in the late-nineteenth century in the attempts of legal formalists, doctrinalists, analytical positivists and proponents of scientific jurisprudence to systematise law into an orderly science. The "instrumental" aesthetic flourished in mid- to late twentieth-century American legal thought. Where the "analytical" aesthetic strives to impose and maintain order by providing a stable, all-encompassing, objectivist frame, the "instrumental" aesthetic seeks to produce change, reform and transformation. He notes that the metaphors and images of the "instrumental" aesthetic are *motion*-oriented. Rights in the "instrumental" aesthetic are seen as the sources, the instruments, or the ends of change. They are symbolised as energy sources (antecedents, motivations etc), trajectories (paths, vehicles, connections etc), as end goals (prizes, trophies, conclusions), and as all three at once.[11]

It is interesting to read the words and phrases of the postamble of the interim Constitution and the preamble to the final Constitution in the light of the above. The postamble refers to "a historic bridge"; "a future founded on"; "reconstruction of society"; "secure foundation"; "reparation".[12] Similarly, the preamble of the final

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10 "Rights in the postmodern condition" in Sarat and Kearns (eds) (1997) *Legal rights. Historical and philosophical perspectives* 263–304 (Hereafter Schlag (1997).) See also Schlag "Fish v Zap: The case of the relatively autonomous self" 1987 *The Georgetown LJ* 37–58; Schlag "Normative and nowhere to go" 1990 *Stanford LR* 167–191.

11 Schlag (1997) 285–286.

12 National Unity and Reconciliation

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

Constitution contains metaphors of "healing"; "foundations"; "improving" and "building".[13] In my view, although these metaphors could lead to an "instrumental" reading and interpretation of the Constitution, they need not do so. The metaphors of motion describing change, progress and transformation could rather be interpreted as signifying an openness. The Constitution could be read and interpreted as a bridge, if the conditions associated with the metaphor are accepted. For example, a rift is a condition for a bridge, and a bridge can only exist as long as the rift exists. Following that argument, transformation and change could be attractive metaphors as long as a definite concluded end goal is not visualised. An ethical reading, having regard to the radical alterity of the other, can never strive for a definite visualised future. Because the unknown cannot be known, and the ethical space for the "event" must be kept open, the metaphors we use when describing our own utopian vision must be open and flexible. The interpretation and application of rights, such as equality, must take place in the same vein. Because complete and pure equality can never be achieved within the present system, a space for the future event must be kept open.

The approach that is followed when we deal with equality in the present system will influence future visions and possibilities. By reinforcing a harmful stereotype on the pretext of addressing previous disadvantages and subscribing to the (by now formalised) approach of substantive equality, the Constitutional Court moves within an "instrumental" aesthetic. The political aspiration of addressing past inequalities in the present could ignore future consequences. The court does not experience, realise or take account of radical alterity or radical difference which is impossible to know and define and address. It adheres to a comfortable difference. The Constitutional Court's formulation means that equality does not mean that all people should be treated the same, without recognising the fact of difference, but does not accept the radicalness and impossibility of their own observation. Kriegler J, in the *Hugo* judgment, seems to be more aware of the difficulties of difference and the harmful effects of relying on generalisations. He not only addresses the case before him, but recognises the effect and consequences of the judgment on broad society. While the majority decision reinforces current stereotypes, Kriegler J's dissenting judgment criticises the past and present *status quo* and opens possibilities of equality for the future. The dissenting judgment plays an important political role in the sense that deeply rooted socialised and cultural constructions of inequality are questioned.[14]

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13 Preamble
. . . Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

14 Sachs J followed a similar inquiry in his analysis of the patriarchal view of marriage in *Harksen v Lane* 1997 11 BCLR 1489 (CC). See Van der Walt and Botha "Coming to grips with the new constitutional order: Critical comments on Harksen v Lane NO" 1998 *SA Publiekreg/Public Law* 17.

4 *CITY COUNCIL OF PRETORIA V WALKER*

In *City Council of Pretoria v Walker*[15] the Constitutional Court had to consider whether the practice of the City Council of Pretoria of differentiating between people living in different geographical areas with regard to the paying of services amounted to unfair discrimination. In the process of the restructuring of local authorities, two formerly black townships were amalgamated with the area which formerly comprised the "old city" of Pretoria. Historically the provision of services and the recovery of service charges in these two formerly black areas had been on a very different footing from that in the former municipal area of Pretoria. There were no meters in the former townships and a flat rate was charged for services. This situation persisted after the amalgamation. A target date of June 1995 was set for the implementation of a new uniform system but this was not achieved. Walker, the respondent, who was a resident in a formerly white area, adopted the practice of paying no more than the flat rate charged in the former black townships. This resulted in a build-up of an outstanding balance on which the City Council instituted action. Walker raised unfair discrimination in defence. The Supreme Court found that the City Council's conduct had been unconstitutional. The City Council appealed to the Constitutional Court.

Langa DP acknowledged that the dispute should be seen in the light of changes which came about as a result of the adoption of a new constitutional order. He argued that the council treated the respondent, together with the other residents of old Pretoria, *differently* in the following manner. First, the residents of Mamelodi and Atteridgeville were treated differently because they were expected to pay a flat rate while a higher rate based on consumption was used in old Pretoria. Secondly, because it differentiated between old Pretoria and those parts of Atteridgeville and Mamelodi where meters had already been installed; and thirdly because the council took legal steps to recover payments from residents of old Pretoria only and failed to take similar action against defaulters in Mamelodi and Atteridgeville.

The court was satisfied that there was a *rational connection* between the different manners of differentiation and their objective. It found that the measures were temporary and designed to provide continuity in the rendering of services by the council while phasing in equality in terms of facilities and resources. The court then went on to consider whether the differentiation constituted *unfair discrimination*. In assessing whether the differentiation amounted to unfair discrimination, Langa DP said that the wording of section 8 and the constitutional and historical context of the developments in South Africa are relevant factors that had to be considered. He noted that not all differentiation amounted to unfair discrimination and that it must be determined whether the differentiation constituted a violation of the right to equality.

Langa DP referred to the four previous judgments of the Constitutional Court[16] which dealt extensively with the equality provision in the interim Constitution and analysed the concept of discrimination. This was the first occasion on which the court had to consider the difference between direct and indirect discrimination and whether such difference had any bearing on the section 8 analysis as developed in the four

15 1998 3 BCLR 257 (CC).

16 *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC); *President of the Republic of South Africa v Hugo supra*; *Harksen v Lane NO supra* and *Larbi-Odam v Members of the Executive Council for Education (North-West Province)* 1997 12 BCLR 1655 (CC).

earlier judgments. The judge accepted that the facts of this case constituted *indirect* discrimination and argued that there was no reason for distinguishing between direct and indirect discrimination. He indicated that the discrimination was on *race*, one of the listed grounds in section 8(2). The council therefore had to prove that the discrimination was not unfair. He considered various factors: the position of the respondent in society, the nature and purpose of the power, the flat rate, the issue of cross-subsidisation, the selective enforcement. The court took note of the fact that the respondent did not belong to a *group* that had been *disadvantaged in the past* by racial policies and practices, but did belong to a *racial minority* which could in a political sense be regarded as vulnerable. Members of such minorities who are vulnerable to discriminatory treatment must look to the Bill of Rights for protection:

> "When that happens a court has a clear duty to come to the assistance of the person affected. Courts should however always be astute to distinguish between genuine attempts to promote and protect equality on the one hand and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other."[17]

In the light of this the court found that the practice of charging different rates for residents of formerly black areas and residents of old Pretoria did not amount to unfair discrimination, as the differentiation was the only practical solution in the circumstances of the case. With regard to the policy of selective enforcement of debt, the court came to a different conclusion.

The court's reference to historical factors such as the existence of a culture of non-payment in Atteridgeville and Mamelodi, is significant. The reason for the culture of non-payment is partly the history of resistance against apartheid structures in the past where services in these areas were non-existent or very poor. In old Pretoria the services were of a high standard. The context did not encourage a culture of non-payment. The council had to confront the problem of preventing a culture of non-payment in old Pretoria and at the same time convert the culture of non-payment in Mamelodi into one of payment. The city council argued that the policy adopted by the council was to enforce payment in old Pretoria, if necessary by means of suspension of services or legal action, and to encourage payment in Atteridgeville and Mamelodi, but not to take legal action against the residents while the installation of meters was still in progress.

Langa DP argued that section 8 of the interim Constitution was a guarantee that "at least" at the level of law-making and executive action, "hurtful discrimination" would not be a part of South African life. Although a city council may *differentiate* by taking note of, for example, the financial position of their debtors, the policy it relies on must be "rational and coherent". Although section 8(3) provided for special measures in order to address the inequalities of the past, the council did not argue that the policy of selective enforcement was a measure adopted for the purpose of addressing the disadvantage experienced in the past by the residents of Atteridgeville and Mamelodi. Langa DP stated that "the reasons given for the policy were pragmatic". This comment can be seen as a rejection of "pragmatic" instrumental, policy-based decisions in favour of principle-based decisions.[18] He stated:

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17 Par 48, 280.

18 Dworkin *Taking rights seriously* (1977) and *Law's empire* (1986) distinguishes between "rules", "policy" and "principle". He associates "policy" with the pragmatism that was brought about by American realism. Dworkin focuses on the application of principles. His view of "law as integrity" and "constructive interpretation" is based on the notion of "principles". He argues

continued on next page

> "No members of a racial group should be made to feel that they are not deserving of equal "concern, respect and consideration" and that the law is likely to be used against them more harshly than others who belong to other race groups."[19]

The majority of the court concluded that the council's conduct of selective enforcement of debt amounted to unfair discrimination within the meaning of section 8(2) of the interim Constitution. Since the respondent's challenge was directed at the conduct of the council which was not authorised, either expressly or by necessary implication, by a law of general application, section 33(1) was found not to be applicable.

The order finally made by the court is interesting. It found that the course followed by the respondent was inappropriate to the extent that his reliance on the breach of the section 8 right was not a defence to the council's claim. It was found that the High Court's order of absolution from the instance with costs was not appropriate relief. The effect of the decision was that even though the council's conduct amounted to unfair discrimination, Walker was not in the right to react by not paying. This case is a good illustration of the multiple factors that come into play at the intersection of the public, the constitutional protection of equality and justice (the ethical). The court's approach reflects a "principle"-based approach and not a "pragmatic" instrumental one. In other words, the court's approach is reflective of political and public action and speech. The court was not ruled by the necessity and tangibility of the economy of present politics and policies.

I would like to put this judgment in the formulation of "legal interpretation as recollective imagination".[20] In this case the political contexts of the past, the present and the future were taken into account. The court had to enact memory, but also had to reimagine the future. The past policies of the apartheid government, whose services to people living in the townships were very poor if not non-existent, had to be addressed. The council had to confront a culture of non-payment. The fact is that whereas non-payment might have been justified in the past, the present requires everyone to pay for services, to contribute to the public good. Walker was not in the right by contributing to the culture of non-payment. The court, however, found that the council was in the wrong in following a policy that discriminated unfairly against some persons. In the light of the present and future context and circumstances, the court found that the actions of the city council amounted to unfair discrimination. The court's order reflects the impossibility of the situation. In the end, the decision remains undecided. Although the court accepted that the policy of the city council amounted to unfair discrimination, Walker was also in the wrong. Although the court found that Walker was vindicated on a political and moral level, he was ordered to pay the outstanding balance. If this case had been only about aspects of instrumental/policy considerations, one could say that the city council was the "winner", but if we situate it in the public realm, no one walked out as a winner. The

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that when a judge makes a decision she must not merely find the correct rule (like the conventionalist or positivist judge) or apply the relevant policy (like the pragmatist) judge, but through constructive interpretation find the principle that provides the best "fit" and the best "justification".

19 Par 81, 290.

20 Cornell *Transformations* (1993) 23–44 puts forward the notion of "legal interpretation as recollective imagination". This entails the rethinking of the relationship between the past (as embodied in the normative conventions which are passed down through legal precedent) and the projection of future ideals through which the community seeks to regulate itself. See also Van Marle "'All sorrows can be borne if you put them into a story or tell a story about them' The literary imagination, recollective imagination and justice" 2000 *SA Publiekreg/Public Law* 137.

court's decision highlighted the necessity of a relationship and of interaction between the city council and the public.

In a dissenting decision, Sachs J argued that although Walker was treated *differently* he was not *discriminated* against "in any manner whatsoever"; alternatively that if the council's conduct could be classified as discrimination against him, it was *not unfair*. In his view, the selective enforcement was based on the identification of objectively determinable characteristics of different geographical areas and there was *no indirect* discrimination on the grounds of race simply because whites lived in one area and blacks in another. He stated that the mere coincidence in practice of differentiation and race, without some actual negative impact associated with race, is not enough to constitute indirect discrimination on the grounds of race. In order to prove discrimination and unfair discrimination some element of *actual or potential prejudice* must be immanent in the differentiation. He said that in the light of our *history of institutionalised racism and sexism*, there might be sound reasons for treating *direct* differentiation on the grounds specified in section 8(2) as *prima facie* proof of discrimination without further evidence of prejudice being required. In the case of *indirect* differentiation there must be some element of prejudice, whether of a material kind or to self-esteem. With reference to section 8(3), the affirmative action clause, he argued:

> "The value system clearly enunciated by section 8 read as a whole would be inverted if the spectre of indirect discrimination was automatically raised each and every time a measure had some differential impact, even if only tangential and psychological, on the advantaged groups in society. In our still fragmented and divided country, with its legacy of racial discrimination and its deeply entrenched culture of patriarchy, and with its practices and institutions based on homophobia or on a lack of attention to the most elementary rights of disabled people, almost every piece of legislation, and virtually every kind of governmental action, will impact differently on the groups specified in section 8(2) of the Constitution. There are *strong policy and practical reasons* for holding that something more than differential impact is required before indirect discrimination under section 8(2) can be inferred"[21] (my emphasis).

Sachs J argued that the real issue before the court was not about money, but about the "rights and responsibilities of citizenship" and about the "path of achieving a negotiated integration of the community into a new united Pretoria". He concluded by saying that the fact that the complainant could not succeed in terms of section 8(2) did not mean that he could not have found any remedy at all under section 8. If the complainant had based his claim on non-acceptable criteria of an arbitrary character which infringed his rights to equal protection and equality before the law, he could have sought a remedy based on a violation of section 8(1) of the Constitution. The question before the court would then have been whether the law had been impartially applied and administered and not whether the complainant's dignity had been attacked.

In the *Walker* case the court had the opportunity to apply the equality test set out in *Harksen*. It was also the first case in which the court had to decide on the difference in approach to direct and indirect discrimination. The political and historical context played a crucial role in the assessment of this case. The court again affirmed the substantive approach to equality, that differentiation will not necessarily amount to discrimination that is unfair. In some cases differential treatment will be the only way of achieving equality. The difference between the decisions of Langa DP and

21 Par 112 and 116, 301–303.

Sachs J is reflective of the ambiguities and undecidability within the constitutional guarantee of equality and of its application. Even though Langa DP concluded that section 8(2) had been infringed, the order made by the court could not bring the relief that the complainant wanted. Sachs J, by denying infringement of section 8(2), took more radical account of the political and historical contexts. His references to "rights and responsibilities of citizenship" put the whole issue into one of political reconstruction of the past. He argued that the fact that the complainant's dignity was not infringed and no prejudice could be proved, did not mean that section 8(1) had not been violated. Sachs J's approach here was consistent with his approach in *Harksen*, where he argued that the hidden structures of inequality should be brought to light. The *Walker* case confronted the court with difficult questions with no easy answers. It is these difficult questions which *par excellence* highlight the undecidability of the law.

5 CONCLUDING REMARKS

In *Hugo*[22] the court followed an "instrumental approach" in deciding that a presidential pardon to all single mothers with children under the age of 12 did not amount to unfair discrimination. The majority of the court applied its approach of substantive equality to conclude that the state did not discriminate unfairly against Hugo. This case illustrates something about my fear that substantive equality will again become formalised and why I argue for an ethical interpretation rather than a substantive interpretation of equality. The court said that we cannot insist on "identical treatment" and that each case will require a careful and "thorough understanding" of the impact of the discrimination in the particular case and that a "classification which is unfair in one context may not necessarily be unfair in a different context". This is exactly what we generally understand under the substantive approach. But it is striking how the court focused only on certain particulars and contexts. O'Regan J in her judgment focused on the *group* which has suffered discrimination. She relied heavily on "social reality", which is that at present and in the near future most mothers will bear the primary caretaking responsibility. Kriegler J, who delivered a minority judgment, argued that to regard mothers as the primary care givers is a root cause of women's inequality. What I find encouraging about Krieglers J's approach is that he emphasised the importance "of both men and women to form their identities freely". An ethical interpretation of equality does not accept one social reality as the final one. If one takes difference seriously, the implication is exactly that difference cannot be reduced to a generalisation of sameness, not even to prove a political point. One set of the concrete contexts and specific circumstances that was ignored by the court is that of the child, Hugo's son. From the perspective of an ethical interpretation of equality, the state discriminated between the children of single mothers and the children of single fathers because not enough attention was given to the concrete contexts of the children. In this respect the court also did not follow a relational approach;[23] in other words, the special relationship between a parent and a child was ignored and only the parent's rights received attention. The substantive approach followed by the court investigated the

22 *Supra.*

23 See Nedelsky "Reconceiving rights as relationships" 1993 *Revue of Constitutional Law* 1 and also "Reconceiving autonomy: sources, thoughts and possibilities" 1989 *Yale J of Law and Feminism* 7; "Law, boundaries and the bounded self" 1990 *Representations* 162 and Minow *Making all the difference. Inclusion, exclusion and American law* (1990).

past and present context. An ethical interpretation of equality follows a future-orientated approach and does not accept a present experience as "the reality". An ethical interpretation of equality would have acknowledged the concrete context and specific circumstances of Hugo and his son. It would have accepted radical difference, in other words, not the difference as perceived by a substantive approach to equality. An ethical interpretation of equality does not presume to know difference fully and to accommodate difference fully.

In *Walker*[24] the court had to consider whether the Pretoria City Council's differential treatment of people living in different geographical areas along racial lines amounted to unfair discrimination. The court decided that the differentiation in method of payment between people living in different areas did not amount to unfair discrimination. In making this decision the court considered the difference in concrete contexts and specific circumstances of living. The people in Pretoria who paid a higher rate lived in far better conditions and received better services than those living in Mamelodi and Atteridgeville. In this case, the court acknowledged the difference in concrete contexts and did not apply an instrumental predictable approach to equality. The court found that the City Council's practice of taking legal steps to recover payments from some residents and not from others amounted to unfair discrimination. The fact that the court made a different finding in regard to the differential treatment in taking steps to recover payments is another positive aspect that shows that it considered the contexts and the difference between the two practices. As I have already mentioned, the court ordered Walker to pay the money he owed to the City Council even though it conceded that it was unfair discrimination to take steps against him and not against other defaulters. Here the court not only took into account the past and the present, but was also future-orientated. The decision reflects the undecidability of law and the impossibility of justice. I am not labelling the court's approach in *Walker* as an ethical interpretation of equality, but hints of an ethical interpretation can certainly be identified. The court realised the significance of public space, equality and justice and interpreted equality in the light of the ethical intersection between them. Walker and people in similar situations were treated by the court with a better understanding of equality than Hugo had been.

It is too early to come to any final conclusions about the South African approach to equality. The South African Constitutional Court is still young and in an initial phase of developing approaches to equality. As I have already stated, my concern is that the Constitutional Court, lawyers and legal scholars may accept the present "substantive" approach as adequate to deal with equality and difference. The fact that it seems as if the Constitutional Court has more or less formalised its approach troubles me. We should also turn to other perspectives as inspiration for the interpretation of our Constitution.

The actual application of an ethical interpretation of equality must still be tested in many concrete contexts and specific circumstances. This is something that I shall occupy myself with in future. This article is the first step towards an ethical interpretation of equality. I wish to stress that I see this not only as an abstract theoretical interpretation. In my view, an ethical interpretation of equality is not only a philosophical and theoretical point of view, but something that can be tested in real situations. Part of an ethical interpretation of equality will be to challenge the law's

24 *Supra.*

current belief in fixity. The challenge will be to show that an ethical interpretation of equality and, accordingly, an open-ended approach, can have a more substantial effect on the concrete contexts and specific circumstances of individuals than a formalised approach, and in the end can serve the ideal of justice better. If an ethical interpretation of equality had been followed in the case of Hugo, he and his son could have found themselves in better, more just circumstances.

According to the dictionaries, we call a crop of artificially and experimentally grown bacteria a culture. The fact is worth noting for at least two reasons: Firstly, it reminds us that the word "culture" is derived from the Latin cultura, *a word for farming, for a complex process in which we deliberately and intentionally interfere with nature and try to improve its performance. Secondly, it points to the fact that, whatever one's culture is, it is something that has been created, artificially and experimentally; it is not something that is given to us in the way in which the number and the colour of our eyes is given to us.*

James Moulder "Moral education in a multicultural environment" 1992 Acta Academica 17.

The address of the laws of Athens in Plato's *Crito*[*]

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OPSOMMING

Die gesprek oor die wette van Athene in Plato se *Crito*

In Plato se dialoog *Crito* vind 'n denkbeeldige gesprek plaas waarin Socrates deur die wette van Athene ondervra word. Die wette verteenwoordig die stem van rede. Hulle deel Socrates mee dat die burger wat, nadat hy die regeringskap en regspleging van sy land ervaar het, besluit om nie te emigreer nie, deur ooreenkoms verplig word om die wette van die staat te gehoorsaam. Hierdie gedagte van 'n ooreenkoms tussen die indiwidu en die staat het 'n reusagtige invloed op latere filosofie uitgeoefen, veral op die idees van Hobbes, Rousseau, Locke en Jefferson. Tog word die Platoniese oorsprong van hierdie gedagte selde erken. In hierdie artikel word die gronde vir gehoorsaamheid aan die reg, soos in die *Crito* uiteengesit, bespreek.

At the dawn of this new century, respect for law appears to be in decline everywhere.[1] Newspapers, television, the Internet and sometimes, sadly, our own experience proclaim the extent of the problem. From executive fraud, political corruption, and match-fixing in sport at one end of the spectrum, to hijackings and rape at the other, lawlessness in its myriad guises hounds us everywhere.

The swelling tide of lawlessness will be turned only by the widespread inculcation of an attitude of respect for law at the individual level. That, in turn, can be accomplished only by providing the individual with a cogent reason for obeying the law. A key question for our age, then, is: "Why ought we to obey the law?" This, of course, is a widely debated topic in modern jurisprudence. The earliest consideration of the question in Western literature occurs in an ancient text, Plato's dialogue *Crito*. There Plato establishes three grounds for obedience to law. I shall examine these, and argue for the contemporary relevance of at least one of them.

But first, a glance at the factual background to the dialogue. In about 400 BC, the Athenian philosopher Socrates was accused by his enemies of heresy and of corrupting the youth of Athens. He was tried, convicted and sentenced to death by the

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* Text of a paper read at the XIth International Symposium of the Olympic Center for Philosophy and Culture, at Pyrgos, Greece, 2000-08-13–18. In this paper I develop, modify and in certain instances depart from the views expressed in my article "Why ought we to obey the law? – Plato's startling answer" 1999 *Akroterion* 24.

1 See Domanski "Stemming the blood-dimmed tide of lawlessness: the rediscovery of duties" 2000 *CILSA* 1.

assembly. While the trial may have been procedurally fair, the charges and the conviction were substantively unjust. Socrates was the victim, not so much of the law *per se*, as of men who manipulated the machinery of the law to suit their own ends.[2] This distinction will turn out to be significant. As the dialogue opens, Socrates is in prison, awaiting the execution of the death sentence. His friend Crito visits him in order to persuade him to escape. Crito is astonished to find his beloved friend and teacher peacefully asleep. Upon awakening, Socrates shows complete indifference to the prospect of death. He listens carefully to Crito's arguments and declares his willingness to examine them in the light of reason, and so decide whether he ought to escape. He says:[3] "I am and always have been one of those natures who must be guided by reason."

Reason is the "golden cord"[4] that runs through the *Crito*, as it does through the entire Platonic *corpus*.

The choice that Socrates is now faced with is a simple, though not an easy one: to escape and so disobey the law of Athens, or to obey the law and submit to the sentence of death imposed on him. The course he chooses will depend on whether a duty to obey the law exists. The existence of such a duty depends in turn upon whether one or more cogent reasons for obedience to law can be adduced.[5] Thus, as

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2 *Crito* 54c; Taylor *Plato : The man and his work* (1926) 173. I rely throughout on the translation of this dialogue by Benjamin Jowett. The *Crito,* the foundational Western text on the citizen's duty to obey the law, has attracted the attention of many modern commentators. Sadly, most of them do no more than emphasise the estrangement between the tortuous complexities of modern analytical philosophy and the simple, universal values of Socrates and Plato. A vivid illustration of the vastness of this chasm is to be found in a view expressed in all seriousness by a distinguished modern scholar in the field of Platonic studies: according to Vlastos (quoted in 1982 *Am J of Jurisprudence* 86), Socrates in the *Crito* is intuitively sensing and groping towards Rawls's and Hart's principle of fairness, though the *Crito* falls short of formulating or explicating the principle, "presumably because Plato lacked either the clarity of thought or the felicity of expression which is the mark of contemporary philosophy" Enough said! Here is a small selection of recent American literature on the *Crito*: Woozley *Law and obedience: The arguments of Plato's Crito* (1979); Driebasch "Agreement and obligation in the *Crito*" 1978 *New Scholasticism* 168; Barker "Why did Socrates refuse to escape?'' 1977 *Phronesis* 13; Strauss "On Plato's *Apology of Socrates* and *Crito*" in *Essays in honour of Jacob Klein* (1976) 255; D'Amato "Obligation to obey the law a study of the death of Socrates'' (1975–1976) 49 *Southern Calif LR* 1079; Congleton "Two kinds of lawlessness: Plato's *Crito*" 1974 *Political Theory* 445; Vlastos "Socrates on political obedience and disobedience'' 1974 *Yale Rev* 517; Weinrib "Obedience to the law in Plato's *Crito*" 1982 *Am J of Jurisprudence* ("Weinrib") 85; Soper "Another look at the *Crito*" 1996 *Am J of Jurisprudence* 103.

3 *Crito* 46b. In this article, I treat the views of Socrates and Plato interchangeably. There is ample authority for the proposition that Socrates and Plato are an inseparable unity: see eg Guthrie in Cantor and Klein (eds) *Ancient thought: Plato & Aristotle* (1969) 157; Rowe *Plato* (1984) 1–4; Field *Plato and his contemporaries* (1967) 61–63; Penner in Kraut (ed) *The Cambridge companion to Plato* (1992) 121ff. For the sake of brevity, I have done violence to the form of the *Crito* by presenting the views of Socrates as though they were his unilateral pronouncements. In fact, these views often take the form of a consensus position arrived at by Socrates and his interlocutor by way of a bilateral process of question and answer. However, I have not misrepresented the substance of the argument in the *Crito*.

4 *Laws* 644–645 transl Jowett.

5 One factor which Socrates instantly and courageously dismisses is the power of the multitude (ie of society) to inflict punishment in the form of "imprisonments, confiscations, deaths, frightening us like children with hobgoblin terrors". This factor cannot be allowed to enter into the equation: *Crito* 46c–d.

is so often the case in Plato, it all comes down to reason: if obedience to law can be justified in reason, then a duty to obey exists, and Socrates must submit to the death sentence. Conversely, if there is no reasonable basis for obedience, there is no duty to obey the law, and Socrates is free to do as Crito urges.

With the debate thus finely poised, we come to the centrepiece of the dialogue, the imaginary arrival at the prison of the personified laws of Athens.[6] In a magnificent discourse which is rich in principle and worthy of the closest study, the laws address and interrogate Socrates. The laws here implicitly represent the voice of reason. On the face of it, they speak only to Socrates; in reality, their address is directed neither exclusively to Socrates, nor exclusively to Crito,[7] but to every citizen of every state. And this is no less than we should expect from universal teachers like Socrates and Plato.

The laws begin their address by posing a rhetorical question which remains as relevant to modern societies as it was to ancient Athens:[8]

> "Do you imagine that a State can subsist and not be overthrown, in which the decisions of law have no power, but are set aside and overthrown by individuals?"

This question plainly implies that lawlessness in any form erodes the fabric of the state. So long as respect for law is lacking in the individual, this erosion is bound to accelerate. In political terms, the end result would, according to Plato, be a tyranny.[9] The laws of Athens posit three grounds for obedience to law:[10]

> "[H]e who disobeys us is, as we maintain, thrice wrong: first, because in disobeying us he is disobeying his parents; secondly, because we are the authors of his education; thirdly, because he has made an agreement with us that he will duly obey our commands."

I shall examine these grounds in the sequence in which they are presented here. The first ground is based on a vivid metaphor, namely the personification of the laws as the parents of the individual citizen. The laws say to Socrates:[11]

> "[S]ince you were brought into the world and nurtured and educated by us, can you deny in the first place that you are our child and slave, as your fathers were before you? And if this is true, you are not on equal terms with us; nor can you think that you have a right to do to us what we are doing to you."

If only to the extent that it is based on a *quid pro quo,* this ground for obedience is reasonable: in return for the inestimable gifts of birth, nurture and education, the citizen must regard the laws as his parents and obey their commands. In these circumstances, as Plato points out, the individual cannot claim to be on equal terms with the state.[12]

Moreover, this ground, modelled as it is on the relationship of parent and child, carries a strong emotional charge which may usefully serve to inculcate an attitude of respect for law in children who are too young to appreciate the other grounds for obedience posited by the laws.

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6 *Crito* 50a–b.
7 As eg Weinrib (85) would have it.
8 *Crito* 50b.
9 *Republic* 562c–564a.
10 *Crito* 51e.
11 *Idem* 50d–e.
12 There is no departure from this principle in the equality clause in the South African Bill of Rights: s 9 of the Constitution of the Republic of South Africa 108 of 1996 places all individuals on an equal basis and proscribes discrimination by the state against individuals. This provision does not, however, go so far as to place the individual on an equal footing with the state.

The laws go further still, and declare:[13]

> "[O]ur country is more to be valued and higher and holier far than mother or father or any ancestor . . . whether in battle or in a court of law, or in any other place, [the citizen] must do what his city and his country order him; or he must change their view of what is just: and if he may do no violence to his father or mother, much less may he do violence to his country."

Modern opinion tends to dismiss these views of Plato as authoritarian or paternalistic. Yet there is little in what Plato says here that is offensive to reason. Be that as it may, the second and third grounds for obedience may well be more congenial to modern thinking.

The second ground posited by the laws requires obedience from the individual by virtue of the fact that the laws are the authors of his education. There is some overlap between the first ground and this one, which has been anticipated in the earlier discussion.[14] The laws of Athens describe themselves[15] as the authors of the education of the citizen, because the laws regulate the system of education in which Socrates has been trained:[16] it is at the behest of the laws that Socrates has been trained by his father in music and gymnastic,[17] the two key elements of Athenian education. Such an education is regarded by the laws as a precious boon, for which the citizen is obliged to pay with his obedience. Again, this exchange can hardly be faulted in reason.

This brings us to the third ground posited by the laws of Athens. Of the three, it is arguably the most powerful and persuasive; it is one of Plato's major contributions to Western jurisprudence. Here are the words in which the laws introduce this ground:[18]

> "[W]e further proclaim and give the right to every Athenian, that if he does not like us when he has come of age and has seen the ways of the city, and made our acquaintance, he may go where he pleases and take his goods with him; and none of [our] laws will forbid him or interfere with him. Any of you who does not like us and the city, and who wants to go to a colony or to any other city, may go where he likes, and take his goods with him. But he who has experience of the manner in which we order justice and administer the State, and still remains, has entered into an implied contract that he will do as we command him."

Thus any citizen is free, at any time after he comes of age, to emigrate and to take with him all of his movable property.[19] This freedom is greater than that afforded by

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13 *Crito* 51a; 51b–c.

14 *Idem* 50d, and text to fn 11.

15 *Idem* 51e.

16 *Idem* 50d.

17 *Ibid.* Music, the mental element of Platonic education, must here be understood in a very broad sense, to include the entire domain of the nine ancient Muses. In that sense, musical education embraces literature, art, music in the strict sense, and much besides. Similarly, gymnastic, the physical element of education, must be understood to include all forms of bodily training or sporting activity. Plato's dialogue, the *Republic*, contains an extensive treatment of his system of education.

18 *Crito* 51d–e.

19 Jowett's translation here ("goods") is clear on this point; other translations are less clear. Both the tenor of the dialogue and our knowledge of property law in ancient Athens support Jowett's reading: it seems highly unlikely that a prospective emigrant would have been entitled to sell land of which he was in occupation, and take the proceeds of the sale with him on his departure from Athens. It seems more likely that he would have been obliged, upon emigrating, to surrender such immovable property to the state: see Vinogradoff *Outlines of historical jurisprudence*

continued on next page

certain modern states, which restrict the amount of money that an emigrant may take with him. By choosing to remain in the country, however, the citizen impliedly binds himself in contract to obey the laws of the state.

It follows from the last two passages quoted that the citizen's contractual obligation to obey the law is subject to two conditions: the first is that he must in law be free at any time to emigrate and take his goods with him, so placing himself beyond the reach of the law; the second, as we saw earlier,[20] is that he must in law be free to campaign for reform of a law to which he is opposed.

Consistently with this, the citizen will not be contractually bound to obey the law in a state where these two conditions are not met. Thus, for example, citizens of Nazi Germany would not have been bound by a contractual obligation to obey the law.

An interesting recent case is that of Zimbabwe, where war veterans, backed by legislation, have invaded privately owned farms. To date, the farmers have acquiesced in the invasions, and in so doing have obeyed the law. Are they, in Platonic terms, contractually bound to acquiesce? An apparent injustice has been done to them. Yet, subject to the fulfilment of the two key conditions, the question would have to be answered in the affirmative.

The most notable difference between the contractual ground for obedience to law and the other two grounds is the voluntary character of the former. The other grounds afford little scope for the exercise of free will by the citizen: obedience is demanded of him *ex post facto,* by virtue of factors – birth, nurture, education – which have long since run their course and are therefore beyond his power to influence. In contrast, the contractual ground, by reserving to the citizen the right to emigrate and take with him his movable property, as well as the right to campaign for reform of the law, in no way restricts the reasonable exercise of his free will.

Thus, to the question: "Why ought we to obey the law?" Plato's compelling answer is: "Because, whether you realise it or not, you have by your conduct agreed to do so." The laws of Athens remind Socrates[21] that the citizen who commits a breach of this contract

> "neither obeys [our commands] nor convinces us that our commands are wrong; and we do not rudely impose them, but give him the alternative of obeying or convincing us; that is what we offer, and he does neither".

This contractual ground for obedience to law, like the other grounds, is fully consonant with reason.

Plato, the father of philosophy, and his teacher, Socrates, were profoundly original thinkers. Here in the *Crito*, for the first time in Western literature and jurisprudence, we find the relationship between the individual and the state expressed in contractual terms. There were, of course, many later writers of "footnotes to Plato"[22]

Vol 2 (1922) ("Vinogradoff") 199–228. The citizen's freedom to emigrate was not merely theoretical for, according to Vinogradoff (37), "every day people all over Greece were leaving their native cities because they found themselves in disagreement with social ordinances".

20 *Crito* 51c, and text to fn13. Did Plato later add a third condition, applicable to laws for violation of which the death penalty was prescribed? According to Lloyd *The idea of law* (1964) 55, Plato later held that only when the state itself embodies the idea of the good can the life of the individual properly be sacrificed to the state.

21 *Crito* 52a.

22 In the famous and apposite words of Whitehead *Process and reality* (Griffin and Sherburne eds 1978) 39: "The safest general characterisation of the European philosophical tradition is that it consists of a series of footnotes to Plato."

on this subject: Hobbes, Rousseau, Locke and Jefferson are probably the best known. Does any of them fully acknowledge his debt to Plato?[23]

Various objections have been raised to Plato's contractual ground for obedience to law. A typical modern challenge runs as follows:[24]

> "[I]f one is not a full citizen, what are one's obligations to the laws? It is easy to imagine how a freeborn Greek male citizen (Socrates) is bound by an agreement with the state, but would a Greek slave or woman be bound by the law, and how? . . . Consider the matter with respect to the United States today: Are disadvantaged inner-city minority youths full citizens? What obligation do they have to the laws? Are they bound by them?"

In the hierarchical societies of the ancient world, these concerns would have carried little weight : the Platonic model, at least on the face of it, is confined to citizens.

At least one cogent reason for obeying the law, that based on agreement, has now been established. It follows that the individual is duty-bound to obey the law of the state. A vital question which now arises, is whether this duty is absolute or relative. Is the duty not perhaps dependent upon the circumstances of each particular case? The answers of Socrates to these questions are unequivocal, and they flow directly from a fundamental principle which he articulates early in the dialogue. This principle, a universal one,[25] is that the injuring of another can never be just. Socrates holds[26] that we ought never

> "when injured, [to] injure in return, as the many imagine; for we must injure no one at all . . . we ought not to retaliate or render evil for evil to any one, whatever evil we may have suffered from him . . . neither injury nor retaliation nor warding off evil by evil is ever right".

This principle is cast in categorical terms and plainly admits of no exception. Thus, given that a duty to obey the law exists, that duty must be absolute. From the Socratic principle of never returning injury for injury, it follows that even if the state has injured an individual, the latter may never retaliate by disobeying the law of the state.

The duty to obey is plainly a very demanding one, which does not depend on the circumstances of a particular case. Thus, even if there had been unfairness in the conduct of the trial of Socrates – which was not the case – this would have afforded no justification for his escaping from prison and so disobeying the law. The sentence

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23 The fact that the social contract envisaged by Hobbes and Rousseau differs from Plato's original is of no consequence in the present context: the difference is one of degree, not of kind. There are writers who argue that, to Plato, the relation of the state to the individual is not contractual but – as the first ground for obedience would have it – one between parent and child. These writers would hold, with Maine, that the characteristic feature of ancient societies like classical Athens was status, not contract. Indeed, our knowledge of the social structure of classical Athens lends support to this view. (See eg Maine *Ancient law* (1920) 174; Barker *The political thoughts of Plato and Aristotle* (1906) 70; Bryce *Studies in history and jurisprudence* Vol 2 (1901) 464.) But the meaning of the text is plain, and there is no good reason to depart from it: Plato is postulating nothing less than a contract between the individual and the state. Moreover, there is no difficulty, in reason or in law, in the notion of a contract between parties who are in an unequal bargaining position. Examples abound today, as they did in the past.

24 Rohrer *The Hypertext Crito* HTML edition (April 1995) 15.

25 It occurs eg in Christian teaching (Luke 6:29), elsewhere in Plato's dialogues (eg *Gorgias* 475d–e; *Republic* 335), Justinian's codification of Roman law (I1 1 3), and in Blackstone's *Commentaries on the laws of England* (Introduction 2 40).

26 *Crito* 49b–d.

imposed on Socrates *was*, of course, unjust,[27] but again, this fact cannot justify disobedience. These conclusions are supported by the force of the rhetorical question posed by the laws of Athens at the start of their discourse.[28]

The adoption of this key principle of not returning evil for evil clears the way to treating every case of disobedience on the basis of general principle, that is, as a simple violation of an absolute duty to obey the law. In other words, this principle rules out the possibility of invoking special circumstances as grounds for treating a particular case of disobedience as exceptional and therefore excusable. There is no middle ground or grey area.

This uncompromising approach would find little favour in the present. It does, however, bring into the law the element of certainty, whose vital importance we seem to be losing sight of today. Thus Socrates is plainly bound by an absolute duty to obey the law, and he calmly submits to the sentence of death.

The laws of Athens close their address to Socrates with these words:[29]

> "Listen, then, Socrates, to us who have brought you up. Now you depart in innocence, a sufferer and not a doer of evil; a victim, not of the laws, but of men. But if you go forth, returning evil for evil and injury for injury, breaking the covenants and agreements which you have made with us, and wronging those whom you ought least to wrong, that is to say, yourself, your friends, your country, and us, we shall be angry with you. Listen, then, to us and not to Crito."

Socrates acknowledges the voice of reason.[30] His parting words represent the harmonisation of the law of Athens with the higher law:[31] "Leave me then, Crito, to fulfil the will of God, and to follow whither he leads."

Plato's wise counsel, then, to a society afflicted by disrespect for law is to remind us that we are bound to obey the laws of our state, not because some external authority has imposed them upon us, but because we have agreed to obey. We neglect this agreement at our peril.

One last question remains. It is in the context of widespread contemporary lawlessness that Plato's teaching on the duty of the individual to obey the law has been examined in this article. But a major problem which confronts us today is institutional lawlessness, that is, unlawful conduct perpetrated by collectivities such as governments and corporate bodies.

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27 *Idem* 50b–c.

28 *Idem* 50b, and text to fn 8. In the words of Stein and Shand *Legal values in Western society* (1974) 46–47: "Socrates' argument is that the law has an authority which is independent of whether its content is just, and independent of whether the sanction for violation is effective. To try to escape the sanction would be a breach of agreement . . . The city cannot continue if the court's decisions are set aside by individuals. The individual cannot pick and choose which laws he will obey and which he will not. Socrates prefers to die obedient to the laws rather than live a lawless life which would contribute to the dissolution of the city."

According to Rawls ("Legal obligation and the duty of fair play" in Hook ed *Law and philosophy: A symposium* (1964) 3ff as summarised by Brandt 48) a modern version of Socrates's argument adopts the idea of a duty not to "free-ride". It is unfair to enjoy the benefits of society without making some contribution in return. The benefits of a secure and ordered life are available only because almost everyone obeys the law. These benefits are available to everyone, irrespective of whether they are law-abiding themselves. A person who does not obey a law is to that extent free-riding.

29 *Crito* 54b–c.

30 *Idem* 54d.

31 *Idem* 54d–e.

What remedy is there for unlawful conduct on the part of government? Plato gives his answer, albeit obliquely, not in the *Crito,* but in the *Republic.* There the principle is established that the characteristic features of a state are invariably derived from the individuals in that state. In Socrates's own words:[32]

> "Must we not acknowledge that in each of us there are the same principles and habits which there are in the State; and that from the individual they pass into the State? – how else can they come there? Take the quality of passion or spirit; – it would be ridiculous to imagine that this quality, when found in States, is not derived from the individuals who are supposed to possess it, eg the Thracians, Scythians and the same may be said of the love of knowledge, which is the special characteristic of our part of the world, or of the love of money, which may, with equal truth be attributed to the Phoenicians and Egyptians."

From this it follows that if disrespect for law is widespread in the citizenry, government too can be expected to engage in unlawful conduct (which could take such forms as excessive taxation, fraud, corruption and the crushing of legitimate political opposition). It has been well said that we get the government we deserve.

Thus the remedy for lawlessness in government lies in the hands of the citizens. If they honour their implied contract to obey the law, their government too will behave in accordance with law. The Platonic solution to the problem of institutional lawlessness is therefore to prevent it from arising in the first place.

Plato's principle, of course, places a great and ongoing responsibility on the individual citizen: Plato requires every one of us to act at all times in accordance with law. In so doing, we will set an example for others to follow and, ultimately, influence government to act in similar fashion. The remedy lies within our power. Let us not underestimate that power.

In a multinational setting . . . federalism acts as a mechanism for effecting compromise and balance between forces of unity and those of diversity, ensuring that the former do not stifle the latter, and that unity is not translated to mean uniformity. It is paradoxical that the very framework that ensures survival of the nation because of its inbuilt compromise mechanism also safeguards the right to self-determination of subnational groupings. Federalism can thus be described as a paradoxical elixir to be purchased from any political market . . . Its inherent compromise mechanism allows for a balance to be struck between the centripetal and centrifugal pulls in the pulley.

J Isawa Elaigwu Federalism: the Nigerian experience 4.

32 *Republic* 435e–436a transl Jowett.

Still unclear: the validity of certain customary marriages in terms of the Recognition of Customary Marriages Act

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OPSOMMING

Steeds onseker: die geldigheid van sekere inheemsregtelike huwelike ingevolge die Wet op Erkenning van Gebruiklike Huwelike

Alhoewel die Wet op Erkenning van Gebruiklike Huwelike 120 van 1998 algemene erkenning verleen aan bestaande en toekomstige inheemsregtelike huwelike, is daar steeds onduidelikheid oor die geldigheid van sekere kategorieë gebruiklike huwelike. In die verlede was gebruiklike huwelike wat voor of na siviele huwelike gesluit is ongeldig, wat nadelige gevolge vir vrouens en kinders in sulke verhoudings ingehou het. Waar eggenote in 'n monogame gebruiklike huwelik later 'n siviele huwelik gesluit het, is die regsgevolge van die gebruiklike huwelik deur dié van 'n siviele huwelik vervang. In die Transkei was die posisie dat gebruiklike huwelike wel saam met siviele huwelike buite gemeenskap van goed gesluit kon word en dat in sulke situasies die siviele huwelike effektief in gebruiklike huwelike omskep is.

Die nuwe Wet bevat nie uitdruklike bepalings oor hierdie probleem nie en gevolglik analiseer ons die geldigheid van sulke gebruiklike huwelike onder beide die ou en die nuwe wetgewing. Ingevolge die nuwe wetgewing bly die fundamentele onderskeid tussen siviele en inheemse reg voortbestaan, soos gereflekteer deur die feit dat gebruiklike en siviele huwelike klaarblyklik nie terselfdertyd regtens kan bestaan nie. Dit bring mee dat talle vrouens wie se mans eggenote by beide soorte huwelike is, gepenaliseer word omdat geen regsgevolge aan hulle huwelike kleef nie. Ons argumenteer dat hierdie nadelige gevolge vermy kan word deur 'n oplossing soortgelyk aan dié wat in die Transkeise Huwelikswet 21 van 1978 vervat word. Waar 'n man beide siviele en gebruiklike huwelike met meerdere vroue gesluit het, behoort al die huwelike as geldige gebruiklike huwelike erken te word. Die vermoënsregtelike gevolge kan gereguleer word deur middel van 'n verdelingsmeganisme soortgelyk aan dié wat deur artikel 7 van die nuwe Wet ten aansien van opeenvolgende gebruiklike huwelike beoog word.

1 INTRODUCTION

The Recognition of Customary Marriages Act 1998[1] has seemingly brought an end to the inferior status of marriages entered into under customary law. Such marriages

1 Act 120 of 1998.

were previously not recognised in civil law because of their potentially polygynous nature.[2] Section 2(1) of the Act provides that all marriages which are valid according to the principles of customary law at the time of commencement of the Act are recognised for all purposes as marriages. This is also the case where a person is a spouse in more than one customary marriage, according to section 2(3) of the Act. Recognition of customary marriages, despite their actual or potentially polygynous nature, is a logical consequence of the coming into force of the Bill of Rights in the Constitution,[3] section 15(3) of which states:

> "(a) This section does not prevent legislation recognising –
>
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
>
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
>
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

Customary marriages entered into after the Act comes into operation will be valid if they comply with the requirements set out in section 3 of the Act, which states that both the prospective spouses must be over the age of 18 years, that both must consent to the marriage, and that the marriage must be entered into or celebrated in accordance with customary law.

The Act does not, however, deal explicitly with the validity of certain categories of customary marriage which have in the past been invalid in terms of civil law but may have been valid in terms of customary law. These relate mainly to customary marriages which existed in conjunction with civil marriages between one of the spouses and third parties, and to customary marriages recognised in the former independent homeland of Transkei. In this article we shall identify such problematic marriages and investigate their validity before and after the adoption of the new legislation.

In terms of the Recognition of Customary Marriages Act it is possible to have more than one customary spouse, but not customary spouses in addition to civil-law spouses. This raises the interesting question of the status of customary marriages in relation to civil marriages, and whether the favoured status of civil marriages under the old marital regime is not perpetuated by the new legislation. We shall address this issue as well.

2 PREVIOUS POSITION

Even though customary marriages were not fully recognised in the past, they were given limited recognition for particular purposes. When a man who was married in accordance with customary law died, his estate would devolve in accordance with the principles of customary law. Even where he left a will, certain assets (notably property belonging jointly to members of a certain house and "land in tribal settlement") would nevertheless devolve in accordance with customary law.[4] Widows of customary marriages were further given statutory claims for loss of support in cases where the

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2 For an overview of the debate surrounding the non-recognition of polygynous marriages, see Dlamini "Should we legalize or abolish polygamy?" 1989 *CILSA* 330 330–342 and Dlamini "The role of customary law in meeting social needs" 1991 *Acta Juridica* 71 77.

3 Constitution of the Republic of South Africa, Act 108 of 1996.

4 S 23 of the Black Administration Act 38 of 1927.

deaths of their breadwinners were caused intentionally or negligently.[5] *Lobolo* agreements were legally enforceable, and were exempted from the ambit of the repugnancy clause in section 1(1) of the Law of Evidence Amendment Act 1988.[6] In terms of the Natal Code, customary marriages had to be registered[7] and could be dissolved only by an order of court.[8] Under the Black Administration Act 1927[9] customary marriages were given full recognition for purposes of proceedings in traditional courts. Certain other statutes also recognised customary marriages for special purposes.[10]

African people could also marry in accordance with civil law under the Marriage Act 1961,[11] even when they were already married in terms of customary law. Such marriages were privileged above customary marriages, and existing customary marriages were nullified by the conclusion of a civil marriage.[12] In this way, a man and a woman married to each other under customary law could change the legal consequences of their marriage simply by marrying each other at common law.

Difficulties arose, however, owing to the potentially polygynous nature of marriages under customary law. Whereas civil marriages are strictly monogamous, many African people married each other under both civil and customary law. Some also had other customary-law spouses.[13] This led to several problems, not all of which were considered in the Law Commission's final report on Customary Marriages,[14] and which seem not to be addressed by the Recognition of Customary Marriages Act. In order to understand the position under the Act, it is necessary to consider the validity of such marriages before the commencement of the Act.

2 1 Customary marriages concluded before civil marriages

When a couple married under customary law remarried each other under civil law, their marriage became a civil one and the customary marriage was nullified.[15] Rather than causing problems for customary spouses, this situation would benefit them by extending the benefits of civil marriages to their union. This would entail a change in the nature of the marriage to take on the characteristics of a civil, rather than a customary, relationship.

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5 S 31 of the Black Laws Amendment Act 76 of 1963.

6 Act 45 of 1988. S 1(1) provides: "Any court may take judicial notice of . . . indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles."

7 KwaZulu Natal Act on the Code of Zulu Law 16 of 1985 of the KwaZulu Legislative Assembly, and the Natal Code of Zulu Law Proc R151 *GG* 10966 1987-10-09 (*Reg Gaz* 4136). The registration procedure is regulated by ss 44–50 of the Code.

8 S 48 of the Natal Code.

9 Act 38 of 1927.

10 Eg s 21(13) of the Insolvency Act 24 of 1936; s 1 of the Income Tax Act 58 of 1962; s 5(6) of the Maintenance Act 23 of 1963; s 27 of the Child Care Act 74 of 1983; and s 1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993. Some of these provisions have been repealed.

11 Act 25 of 1961.

12 Bekker *Seymour's Customary Law in Southern Africa* 5 ed (1989) ("Bekker") 253; Bennett *A Sourcebook of African customary law for Southern Africa* (1991) ("Bennett") 455.

13 Bennett 455. See also Prinsloo, Van Niekerk and Vorster "Knowledge and experience of *lobolo* in Mamelodi and Atteridgeville" 1997 *De Jure* 314 321–323

14 South African Law Commission Project 90 *The Harmonisation of the common law and the indigenous law: Report on Customary Marriages* (1998) ch 3.

15 See fn 12 above.

> "If the parties . . . conclude a marriage by civil rights subsequent to a customary marriage it has the general effect of imposing a new personal status on the spouses, one governed by the common law."[16]

But when a husband in a customary marriage married another wife at civil law, or a husband in more than one customary marriage married one of his customary wives at civil law, his civil marriage was valid, whereas the other customary unions were immediately terminated, leaving his customary wives discarded.[17] It was decided in *Nkambula v Linda*[18] that where a husband in a customary marriage subsequently contracted a civil marriage with another woman, this constituted desertion of his customary wife, who could consequently leave him without her guardian having to return any *lobolo*. Because they were not themselves opposed to polygyny or did not know of the existence or legal consequences of subsequent civil marriages, many women did not leave their customary-law husbands, and were therefore only regarded as concubines without any legal rights.[19]

Because such customary wives found themselves in an extremely precarious position, section 22 of the Black Administration Act was amended in 1988[20] to grant them certain material rights. Section 22(7) of the Act provided:

> "No [civil] marriage contracted . . . during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and the issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union."

The customary wives would therefore retain their right to support from house property or general family property, and also preserved their limited interests in their husband's estate at the husband's death.[21] This meant that, at least as far as proprietary consequences were concerned, the customary marriage continued.

Section 22(7) applied only to marriages concluded before the coming into operation of the 1988 amendment, because section 22(1) and (2) now provided that a person could no longer conclude a civil marriage if he or she was at the time married in customary law to a third person, and that no civil marriage of an African man would be solemnised without a declaration that he was not already married to another woman at customary law. This meant that the phenomenon of "discarded" spouses was no longer legally possible.[22] The making of a false declaration was regarded as a criminal offence.[23]

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16 *Hlophe v Mahlalela* 1998 1 SA 449 (T) 459A–B. See also *Fuzile v Ntloko* 1944 NAC (C & O) 2; *Sgatya v Madleba* 1958 NAC (S) 53.

17 Bennett 456–457. This was also the position in KwaZulu-Natal, where marriages otherwise had to be dissolved by court order. See *Kumalo v Kumalo* 1954 NAC (S) 54 and Bekker 269–270.

18 1951 1 SA 377 (A).

19 Peart "Civil or Christian marriage and customary unions: The legal position of the 'discarded' spouse and children" 1983 *CILSA* 39 ("Peart") 43.

20 By the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

21 Peart 39–64; Kaganas and Murray "Law, women and the family: The question of polygyny in a new South Africa" 1991 *Acta Juridica* 116 122.

22 Maithufi "Do we have a new type of voidable marriage?" 1992 *THRHR* 628 ("Maithufi") 630.

23 S 22(5) of the Black Administration Act 38 of 1927. A similar declaration, stating the names of all customary wives and children, was required when a man entered into a civil marriage under the old s 22.

The validity of civil marriages solemnised contrary to this provision (whether because of a false declaration or negligence on the part of the marriage officer) was uncertain. Before the 1998 amendment, a civil marriage concluded in the absence of a declaration, or concluded where a false declaration had been made, continued to be valid. The argument was that invalidity would prejudice the civil wife and children while the customary family would not suffer additional inconvenience.[24] Maithufi is of the opinion that such a civil marriage should, in the light of the explicit prohibition of it, at least be regarded as voidable.[25]

2 2 Customary marriages concluded after civil marriages

If a partner to a civil marriage subsequently concluded a customary marriage, the customary marriage would be regarded as null and void *ab initio*, without even the limited legal recognition bestowed upon other customary marriages.[26] Customary wives from such marriages had similar problems to wives from customary marriages where the husbands subsequently concluded civil marriages. Because the protective measures of the Black Administration Act did not apply to them, however, they did not even have the benefit of access to certain categories of property as in the former case and would, for example, be left entirely destitute upon the death of their husbands.

It is therefore clear that although customary marriages were recognised in certain instances in the past, they were regarded as subordinate to subsequent or previous civil marriages. This had detrimental consequences for customary wives, whose rights (and those of their children) to matrimonial property and succession were always inferior to those of civil-law wives. This reflected the generally inferior status of customary law *vis-à-vis* civil law in the dual South African legal order.

2 3 Customary marriages in the Transkei

In the Transkei, customary marriages were given full legal recognition. Section 3(1) of the Transkei Marriage Act 1978[27] provided as follows:

> "Nothing in this Act or any other law contained shall be construed as prohibiting –
>
> (a) any male person from contracting –
>
> (i) a civil marriage which produces the legal consequences of a marriage out of community of property with any female person during the subsistence of any customary marriage between such male person and such female person or any other female person; or
>
> (ii) a civil marriage which does not produce the legal consequences of a marriage out of community of property with any female person during the subsistence of any customary marriage between such male person and such female person; or

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24 *Malaza v Mndaweni* 1974 BAC (C) 45 55–57. See also *Mutandaba v Morenwa* 1951 NAC (NE) 326.

25 Maithufi 631. Maithufi contends that the criminal sanction attached to false declarations may indicate that the legislature did not intend the civil marriage to be void *ab initio*. See also Maithufi "The effect of the 1996 Constitution on the customary law of succession and marriage in South Africa: Some observations" 1998 *De Jure* 285 285–287.

26 See *Zulu v Mcube* 1952 NAC (NE) 225; *Qitini v Qadu* 1981 AC (N–E) 42; South African Law Commission Project 90 *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages* (1998) paras 3 1 3 and 3 2 1.

27 Act 21 of 1978 (Tk).

(iii) a customary marriage with any female person during the subsistence of any civil marriage which produces the legal consequences of a marriage out of community of property or any customary marriage between such male person and any other female person . . ."

Section 38 of the Act further stated that when a man became a party to more than one marriage (irrespective of whether one of the marriages was a civil marriage), the status and legal rights of his wives and children would be governed by customary law, and the civil marriage would be deemed to be a customary marriage.

Though the Act did not explicitly state the legal consequences of customary marriages concluded while the husband was partner to a subsisting civil marriage in community of property, the Transkei Supreme Court held in *Makholiso v Makholiso*[28] that it was clearly the intention of the legislature that such customary marriages be deemed null and void.[29] The court did, however, declare the marriage in that case a putative one, meaning that the children born of it were legitimate and could share in their late father's estate.[30]

3 POSITION UNDER THE RECOGNITION OF CUSTOMARY MARRIAGES ACT

In order to assess the validity of the various categories of customary marriage identified above, it is convenient to quote the provisions of section 2 of the Act in full. It reads as follows:

"(1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.

(2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.

(3) If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.

(4) If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages."

It seems that we should distinguish here between marriages concluded before the operation of the Act, and those concluded thereafter. In the case of the former, section 2(1) seems to imply that such marriages will be valid if they were recognised at customary law.

3 1 Customary marriages concluded before civil marriages

We would argue that, despite the fact that they were invalid at civil law, customary marriages concluded before civil marriages were probably still valid at customary law. This is because the requirements for a valid marriage at customary law would have been met, despite the subsequent civil marriage. At civil law, such marriages are void owing to the monogamous nature of civil marriages. There is nothing to indicate that, if the requirements for a valid customary marriage were fulfilled (sc that the consent of the parties and the prospective wife's father was obtained, that an agreement regarding the payment of *lobolo* was reached, and that the bride was

28 1997 4 SA 509 (Tk).
29 519F–G.
30 520E 521F 522E–F.

symbolically transferred to the husband's family[31]) they would not be deemed valid by the customary-law community.[32] Such marriages would therefore be validated by the coming into operation of the Recognition of Customary Marriages Act, leading to the problematic situation of a civil marriage co-existing with one or more valid customary marriages. Possible solutions to this problem are investigated below.

Where, after the coming into operation of the Act, a customary marriage is entered into, the validity of the marriage is determined by section 2(2), which requires that it must comply with the statutory requirements set out in section 3. Section 3(2) provides:

> "Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act . . . during the subsistence of such customary marriage."

Section 10(1) in turn provides:

> "A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act . . . if neither of them is a spouse in a subsisting customary marriage with any other person."

It is clear from a reading of these two provisions that, as under the old legislation, subsequent civil marriages to third parties are prohibited under the new Act. The Act does not, however, give any indication of the consequences of such marriages, should they nevertheless take place. Although section 4 of the Act requires the registration of existing and future customary marriages, this is not a requirement for the validity of such marriages.[33] It is therefore possible that, where the customary marriage was not registered, the marriage officer who solemnises the civil marriage may have no indication of the existence of a prior customary marriage.

The central issue is therefore whether, in such a situation, the customary marriage or the civil marriage is valid, or perhaps even both. It would seem that, given the express prohibition of subsequent civil marriages, the civil marriage would be regarded as invalid, while the customary marriage continues to exist. This would also be consonant with the fundamental requirement that civil marriages be monogamous.[34] If a valid customary marriage exists in terms of the Act, conferring validity on subsequent civil marriages would entail the creation of a new category of effectively polygamous civil marriages. The same argument would apply where a man who is partner to more than one customary marriage subsequently enters into a civil marriage with one of his customary-law spouses.

Although subsequent civil marriages between (monogamous) customary spouses are allowed in terms of section 10(1), it is not clear whether they will then retain any or all of the characteristics of customary marriages. The Law Commission's

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31 Olivier *et al Indigenous law* (1995) 17. These requirements will now be replaced by those set out in s 3 of the Recognition of Customary Marriages Act. The question whether this creates another category of marriage valid under the customs of the community but not under the Act, is beyond the scope of this article.

32 Early Native Appeal Court decisions declaring such marriages void seem to be based on notions of "Western" morality. See *Moshesh v Matee* 1920 NAC 78, *Sogayise v Mpahleni* 1931 NAC (C & O) 13 and *Zulu v Mcube* 1952 NAC (NE) 225.

33 S 4(9).

34 A marriage was defined in *Ismail v Ismail* 1983 1 SA 1006 (A) 1019 *in fine* as "the legally recognized voluntary union for life of one man and one woman to the exclusion of all others while it lasts".

recommendation that the parties should in such cases be allowed to make a declaration about the legal system which should regulate their marriages[35] is not reflected in the Act. Instead, section 10(2) and (3) stipulates that the patrimonial consequences of civil marriages apply to such marriages. Since the status and capacity of the spouses[36] and the dissolution of customary marriages[37] are effectively now in line with the position in civil marriages, it seems that for all intents and purposes, the existing customary marriage will be turned into a civil marriage. The possibility of polygyny, which exists in relation to customary marriages, is excluded by section 10(4) which precludes any customary marriages by people already married in terms of civil law.

3 2 Customary marriages concluded after civil marriages

After the commencement of the Act, customary marriages will be valid only if they comply with its requirements.[38] Section 10(4) provides:

> "Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage."

The inference accordingly seems to be that, as was previously the case, subsequent customary marriages will not be valid. The detrimental consequences to customary wives, who may not be aware of the civil marriage or of the legal effects of a civil marriage upon their relationship, thus continues. This seems logical in the light of the monogamous nature of civil-law marriages.

3 3 Customary marriages in Transkei

The new Act repeals both section 3 and section 38 of the Transkei Marriage Act[39] without giving any indication as to the status of marriages validly concluded under the Transkei Act where the man was a partner in both a customary marriage and a civil marriage out of community of property. Such customary marriages would have been valid in the Transkei, and should therefore be recognised in terms of section 2(1) of the Recognition of Customary Marriages Act. Civil marriages deemed to be customary marriages under the Transkei Marriage Act should therefore be deemed to be valid customary marriages on the same principle.

4 CONCLUSION: PERPETUATING THE SUBORDINATE STATUS OF CUSTOMARY MARRIAGES AND CUSTOMARY WIVES?

The fact that conversion from customary marriages to civil marriages is allowed, but not conversion from civil to customary marriages, should not, according to the Law Commission, be regarded as an indication of the continued inferior status of the customary marriage.[40] Given that the marriage is regulated by civil law where parties marry in terms of both systems and that a civil marriage may not be converted into a customary marriage, however, it seems that the Act has either inadvertently or deliberately perpetuated the previous subordinate status of customary marriages.

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35 South African Law Commission Project 90 *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages* (1998) para 3 3 5.

36 S 6.

37 S 8.

38 S 2(2).

39 S 13 of the Recognition of Customary Marriages Act, read with the Schedule to the Act.

40 South African Law Commission Project 90 *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages* (1998) para 3 3 6.

The fact that customary marriages solemnised after the conclusion of civil marriages will be invalid, may seem justifiable in the light of the fact that civil marriages concluded after customary marriages will also be invalid. This means, however, that if a man who is already married in terms of civil law wishes to marry other women in customary law, he will first have to divorce his civil wife and then remarry her at customary law in addition to other customary wives. This maintains a rigid dichotomy between civil and customary marriages where parties have to choose to marry in terms of either one or the other. Such a legal position is unrealistic in the light of the fact that people do not necessarily structure their lives, or perceive their lives to be structured, in terms of either one or other legal or cultural system. Although African people may organise many aspects of their lives in accordance with Western structures and norms, they often retain aspects of "traditional" identity which stand them in good stead in other contexts.[41]

Furthermore, this rigid position also fails to take sufficient account of the position of African women whose husbands have also married other wives. In migrant-labour situations, they may be unaware of existing civil or customary marriages and, depending on whether they were married first or last, be completely excluded from any benefits of the marriage. Non-recognition of a customary marriage has pernicious consequences, especially for the wives of such marriages:

> "In law, they are effectively treated as strangers – for example, there is no reciprocal duty of support or any claim for maintenance, the provisions of the Maintenance of Surviving Spouses Act 27 of 1990 are not applicable to such a surviving spouse, she has no claim if her husband dies intestate, she may be compelled to give evidence against her spouse in criminal proceedings, the children of such a union are stigmatised as being illegitimate and, in the eyes of the law . . ., she is considered a concubine."[42]

Visiting the adverse consequences of moving between the different systems upon women will not put an end to the practice. Women will be punished for the transgressions of their husbands who may not be aware of the legal consequences of their actions, or who may disagree with the conceptual legal and theoretical separation between these types of marriage.

A better solution for such women may be to determine that, where there are existing customary marriages and the man purports to conclude a civil marriage, the latter will not be regarded as a civil marriage, but will operate as a valid customary marriage, and that existing civil marriages will be transformed into customary marriages upon conclusion of subsequent customary marriages. A similar solution was adopted with regard to civil marriages out of community of property by the Transkei Marriage Act.[43] We would therefore recommend that Parliament consider adopting a system similar to that which prevailed in Transkei. In relation to marriages in community of property, we would suggest the inclusion of mechanisms regulating the distribution of property similar to that regulating consecutive customary marriages under section 7 of the Recognition of Customary Marriages Act.[44]

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41 Fishbayn, Goldblatt and Mbatha "The harmonisation of customary and civil law marriage in South Africa": Paper presented at the 9th World Conference of the International Society of Family Law, Durban, 1997-07-28–31; Bronstein "Reconceptualizing the customary law debate in South Africa" 1998 *SAJHR* 388.

42 Costa "Polygamy, other personal relationships and the constitution" 1994 *De Rebus* 914 915.

43 S 38.

44 S 7(6)–7(9).

The legal certainty and other benefits associated with having a customary marriage recognised make it imperative that as many of these marriages be awarded recognition as possible. This was also the intention of the legislature in enacting the Recognition of Customary Marriages Act. This intention is frustrated when certain categories of customary marriage fall through the protection of the Act and remain nothing more than a type of concubinage.

Finally, the legal uncertainty surrounding many customary marriages is not alleviated by the fact that, more than a year after its adoption, the Recognition of Customary Marriages Act has not yet come into operation.

The insight that "law is politics" is an opportunity to enhance social justice, not an obstacle to its achievement. In making those ideological choices, judges best meet their democratic responsibilities, not by masking their values and commitments but by addressing them candidly. Indeed, they treat their values and commitments in much the same way that they treat their legal materials – as resources to be interrogated and reworked in the service of a vision of social justice that is itself always in the process of revision and transformation.

Alan Hutchinson It's all in the game: a nonfoundationalist account of law and adjudication 323.

A captive in the wrong body: Transsexualism – a comparative perspective*

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OPSOMMING

Vasgevang in die verkeerde liggaam:
Transseksualisme – 'n vergelykende perspektief

By geboorte word die geslag van 'n baba bepaal aan die hand van sy/haar fisieke geslagsorgane. Die geboortesertifikaat is van uiterste juridiese belang aangesien die geslag van die kind hierin opgeskryf word. Vanaf hierdie moment word die geslag onveranderlik bepaal. In die geval van transseksualisme het 'n mens te doen met fisies gesonde persone, maar bestaan daar 'n teenstrydigheid tussen die fisiese geslag soos aangedui deur die geslagsorgane, die geboortesertifikaat en die geslag waar die persoon hom/haar self tuisvoel. Hierdie gevoel van ongemak met die fisiese toestand en die verwante rolpatroon kan so hewig wees dat die persoon 'n geslagsveranderingsprosedure wil ondergaan, bestaande uit 'n hormoonbehandeling en 'n geslagsveranderingsoperasie. In Suid-Afrika bestaan daar tans geen juridiese erkenning van sodanige geslagsverandering nie. In Nederland word die situasie anders gereël deurdat artikel 28–28c van die siviele wetboek (Boek I) dit moontlik maak dat 'n transseksueel deur middel van 'n hofaansoek sy/haar geslag in die geboorte-akte kan laat wysig. Die vereistes vir hierdie aansoek is dat die persoon ongetroud moet wees en nie meer in staat moet wees om kinders te verwek of te baar nie. Die amptelike verandering van die geslag van die persoon tree in werking op die dag waarop die inskrywing in die geboorte-akte gewysig word, en alle ander dokumente word outomaties aangepas om die verandering aan te toon. In Suid Afrika word geslagsveranderingsprosedures nie as *contra bonos mores* beskou nie, maar daar is geen juridiese erkenning daarvan nie. Hierdie situasie hou nie tred met ontwikkelings binne die mediese wetenskap en die samelewing nie. Die fokus van hierdie artikel is dat die bestaande situasie nie langer geduld kan word nie, veral in die lig van die Grondwet van 1996 se erkenning van fundamentele regte van gelykwaardigheid en inherente menswaardigheid.

1 INTRODUCTION

The sex of the newborn child will usually be certified by an obstetrician or midwife at birth in accordance with the child's physical genital characteristics.[1] The birth

* I wish to thank Professor EJH Schrage, University of Amsterdam, the Netherlands, for his advice and support.

1 However, technically speaking it is possible that an obstetrician or midwife may be mistaken about the sex of the newborn child, in which case an amendment of the birth certificate will be necessary. See below.

certificate, which explicitly states the sex of the legal subject, is of decisive legal importance. Throughout time and in all cultures[2] there have been human beings who have not felt comfortable with their own sexual characteristics.[3] In the case of transsexuals,[4] there is a discrepancy between appearance and inner-experienced reality. They are normal physically healthy persons, born with the normal characteristics of a male or female. They perceive themselves as captured in the wrong body and experience themselves as belonging to the opposite sex.

Transsexuals suffer from gender dysphoria, which is the feeling of discomfort and dissatisfaction with one's physical sex and the gender role linked with it. In order to relieve this discrepancy, a transsexual has an insatiable desire to have a body with the characteristics of that of the opposite sex as well as social and legal recognition of this sexual status.

For some decades it has been possible to undergo a change of sex by means of a sex-change procedure consisting of hormonal treatment and sex-realignment surgery. Such a sex-change procedure gives the person a realistic outward appearance of the opposite sex. The procedure includes the creation of what appear to be the sexual organs of the opposite sex.[5]

In summary, one could say that the technical/scientific possibilities have been put in place. But the important question that arises is how the law responds to these developments. Gender is important and protection against discrimination on this basis is to be found in many human rights documents;[6] moreover, lack of such recognition will obviously lead to many legal anomalies, predominantly in the fields of family law, criminal law, succession and labour law.[7] One of the problems regarding marriage and related matters will be illustrated by the case of *W v W* 1976 2 SA 308 (W) where the plaintiff's purported marriage was held to be null and void. A marriage is defined as a union between two persons of the opposite biological sex. *In casu*, one of the partners felt trapped within the gender identity laid down in the birth certificate. The fact that the sexual identity was changed by way of an operation and the real identity of the partner involved were fundamentally denied by Nestadt J.

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2 Men and women who behave like members of the opposite sex have been described since Greek antiquity. Pen "Enkele psychiatrische aspecten van transsexualisme" 1976 *Transsexualiteit, Boekenreeks Nederlands Juristenblad* 18.

3 Over the world the frequency is approximately 1:100 000 births. Van der Reijt "Transsexueel en (Scherp)rechter" 1976 *Transsexualiteit Boekenreeks Nederlands Juristenblad* 1. According to the South African Law Commission, the number of transsexuals in South Africa was approximately 800 by the time the Working Paper was finalised, of whom approximately 600 are male-female transsexuals and 200 female-male. South African Law Commission Working Paper 24 Project 52 (1994) 5 and 6.

4 In this regard it is relevant to distinguish between transsexuals; homosexuals: persons who are sexually attracted to persons of the same sex but are satisfied with their own biological sex; transvestites: persons who dress in clothes of the opposite sex; and hermaphrodites (persons who have characteristics of the sexual organs of both sexes, and who may, as a result of medical treatment, become a member of either sex). See Barnard, Cronje and Olivier *The South African law of persons and family law* (1994) 162.

5 South African Law Commission, Working Paper 24 (1994) 1.

6 Eg a 2 of the Universal Declaration of Human Rights or s 9(3) of the Constitution of the Republic of South Africa, 1996.

7 South African Law Commission Working Paper 24 (1994) iv.

Another problem can be foreseen with regard to adoption, where a natural parent may refuse the required consent to an adoption on the ground that both (adoptive) parents are of the same sex.

Other problems that may arise, are the following:

- under African customary law only a male is able to inherit;
- the definition of "rape" reads: "Rape consists in a male having unlawful and intentional sexual intercourse with a female without her consent." As will become evident, we see the anomaly that at present a post-operative transsexual with the characteristics of a female cannot be raped under South African law; at most the act would fall within the ambit of indecent assault. Apparently such a woman is an outlaw.
- The adaptation process for the transsexual and his/her working environment could possibly create problems which would amount to disturbed labour relations (eg bullying or taunting).

The purpose of this article is to show that the legislature cannot simply ignore the fact that there are indeed transsexual persons in South Africa, who, after a sex-change procedure, have a need to be recognised as persons of the opposite sex from both a legal and a social point of view.

I shall focus first on the situation in South Africa and the role of the Constitution. Thereafter the focus will shift to the Netherlands, where specific provision has been made in the Dutch Civil Code.[8] It will become evident that the time has come for legal recognition and the legal implications of this in South Africa. South Africa cannot close its eyes to international developments. For example, South Africans and foreigners operated upon abroad may find themselves in South Africa. Consequently the recognition of sex changes abroad must have legal implications within South Africa. Furthermore, I will show that it is an elementary requirement of justice that everybody, including the transsexual, is accorded fair and just treatment.

Opinion is divided about the definition as such and about the causes of transsexuality; these aspects fall beyond the scope of this article.[9]

2 THE SITUATION IN SOUTH AFRICA

The Constitution of the Republic of South Africa (Act 108 of 1996) does not refer expressly to the phenomenon of transsexualism. Therefore the position has to be

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8 South African Law Commission Working Paper 24 (1994). Ch 4 deals with the comparative study of the recognition of a transsexual's post-operative sex. The Netherlands are also mentioned in four and a half sentences, which deal only with one formal aspect of the whole subject, all the more reason for examining in greater detail the reasoning which eventually led to recognition.

9 A transsexual is "a person who biologically belongs unmistakably to either the male or female sex, but psychologically identifies himself (or herself) with the opposite sex" (Barnard, Cronje and Olivier *The South African law of persons and family law* (1994) 162). According to the explanatory memorandum to the legislative proposal of the Lower House of the States General in the Netherlands regarding the position of transsexuals, transsexualism may be described as "the phenomenon whereby someone with the normal internal and external genital organs of the one sex lives in the indisputable conviction [that he or she belongs] to the other sex, whilst there is no indication of serious psychopathological symptoms"(17 297 of 1981–1982).

accommodated within Chapter 2 of the Bill of Rights. It is generally acknowledged that a person has inherent dignity and the right to have his or her dignity respected and protected. Explicit provision has been made for this fundamental right in section 10 of the Constitution. Section 9(3) of the Constitution further provides:

> "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."

This so-called "equality clause" provides for the guarantee of protection against unfair discrimination. Legal writers do not seem to be bothered by the question whether or not these sections in the Constitution are directly applicable to transsexuals, and whether it would exclude every kind of discrimination, as in the Netherlands for example,[10] or only prohibits "unfair" discrimination. For the purpose of this contribution questions of interpretation will not be taken into consideration.

The question which arises, is how the above-mentioned sections affect the position of transsexuals in South Africa.

2 1 The legal consequences of "sex change" in South African law[11]

The birth certificate states the sex of a person. Sometimes mistakes occur[12] regarding the registration of the sex of the person concerned, in which case rectification[13] is generally accepted and can be done relatively easily. However, this is not the problem that transsexuals have. In order to achieve the desired legal recognition, it is essential that after a sex-change procedure, the birth certificate be altered to reflect the change. In section 7B of the Births, Marriages and Deaths Registration Act 81 of 1963[14] provision was made for the change of the sex description of a post-operative transsexual in such a person's birth register.[15] Apparently a sex-change procedure was not considered *contra bonos mores* by the state, since the state recognised the fact that a sex-change operation as such is accepted medical treatment.[16] Nevertheless the problem was that at that time there was no legislation which recognised the post-operative sex change for any other legal purposes. Section 7B had a slight effect on the life and integration of the transsexual in society; it was possible for a post-operative transsexual to obtain official documents (eg an identity document) indicating his or her present sex, with no reference to the previous position. Thus the registered sex was in line with the appearance of the particular individual. It seemed to be a step in the right direction.

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10 Compare the prohibition of discrimination in the Bill of Rights with the text of the Constitution for the Kingdom of the Netherlands of 1987: "All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex *or any other grounds whatsoever* shall not be permitted."

11 South African Law Commission Working Paper 24 (1994) iv.

12 Eg a mistaken determination by the obstetrician or midwife, or a typing error made in the process of registration by the official.

13 Compare this with the situation in the Netherlands below.

14 This section provides: "The Secretary (for the Interior) may, on the recommendation of the Secretary for Health, alter, in the birth register of any person who had undergone a change of sex, the description of the sex of such person and may for this purpose call for such medical reports and institute investigations as he may deem necessary."

15 The Birth, Marriages and Death Registration Act 81 of 1963 has been repealed and replaced by the Birth and Deaths Registration Act 51 of 1992.

16 *Supra.*

The leading case concerning the position of transsexuals is that of *W v W*,[17] in which Nestadt J of the Witwatersrand Local Division defined the sexual identity of a post-operative transsexual. The plaintiff in a divorce action had undergone a male-to-female sex change procedure, after which her sex description in her birth register was altered. Then a properly solemnised marriage took place between the plaintiff and defendant, who knew about the sex-change operation. They had a normal sexual relationship, but the plaintiff was unable to have children. The plaintiff instituted a divorce action after the defendant committed adultery. No medical evidence was submitted.

Nestadt J found that a valid marriage requires the parties to be of the opposite sex (314A), further that the issue was whether the plaintiff was a woman at the time of conclusion of the marriage (314D). The evidence showed that the plaintiff was a male prior to the operation. The judge found that there was sufficient proof that the operation indeed changed the plaintiff's sex (314D–E). In the absence of proof that the present operation changed the plaintiff's sex, she failed to prove that the marriage was valid (315E).

The judge referred to the English case of *Corbett v Corbett*,[18] in which it was held that in spite of the surgery, the plaintiff remained a male and furthermore that a valid marriage requires the parties to be of the opposite sex. The marriage was declared null and void.

The decision of *Simms v Simms*[19] also clearly contradicts reality. Reference was made to *W v W*; the marriage was declared null and void. Howard J found:

> "She has always had and still has male chromosomes. She has never had the normal sexual organs of a female, and what she has now been provided with merely simulates feminine attributes."

As is mentioned above, the Births, Marriages and Deaths Registration Act 81 of 1963 has been replaced by the Births and Deaths Registration Act 51 of 1992. The present Act contains many of the provisions of the Act of 1963, but it lacks a provision in the tenor of section 7B of the previous Act. Thus alteration of the sex description in a birth certificate is no longer possible under the new Act. Apparently when the sex of a person is established at the time of birth, this is final. I submit that by this very limited view, reality is emphatically being denied. Even though sex changes are permitted, they are not legally recognised in South African law.[20]

3 THE POSITION OF THE TRANSSEXUAL IN THE NETHERLANDS

An important turning point in the official status of the transsexual in the Netherlands was the adoption of an amendment in Volume I of the Dutch Civil Code, dealing

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17 *W v W* 1976 2 SA 308 (W).

18 1970 2 All ER 33, in which Omrod J identified the following factors to determine one's sex: chromosomal, gonadal, genital, psychological and hormonal, and concluded that one's sex can be determined only by biological factors and cannot be changed by a sex change operation.

19 1981 4 SA 186 (D) 186G–H.

20 However, with a view to the above-mentioned, the question arises whether the legal position must be urgently adjusted, in tune with reality, in particular with regard to the Bill of Rights in the 1996 Constitution.

with the Law of Persons and Family Law, which came into operation in 1985.[21] In this way legal recognition was achieved; the male-female transsexual became officially a woman, and the female-male transsexual was officially recognised as a man. The Dutch legislature has therefore made provision in the Act of 24 April 1985 (Stb. 243) which resulted in the addition of the articles 29 a–d of Volume I of the Dutch Civil Code.[22] The registration systems in the Netherlands will be outlined to elucidate the content of the article.

3 1 Registration

In the Netherlands there are two related registration systems, each of which has different legal implications:[23]

3 1 1 Registry office of Births, Deaths and Marriages[24]

The registrar decides autonomously about the content of the document which has to be drawn up. For example, the birth certificate contains the relevant information regarding a newborn child, such as the date and place of birth, surname, given names and sex. If an error is made by the obstetrician or midwife regarding the sex of the newborn child, a correction of the birth certificate is both necessary and possible. The same applies when a mistake has been made by the registrar of Births, Deaths and Marriages. These mistakes can be rectified at any time.

However, in the case of transsexuality we are dealing with an initially correct certificate, which has to be altered for a technical reason, namely, the sex-change procedure. Thus the Dutch Civil Code makes it possible to bring the legal status in line with the physical appearance. The documents can only be altered by an order of court (at the request of the party concerned or the public prosecutor). The documents always remain at the municipality where they were drawn up.

3 1 2 Municipal Register[25]

This is a service provided purely to obtain information regarding passports, driver's licences and so on. This information is available at the municipality of the place of residence of the person concerned. The registration of personal data is drawn up on the basis of documents of the Registry Office of Births, Deaths and Marriages. These personal data "travel with" the particular person from one municipality to the other.

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21 The amendment resulted in the addition of a 29a–d of Vol I of the Dutch Civil Code, which made it legally possible to obtain alteration of the sex description in the Birth Register, within certain limitations and under certain conditions. I hereby refer to the paragraph "The crucial (sub) articles in a nutshell" below. Since 1999-06-01 the relevant articles have been renumbered as a 28–28c of Vol I of the Dutch Civil Code.

22 The original wording of the supplemented a 28(1) of Vol I of the Dutch Civil Code reads (BW 1:28 lid 1; Burgerlijk Wetboek, Boek 1, artikel 28 lid 1): "Iedere Nederlander die de overtuiging heeft tot het andere geslacht te behoren dan is vermeld in de akte van geboorte en lichamelijk aan het verlangde geslacht is aangepast voor zover dit uit medisch of psychologisch oogpunt mogelijk en verantwoord is, kan de rechtbank verzoeken wijziging van de vermelding van het geslacht in de akte van geboorte te gelasten indien deze persoon: a. niet gehuwd is; b. als mannelijk in de akte van geboorte vermeld staande, nimmer meer in staat zal zijn kinderen te verwekken, dan wel als vrouwelijk in de akte van geboorte vermeld staande, nimmer meer in staat zal zijn kinderen te baren."

23 Verschoor "De transsexuele mens en de hulpverlening in Nederland" *Stichting Nederlands Gender Centrum Amsterdam* (1993) 40.

24 In Dutch: de Burgerlijke Stand.

25 In Dutch: het Bevolkingsregister.

3 2 The crucial (sub)articles in a nutshell

3 2 1 Details of the amendment of 1985

Once the court orders the registrar of the Registry Office of Births, Deaths and Marriages to alter all sex descriptions of the person concerned in the birth certificate to that of the other sex, the necessary changes are effected. Thus "daughter of" will be altered to "son of", first names may be changed, and so on.

Following the order of court the registrar draws up a document and inserts a "marginal note" on the original birth certificate. Notice will be given to the person concerned. In addition, notice of the document and marginal note will be given to the Municipal Register of the domicile of the person concerned and the personal data are adjusted, with the result that a new passport or driver's licence will "automatically" be adjusted to the new situation.

In terms of article 28(1) of Volume I of the Dutch Civil Code, every Dutch citizen may request the court to have the sex description in the birth register altered, within certain limitations and under certain conditions. Article 28(1) reads:[26]

> "Each Dutch citizen who is convinced that he or she belongs to the opposite sex to that stated in the birth certificate, and who has been adapted to the desired sex as far as possible and justified from a medical or psychological point of view, may request the court to order an alteration of the description of the sex in the birth certificate:
>
> a. provided that the person is not married;
>
> b. provided that if the person is designated in the birth certificate as being male, he will never be able to father children, or, designated in the birth certificate, as being female, she will never be able to give birth to children."

The elements required for the admissibility of a request for alteration of the sex description in the birth register are the following:[27]

3 2 1 1 Dutch citizenship

The main rule states that the applicant must have Dutch nationality, regardless of whether or not the person is resident in the Netherlands.[28] Someone who does not have Dutch nationality may nevertheless under certain conditions, make a request for alteration of the sex description.[29]

3 2 1 2 Jurisdiction

As a rule, this will be the court of the place of residence of the applicant.[30]

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26 My own translation.

27 De Boer *Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht; Personen- en familierecht* (1998) 91–97.

28 If the applicant resides abroad, he or she must travel to the Netherlands to obtain the necessary medical certificates.

29 In terms of a 28(3) of Vol I of the Dutch Civil Code, it is possible under these circumstances to request an alteration, if the person has been domiciled in the Netherlands, for at least one year immediately prior to the request and is in possession of a valid residence permit. Obviously one also has to meet the conditions in a 28(1). These restrictions have been imposed to avoid improper use and to ensure that the foreigner has a close link with the Dutch legal sphere. At the same time one must request the court to order the transcription of the foreign birth certificate in the Register of Births of the Municipality of The Hague, and notification of the sex realignment in the margin of the transcript.

30 Provision has been made for the Dutch citizen who is not resident in the Netherlands in a 29a(4) of vol I of the Dutch Civil Code; the request must be directed to the court in whose jurisdiction

continued on next page

3 2 1 3 Unmarried status

In terms of article 33 of Volume I of the Dutch Civil Code, which deals with monogamy, a marriage concluded between two persons of the same sex is invalid, this rule is not compatible with the recognition of the sex change of a married person.

3 2 1 4 The inability to father children or to give birth

The condition in article 28(1)(b) implies that the applicant has had sex realignment surgery which rules out with absolute certainty that the applicant will be able to father children or bear children, as the case may be. The reason for this condition is "the best interest of the child".[31] Imagine a child born of parents with a "legal" sex which is the opposite of their biological sex, for example, a child fathered by a person whose sex description in the birth certificate has been altered to female.

3 2 1 5 No age limit

There is no age restriction for applications for alteration of the sex description in a birth certificate. In the case of a minor, the parent or guardian may make a submission on his or her behalf.

3 2 1 6 Conviction that one belongs to the opposite sex

This is one of the *essentialia* of the application. Normally this element is coupled with the rejection of the person's inherent genital and generic characteristics and with the desire for a sex change. During the preparatory phase a psychiatrist must report to the so-called gender team of the hospital and must finally inform the court about the condition of transsexuality. Any person who is convinced of the above-mentioned characteristics and satisfies the other formal and substantive conditions, has the right in principle to an administrative adjustment of his or her sex.

3 2 1 7 Physical adjustment.

Hormonal treatment and sex alignment surgery are understood under this heading. This requirement relates to the consistency of the alleged gender identity of the applicant. The transformation will be a clear indication to the court of this identity. This requirement can be dispensed with only if there are medical or psychological objections.[32]

Obviously the court will not be able to verify on its own whether the content of the request conforms to the truth. A similar provision which could also be relevant in the South African context, is article 28a of Volume I of the Dutch Civil Code, which ensures that the court will be informed by experts about the presence of transsexuality and gives guidelines for reporting.[33]

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the birth certificate has been registered at the Registry Office of Births, Deaths and Marriages. If the birth certificate was drawn up abroad, the court in The Hague will usually be the competent court in the matter.

31 The question arises as to the interests of existing children as well.

32 A 28(1) of Vol I of the Dutch Civil Code reads: ". . . as far as this is possible and justified as from a medical or psychological point of view . . .". An example of the former could follow from the age factor which could involve a higher risk of complications and one of the latter, fear of undergoing an operation.

33 A 28a(1) reads: "Together with the request one has to submit a certified transcription of the birth certificate, as well as a statement signed by the experts concerned, issued *at most six months*

continued on next page

In terms of article 28b, the request will be granted if the court is satisfied that the limitations and conditions of articles 28 and 28a have been met. The applicant will be heard and in case of doubt witnesses will testify. When the court grants the request, it will order an alteration of the description of the sex in the birth certificate. If desired, the court may also alter the first names/forenames of the applicant.

3 3 The effect of alteration of the sex description with regard to the law of persons and family law

In this regard explicit provision has been made in article 28c.[34] The alteration of the sex description in the birth certificate has an effect on the law of persons and family law, as from the day on which the registrar of the Registry Office of Births, Deaths and Marriages records a certificate of registration of the judicial order of alteration in the register (ie, *ex nunc*).

It is from this moment that the sex change is complete from a legal point of view. The most important consequence of all is the possibility of a marriage to someone of the same sex as that to which the person belonged before the sex-change procedure. The requirement that the parties must be of different sexes is deemed to have been met.

From the date of recording, the consequences extend to existing legal family relations and the rights, competence and duties, founded on Volume I of the Dutch Civil Code – for example, the duty to pay maintenance.[35]

The continued existence of legal family relations means that, in spite of the sex change, a father (now female) will remain the father of the children, and the mother (now male) will remain the mother of those children. Obviously, it is not possible to establish legal family relations based on the former sex once the record has been changed. The female (formerly a male) will not be able to legitimise a child; only a male can legitimise children.[36] The male could have legitimised the *nasciturus* before the sex change took place.

It is important to bear in mind the consequences of a sex-change procedure in the various fields of law. These aspects fall beyond the scope of the present article; there are implications; there are different implications, not only for the law of persons and family law, but also for labour law and the law of succession for example.

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before the date of submission (see the last sentence of this note) of the request, which shows: *a.* the conviction of the applicant that he or she belongs to the opposite sex from that stated in the birth register and in particular the permanent nature of the conviction, for which is needed the opinion of the expert concerned, stating the period for which the applicant has been living with this condition, meaning lived 'as belonging to the opposite sex'; b. whether, and if positive, to what extent the applicant has been realigned to the desired sex as is possible and justified from a medical or psychological point of view; c. that the applicant if declared a male in the birth certificate, will never be able to beget children, and if declared a female in the birth certificate, will never be able to give birth to children. The validity of the statement signed by the experts is of limited duration, because of the possibility of changes to the physical or psychological state of the person concerned."

34 Possible consequences in the various legal fields must be dealt with separately.

35 A 28c(2) of vol I of the Dutch Civil Code, which refers to a 157 and 394 of Vol I concerning maintenance.

36 See also a 197 of vol I of the Dutch Civil Code.

4 CONCLUSION

In the case of transsexuality, there is a discrepancy between the appearance of an individual and the inner feelings experienced. The feeling of discomfort and dissatisfaction with one's physical sex (and gender role) is not exactly a new phenomenon. For decades it has been possible to undergo a change of sex by means of a sex-change procedure consisting of hormonal treatment and sex-realignment surgery. A transsexual has the desire to belong to the other sex; we are dealing with a disorder of the perception of one's own gender identity. This desire cannot be fulfilled only through a sex-change procedure. Social and especially legal recognition is indispensable, because of the many legal anomalies in the various legal fields.[37]

The Netherlands has gone further than many other countries in granting this vulnerable group full legal recognition of its new identity.[38] In South Africa a sex-change procedure was apparently not considered *contra bonos mores* by the state. Section 7B of the Births, Marriages and Deaths Registration Act 81 of 1963 was a step in the right direction; for some time[39] it was possible for a post-operative transsexual to obtain official documents indicating his or her present sex, with no reference to the previous position. Nevertheless the outcome of the various cases soon indicated that the positive line would not be continued;[40] a marriage in which a post-operative transsexual was involved, was declared null and void. In that regard, we are still a long way from recognition of transsexuality in South Africa. I think the present situation is hypocritical and inhuman and absolutely in violation of the Constitution of the Republic of South Africa.

It is submitted that the law should make provision for the legal recognition of transsexuals. Particularly in view of the developments in other parts of the world and especially if we focus on our own Bill of Rights, there can be only one conclusion. Indeed, everyone has the inherent right to human dignity and the right to equal protection and benefit of the law (ss 10 and 9(1) and (3) of the 1996 Constitution respectively). Does the principle of respect for private life and the right to make one's own private decisions in a modern democracy not justify the right to have one's birth certificate altered so that the sex description corresponds to one's physical appearance? Since modern scientific techniques have made it possible to undergo a sex change procedure, is it justifiable not to adjust the legal position and to allow a situation where there is a discrepancy between the reality and the pretended reality of the birth register? The law cannot simply close its eyes to scientific and societal developments. These societal developments are not restricted to South Africa. Developments abroad must have their implications within South Africa, since both South Africans and foreigners who have been operated upon abroad will cross the (open) South African borders. Consequently the changing international perspective entails the necessity for South Africa to take these developments seriously. But there is even more. The Constitution recognises the

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37 Especially in the field of family law, succession, criminology and labour law.

38 Van Iterson, International Commission on Civil Status in the Hague, "International aspects of sex reassignment decisions" *Transsexualism, medicine and law* (1993).

39 Until the repeal of the Births, Marriages and Deaths Registration Act 81 of 1963. The Act has been replaced by the Births and Deaths Registration Act 51 of 1992, which lacks an equivalent provision to s 7B of the previous Act.

40 *W v W supra*. See the discussion above.

equality of everyone before the law and their right to equal protection and benefit of the law. This is spectacular, but nothing new. Even the Romans stated that there are three fundamental legal rules: live honestly, do not harm others and give everybody his due.[41] It is a simple requirement of justice in our society to give everyone his due, including the transsexual. He or she should no longer be a captive in the wrong body but should have the full and equal enjoyment of all rights and freedoms.

In a society such as ours, but basically in any society, there are manifold relations of power which permeate, characterize, and constitute the social body, and these relations of power cannot themselves be established, consolidated or implemented without the production, accumulation, circulation and functioning of a discourse.

Michel Foucault Power/knowledge: selected interviews and other writings, 1972–1977 (*trans Gordon*) 93.

41 *D* 1 1 10 (Ulp): "Praecepta iuris sunt haec, honeste vivere, alterum non laedere et ius suum cuique tribuere."

AANTEKENINGE

VOERTUIGVLOOT AS SEKERHEIDSOBJEK

1 Inleidend

In hierdie bydrae word ondersoek in welke mate 'n onderneming wat reeds oor 'n vloot voertuie beskik dit as sekerheidsobjek vir die verkryging van verdere krediet kan aanwend. Daardie voertuie verteenwoordig 'n wesenlike vermoë wat as deel van die kredietwaardigheid van die onderneming in aanmerking geneem moet word om die werklike finansiële gesondheidstoestand van die onderneming te kan bereken. In kort beteken dit dat die mate waarin die voertuigvloot hoegenaamd as sekerheidsobjek benut kan word, indien daarmee rekening gehou word dat die vloot nie staties is nie, ondersoek word. Op 'n deurlopende grondslag word beskadigde of afgeleefde voertuie vervang deur nuwes. Saakvervanging vind dus deurlopend plaas.

Aangesien die onderneming reeds die voertuie in eiendomsreg verwerf het, kom die eiendomsvoorbehoudsfiguur wat tipies ter beskerming dien van die afbetalingsverkoper en die finansieringshuis aan wie sodanige krediettransaksies verdiskonteer word, ook nie in die eenvoudige vorm in spel nie.

Uit die aard van die saak is die kredietsoeker ononderbroke op die beskikbaarheid van die vloot aangewese. Vir doeleindes van die bespreking word aanvaar dat die onderneming op groot skaal en reg oor die land besigheid doen. Argumentshalwe word veronderstel dat die onderneming as SNEL-koerierdiens bekendheid verwerf het en dat sy voertuigvloot met hul kenmerkende helder kleure en logo op die strate van die land reeds 'n bekende gesig is. Veiligheidshalwe het die onderneming die bepaalde kleure en patroon waarmee hy al sy voertuie laat verf saam met sy "logo" as erkende handelsmerke laat registreer ten einde moontlike verwarring en aanklamping deur onbillike mededingers te ontmoedig. Verder word aanvaar dat die bekende finansieringshuis ANB wel in beginsel in die finansiering van die koerierdiens op 'n langdurige grondslag belangstel, maar voldoende sekerheid vir die aldus verskafte krediet verlang.

In beginsel word slegs op die volgende aspekte in die bespreking gekonsentreer:

1 Kan die bestaande voertuigvloot van SNEL aan die finansieringshuis "verkoop" word en direk weer teruggehuur word sodat die verkoper nooit die benutting daarvan ontbeer nie maar wel oor die koopsom as krediet kan beskik? (Die benutting van 'n huurooreenkoms of 'n huurkoopooreenkoms as *causa* vir die feit dat SNEL steeds in beheer van die "verkoopte" voertuie sal bly, verander in beginsel niks aan die vraag of ingevolge die voorafgaande transaksie wel eiendomsreg aan ANB oorgedra is nie.)

2 Kan 'n spesiale notariële verband oor die voertuie, met inbegrip van alle toekomstige voertuie, geregistreer word sodat die kredietverskaffer langs dié weg saaklike sekerheid kan verkry? (Die gebruiklike algemene notariële verband wat inderdaad oor so 'n onbepaalde saakgemeenskap geregistreer sou kon word, verleen slegs voorkeurregte en is nie werklik sekerheidsregte nie.)

2 Fidusiêre eiendomsoordrag

2 1 Ingevolge die tipe ooreenkoms dra SNEL sy totale voertuigvloot as verkoper aan die finansieringshuis [ANB] as kredietverskaffer oor. Vir die verskafte krediet verlang ANB sekerheid en daartoe moet die eiendomsreg dien. Selfs na die herhaalde uitsprake van die appèlhof waarin geen twyfel gelaat is nie oor die onaanvaarbaarheid van fidusiêre eiendomsoordrag as sekerheidstellingsfiguur in die Suid-Afrikaanse reg, blyk dat die figuur in die praktyk steeds benut word asof daar niks mee skort nie. Uit opmerkings van regters blyk dat steeds 'n verstommende onkunde oor die werklike oneffektiwiteit van hierdie gewaande sekerheidsfiguur bestaan. Dit is 'n tipe konstruksie waarop die Suid-Afrikaanse howe reeds herhaaldelik nie hul seën uitgespreek het nie. (Sien *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A); *Nedcor Bank Ltd v ABSA Bank Ltd* 1998 2 SA 830 (W); Reehuis "Omvang en werking van het Nederlandse 'fiducia-verbod'" 1997 *TSAR* 66; Sonnekus "Vloerplanooreenkomste en 'n sober klank van die regbank daarteen?" 1998 *TSAR* 776. Sien ook die gelykluidende gevolgtrekking van die regskommissie in sy "Verslag oor sekerheidstelling deur middel van roerende goed" *Sekerheidstelling deur middel van roerende goed* Verslag, Projek 46 (1991) 26–27 (vrygestel Oktober 1992).)

Anders as in die Duitse reg waar *Sicherungsübereignung* 'n aanvaarde en daagliks benutte figuur is wat nie meer uit die handel weg te dink is nie, het die Suid-Afrikaanse hoogste hof konsekwent sedert die bekende uitsprake uit 1917 (*Goldinger's Trustee v Whitelaw & Son* 1917 AD 66; *Groenewald v Van der Merwe* 1917 AD 233) geweier om die gevolge van eiendomsreg aan die gesimuleerde ooreenkomste te heg wanneer blyk dat die koper (ANB in ons voorbeeld) hoegenaamd geen gebruiksbevoegdhede ten aansien van die koopsaak gaan verkry nie (sien *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A) 620G–H).

As alle gebruiksbevoegdhede na die "eiendomsoordrag" aan ANB steeds by SNEL gaan setel, is dit duidelik dat nie werklik eiendomsreg oorgedra word nie, maar bloot sekerheid vir die verskafte krediet deur die nuwe "eienaar" verlang word. In dié verband behoort die volgende uit die uitspraak van appèlregter Nienaber in *Bank Windhoek Bpk v Rajie* 1994 1 SA 115 (A) voor oë gehou te word:

> "Blykens die dokumentasie het Motor World, 'n firma waarvan Hoosain die alleeneienaar was, die voertuig teen kontant aan die Bank verkoop en gelewer (sodat die Bank eienaar daarvan sou word), net om dit onmiddellik daarna teen krediet (maar met voorbehoud van eiendomsreg aan die Bank) terug te koop. Die vraag is: het die partye werklik bedoel dat volle eiendomsreg op die Bank oorgaan, of was die eintlike gedagte nie eerder dat Hoosain 'n voorskot by die Bank ontvang, vir die terugbetaling waarvan die voertuig as 'n vorm van saaklike sekuriteit moes dien, en dat die koop- en herverkoop-kontrakte bloot 'n voorwendsel was wat hulle prakseer het om aan daardie bedoeling uitvoering te gee nie? Indien laasgenoemde, sou die skema tot mislukking gedoem wees omdat dit in wese 'n vorm van saaklike sekerheid, te wete pandgewing, beoog, sonder dat besit aan die pandhouer gegee word. Volgens ons reg moet 'n pandhouer (in die onderhawige geval die Bank) in besit van die saak geplaas word en in besit daarvan bly, anders vestig of behou hy geen voorkeuraanspraak daarop nie (*Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A) 611H–612D). Dit sou die geval wees al is beide partye volkome openlik en opreg" (143F–I).

Daar is juriste wat van mening is dat die smet van 'n gesimuleerde ooreenkoms nie hierdie vorm van heimlike sekerheidsoordrag tref indien die partye goedgelowig was en nie daarop uit was om 'n ander of derdes in die algemeen te mislei nie. Ook met daardie denkrigting maak appèlregter Nienaber korte mette:

> "Die skema hoef nie verbloem te wees om verdoem te word nie. Dit kan aanvegbaar wees selfs al was dit nie te kwaaier trou of met 'n onbehoorlike oogmerk aangegaan nie – maar wel omdat dit regtens ondoenlik en as sodanig onuitvoerbaar was ... [W]at wel waar is, is dat hierdie soort konstruksie, met *constitutum possessorium* as sy hoeksteen, hom by uitstek tot onderduimsheid leen ... [W]aar die verbintenisskeppende ooreenkoms nie 'n egte koopkontrak is nie (al word dit ook deur die partye so ingeklee) maar iets anders, soos 'n set om 'n bepaalde bate van of teen die besitter se skuldeisers te verskuil of te verskans, dui dit op die afwesigheid van 'n egte geestesverandering oor die hoedanigheid waarin die saak voortaan deur die besitter gehou word." (144C–145B).

Die probleme om hierdie aanwending van eiendomsreg ter sekerheidstelling hou direk verband met die feit dat die Suid-Afrikaanse reg vir die oordrag van 'n saaklike reg ook voldoening vereis aan die onderliggende beheersverkrygingsvereistes wat by roerende goed inhou voldoende legitimering van die beheerder as belanghebbende party:

> "En as die partye in werklikheid pandgewing bedoel het, kon hulle ook nie die oorgang van eiendomsreg in gedagte gehad het nie want pand en eiendom kan nie tegelyk in een hand saamgevat word nie. En as hulle nie die oorgang van eiendomsreg in gedagte gehad het nie, het hulle ook nie die bedoeling gehad nie dat Hoosain die saak nie meer vir homself nie, maar ten behoewe van die Bank besit.
>
> Na my mening het die Bank, ondanks die dokumentasie in sy guns wat oënskynlik op die verkoping en lewering van die voertuig aan hom dui, nie bewys dat eiendomsreg van die voertuig met die eerste transaksie op hom oorgegaan het nie. Hy kan hom dus nie op sy *rei vindicatio* teenoor die eerste respondent beroep nie. Anders as wat tydens betoog voor hierdie Hof namens die respondente toegegee is, sou hy hom ook nie teenoor Hoosain of sy boedel op 'n *rei vindicatio* kon beroep het nie. Hy het denkbaar wel 'n eis teen die boedel op grond van Hoosain se kontrakbreuk maar dit is iets anders wat nie nou ter sake is nie" (150C–E).

Dit is vanselfsprekend dat indien ANB in die onderhawige geval nie werklik eiendomsreg verwerf het op die voertuie van SNEL deur die lewering met *constitutum possessorium* nie, daar ook geen sprake kan wees dat ANB as nuwe eienaar enige saaklike regte op die voertuie aan 'n ander kan oordra nie. Ook die latere opvolgers in titel ten aansien van die voertuie mag met leë hande daar staan. In die gunstigste geval is dit moontlik dat hulle nog hul skade kan beperk met 'n beroep op estoppel as verweer teen enige vindiserende aksies van ander reghebbendes. Sekerheidseiendomsoordrag behoort dus as veilige opsie prakties buite rekening gelaat word.

3 Tipes saaklike sekerheid op roerende sake

Die Suid-Afrikaanse reg erken naas die gemeenregtelike vuistpand wat weens die besitsvereiste uiteraard nie in die onderhawige geval aantreklik is nie, sogenaamde notariële verbande.

Daar word onderskei tussen die algemene notariële verband oor ongespesifiseerde roerende bates van die sogenaamde verbandgewer en sedert 7 Mei 1993 die statutêr gereëlde geregistreerde notariële verband oor spesifiek geïdentifiseerde roerende sake ingevolge die Wet op Sekerheidstelling deur Middel van Roerende Goed 57 van 1993 wat prakties die ou Natal-posisie ingevolge die Wet op Notariële Verbande (Natal) 18 van 1932 op die hele land toepaslik maak.

Hoewel die begrip "notariële verband" vir beide die gemelde tipes voorkeurskepping benut word, is dit misleidend. Terwyl 'n "verband" gemeenregtelik 'n saaklike sekerheidsreg is, is 'n algemene notariële verband geen saaklike reg nie, verleen dit geen saaklike sekerheid van enige aard nie en het dit met 'n saaklike sekerheidsreg slegs gemeen dat dit 'n mate van voorkeur op die vrye oorskot bied aan die reghebbende bó konkurrente skuldeisers by 'n sameloop van skuldeisers (dws by 'n *concursus creditorum* weens die insolvensie van die verbandgewer). Voor daar met sekwestrasie- of likwidasieverrigtinge begin word, het dit eintlik geen ander effek as om derdes te kan waarsku oor 'n bestaande belasting teen bates van die verbandgewer nie. Dit veronderstel egter dat elke toekomstige potensiële krediteur van die verbandgewer vooraf eers al die persoonsregisters nagaan om wel 'n behoorlike beeld oor die werklike kredietwaardigheid van die kredietsoeker te bekom – wat nie heeltemal met die werklikheid van die daaglikse praktyk ooreenstem nie. Uit die gerapporteerde uitsprake in byvoorbeeld *Bokomo v Standard Bank van SA Bpk* 1996 4 SA 450 (K) en *Nedcor Bank Ltd v Absa Bank Ltd* 1998 2 SA 830 (W), blyk nie dat die kredietverskaffer as sekerheidsoeker hoegenaamd enige moeite gedoen het om in die registers te kontroleer of die tersake bates nie moontlik reeds beswaar is en of daar nie reeds bepaalde voorkeurregte teen die bates in die algemeen geregistreer was nie.

4 Statutêre notariële verband oor gespesifiseerde roerende saak

In die geval van 'n statutêre geregistreerde notariële verband staan die sekerheidswaarde van die sekerheidsreg vas. Artikel 1 van Wet 57 van 1993 bepaal:

> "1 Regsgevolge van spesiale notariële verband oor roerende goed.
>
> (1) Indien 'n notariële verband waarby liggaamlike roerende goed *wat in die verbandakte gespesifiseer en beskryf word op 'n wyse wat dit geredelik kenbaar maak,* verhipotekeer word, na die inwerkingtreding van hierdie Wet ooreenkomstig die Registrasie van Aktes Wet, 1937 (Wet No 47 van 1937), geregistreer word, *word sodanige goed*
>
> (a) onderworpe aan enige beswaring wat op die datum van registrasie van die verband daarop gerus het; en
>
> (b) nieteenstaande die feit dat dit nie aan die verbandhouer gelewer is nie, *geag net so daadwerklik aan die verbandhouer verpand te wees* asof dit uitdruklik aan die verbandhouer verpand en gelewer was" (my kursivering).

Dit is duidelik dat die statutêre mobiliêre verband as saaklike sekerheidsreg (en nie bloot as voorkeurreg nie) behandel word en as sodanig dieselfde begunstigde posisie as 'n vuistpandreg oor 'n roerende saak inneem. By die eerste blik is dit 'n ideale sekerheidstellingsfiguur om in die behoeftes van ANB en SNEL te voldoen. By nadere besien, haper dit egter in meer as een opsig.

4 1 Die voorvereiste vir die begunstigde posisie is dat die bepaalde roerende saak wat as verhaalsobjek geïdentifiseer word, duidelik as sodanig omskryf en in die tersake register by die registrateur van aktes geregistreer word. Daar is oor die hierbo gekursiveerde deel van die tersaaklike artikel nog geen gerapporteerde regspraak nie, maar in die algemeen word aanvaar dat voldoende gespesifiseerdheid verlang word, ten einde aan die publisiteitsvereiste, naas die algemene vereiste van bepaaldheid, eie aan die sakereg te kan voldoen. In die geval van SNEL se voertuigvloot veronderstel dit dat 'n afsonderlike notariële verband ten aansien van elkeen van die voertuie verly en geregistreer word. Nie alleen is dit omslagtig en duur nie, maar by iedere wysiging aan die vloot se samestelling moet ook die toevoeging of skrapping uit die vloot eweneens formeel geregistreer word. Die enigste private party wat daarby baat, is die notaris.

Dit help ook nie dat die partye afspreek om in die lig van die omslagtige en duur registrasie die formele wysigings weens veranderings aan die vloot se samestelling uit te stel totdat dit wel lyk of bankrotskap SNEL in die gesig staar nie. (Tot dan gaan dit luidens dié denkwyse immers goed en deug die duur sekerheidstelling niemand behalwe die verlydende notaris nie.) Voor registrasie het die kredietverskaffer geen sekerheid of voorkeur nie, maar hoogstens 'n vorderingsreg teen die potensiële sekerheidsgewer om mee te werk tot registrasie van die verband. Omdat die skuld voor registrasie van die verband onverseker was, word sodanige registrasie beheers deur artikel 88 van die Insolvensiewet 24 van 1936:

> "Sekere verbande is ongeldig.—'n Ander verband as 'n kustingsbrief (onverskillig of dit spesiaal dan wel algemeen is), gepasseer tot versekering van die betaling van 'n voorheen onversekerde skuld wat aangegaan is meer as twee maande voor die indiening van die verband by die betrokke registrateur van aktes om geregistreer te word of tot versekering van die betaling van skuld wat aangegaan is as 'n novasie of tot vervanging van so 'n eersbedoelde skuld, *verleen geen preferensie* nie as die boedel van die verbandskuldenaar gesekwestreer word binne 'n tydperk van ses maande na daardie indiening: Met dien verstande dat 'n verband beskou word nie soos voormeld ingedien te geword het nie, as dit weer aan die registrasie onttrek is" (my kursivering).

Hierdie artikel is nie alleen in sy duidelik dempende werking op verslaapte sekerheidstellingspogings nie en moet saamgelees word met die algemene werking van artikel 30 van dieselfde wet wat voorsiening maak vir die "tot niet maak" van 'n "onbehoorlike voorkeur" vir 'n vermeende sekerheidsreghebbende met verband. (Sien *SAPDC (Trading) Ltd v Immelman* 1989 3 SA 506 (W).)

4 2 Uit die bewoording van die wet word afgelei dat daar geen voorsiening gemaak word vir 'n vae of algemene omskrywing van die tipe sake wat as sekerheidsobjekte in aanmerking geneem kan word nie. Daar kan dus volgens die heersende mening nie vir 'n spesiale notariële verband slegs vaagweg vermeld word dat "alle roerende sake" of "alle voertuie" as verhaalsobjek sal dien vir die sekerheidsreg nie. Dit is immers een van die tipiese verskille met 'n algemene notariële verband as blote voorkeurreg wat wel in die algemeen verwys na onbelaste bates van die verbandgewer.

4 3 Alles draai daarom dat potensiële belanghebbendes met relatiewe sekerheid die juiste sake kan bepaal wat as verhaalsobjekte vir die doeleindes van die sekerheidsreg dien. Dit kan reeds afgelei word uit die volbankuitspraak in *Rosenbach & Co (Pty) Ltd v Dalmonte* 1964 2 SA 195 (N) wat oor die ou Natal-posisie handel, maar wat as voorbeeld vir die huidige regsposisie mag dien by ontstentenis van enige daarmee strydige uitspraak. "Accordingly, for a bond to comply with the Act, there must be a special description of the movables to be covered by it and an enumeration of them" (204C). Die hof verwys daarop na die omskrywings van die begrippe "description" en "enumeration" in erkende woordeboeke en vervolg:

> "In my judgment, it is not a compliance with the Statute to describe the assets to be hypothecated in wide general terms, as 'goods, wares, merchandise, stock-in-trade, fixtures, fittings, furniture and appliances'. *It is necessary to know what are the goods, wares, merchandise and so on, the nature of them and the types or kind of each of them, and also the number of them*, (eg so many 1 lb tins of A make of jam, so many of B make, so many 5 lb tins of C make biscuits, so many rolls of suiting material and of dress material and so on, as in a stock list) described so that at any given moment they may be identified; . . ." (204H–I) (my kursivering).

In die lig daarvan dat daardie regter sterk onder die indruk was van die gemeenskaplike oogmerke van die Suid-Afrikaanse en die Britse wetgewer om in die verband die kanse vir onsekerheid te verminder, kan moontlik afgelei word dat 'n verruiming van die registrasievereiste vir doeleindes van Wet 57 van 1993 oorweeg sou kon word, mits dit nie met die onderliggende bepaaldheidsvereiste in stryd sou wees nie.

> "In *Davidson v Carlton Bank,* (1893) 1 QB 82 (CA) at pp 86, 87, LOPES, LJ, adopted what had been said in *Carpenter v Dean* 23 QBD 566 by FRY LJ as to the scope and object of the section, namely:
>
> > 'They are in my opinion plain. I think they are to facilitate the identification of the articles enumerated in the schedule with those found in the possession of the grantor – that is to say, to render the identification as easy as possible, and to render any dispute as to the intention of the parties as rare as possible, and to shut the door to fraud and controversy, which almost always arise when general descriptions are used. That is to be done as far as possible; by which I mean, as far as is reasonably possible – so far as a careful man of business trying to carry the object of the Act into execution could and would do without going into unreasonable particulars.'
>
> LOPES LJ also repeated what he himself had previously said in *Carpenter v Dean* as to the meaning of 'specifically described', namely that it means 'described with such particularity as is used in an ordinary business inventory of such chattels'. Earlier, in *Roberts v Roberts* 13 QBD 794 (CA) at p 806, LINDLEY LJ had said:
>
> > 'A mere general description is not enough; there must be an inventory describing the chattels as business men would describe them'. . .
>
> These decisions appear to me to support the conclusions to which I have come in interpreting our legislation. It appears to me also that, to be capable of hypothecation under this Statute, movables (unless within secs 5 and 6) must *necessarily be capable of special description and enumeration* and, in addition, since the purpose is to allow of hypothecation having the force or effect of a pledge without delivery, they must, it seems to me, be themselves of such a nature as are capable of being delivered (by any of the recognised methods for corporeals or by cession for incorporeals) at the time the bond is passed . . . I come to the conclusion that the bond failed effectually to hypothecate all those movables set out in para (a) cited at the commencement of this judgment. The goods, wares, merchandise and so on are not specially described or enumerated. There has at no time been any means of identifying them" (205E–206F – my kursivering).

4 4 Juis by voertuie, waar iedere voertuig aan die hand van sy individuele enjinnommer, ratkasnommer, onderstelnommer en reeksnommer, benewens die administratiewe registrasienommer, identifiseerbaar is, sal net aan die vereistes van die wet voldoen word indien iedere sekerheidsobjek individueel as sodanig as die objek van 'n geregistreerde notariële verband geïdentifiseer kan word vir doeleindes van die registrasie van die sekerheidsreg.

Uit die wet alleen is egter nie af te lei dat dit noodwendig hoef te beteken dat 'n afsonderlike registrasiehandeling vir elke voertuig moet plaasvind nie – hoewel ek my kan voorstel dat benewens die belanghebbende "gilde" van notarisse, die registrateur se kantoor bloot uit die finansiële oogpunt ook 'n belang sal hê om dit te wil beweer. Of laasgenoemde hoegenaamd gerat is om die bykomstige werkbelading bevredigend te hanteer, is 'n ander vraag.

5 Geen saakvervanging

Tot nou is in die besprekings van die nuwe statutêre sekerheidsvorm deurgaans beklemtoon dat dit 'n wesenlike nadeel van die beklemtoning van die individuele aard van 'n saak as verhaalsobjek is dat daar hoegenaamd nie voorsiening gemaak word vir saakvervanging nie.

Hoewel die partye in ooreenstemming met die onderliggende beginsel van die party-outonomie 'n mate van bewegingsvryheid geniet oor hoe hulle hul afsprake wil inklee en dus by wyse van onderlinge ooreenkoms grootliks kan bepaal hoe die lewering sal geskied, word die party-outonomie juis begrens deur die oorkoepelende beginsels van goeie trou, redelikheid en billikheid sodat nie agter die party-outonomie geskuil kan word om die vereistes van die objektiewe regsnorme van legitimering en bepaaldheid te omseil nie. Dit is ook die sluitstuk van appèlregter Nienaber se beklemtoning in die *Windhoek*-saak (hierbo) van die feit dat die verdoeming van die heimlike sekerheidstelling met *constitutum possessorium* nie afhanklik is van die mate waarin dit verbloem was nie. Ondeurskoubare sekerheidstellingsvorme is teen die uitgekristalliseerde openbare belang en in daardie opsig teen die goeie sedes en dus onhoudbaar.

Daar is ook geargumenteer dat om hierdie rede (geen saakvervanging nie) ook geen spesiale notariële verband gevestig kan word oor "die winkelvoorraad" van 'n winkelier as sekerheidsgewer nie. (Sien in die verband die bespreking deur Wunsh "What rights of preference are enjoyed by a special notarial bond?" 1960 *THRHR* 112 ev en Sacks "Notarial bonds in South African law" 1982 *SALJ* 605 612.) Die partye kan dus nie afspreek dat die vervangende voorraad in die plek kom van die voorraad wat op die rakke was toe die ooreenkoms aanvanklik aangegaan is nie. Die party-outonomie strek dus luidens die argument nie so ver dat dit vir saakvervanging voorsiening kan maak nie.

Hierdie argument verwar moontlik twee aspekte. Uit die aard van die saak word winkelvoorraad voortdurend vervang, maar dit is nie die wegspringplek hoekom winkelvoorraad nie as sekerheidsobjek vir hierdie vorm van sekerheidsreg aangebied kan word nie. Van meer betekenis is die feit dat die tipiese winkelvoorraad van die kruidenier op die hoek nie voldoende as individuele sake omskryfbaar is nie. Die nievoldoening aan die bepaaldheidsvereiste gee dus die deurslag en nie die feit van saakvervanging alleen nie.

Die bestaande voorraad op die rak word verkoop en daardie sake se plek word ingeneem deur nuwe sake wat ingekoop word. Dit is egter sakeregtelik gesproke nuwe sake, al is dit van dieselfde soort, en daarom kan die vorige saaklike sekerheidsreg nie outomaties op die vervangende sake "oorgedra" word sonder nakoming van die sakeregtelike bepaaldheidsvereistes wat nodig is om die nuwe saaklike reg vir die saaklikreghebbende sekerheidsnemer te vestig nie.

Dat dit 'n ongunstige finansiële belasting en moeite vir die sekerheidsnemer behels, staan vas – maar as troos word dan gewoonlik gemeld dat dit uit 'n sekerheidsregtelike oogpunt wel vir hom die moeite werd is.

Ek is egter nie oortuig daarvan dat dit die volle verhaal vir 'n geval soos dié van SNEL en ANB is nie. Anders as die tipiese winkelvoorraad-geval, is die tipe saak wat as sekerheidsobjek in ANB se geval ter sprake kom, veel beter bepaalbaar. Dit is identifiseerbare voertuie en nie kruideniersware wat bestaan uit suiker, eiers en meel wat alles uiters onbepaalde generieke sake is nie. Die voertuie kan aan die hand van byvoorbeeld 'n behoorlike inventaris juis met benutting van 'n aktuele register presies identifiseer word en enige potensiële kredietverskaffer wat reeds die moeite doen om die persoonsregister te benut, sal vandaar direk verwys word na die feit dat die werklike register die huidige voertuie wat betrokke is per registrasienommer, enjinnommer en so meer identifiseer. Indien die twyfel boonop gekombineer word met die bewese behoefte aan meer soepelheid in sekerheidspraktyk (vgl bloot die opmerkings deur appèlregter Nienaber in die *Windhoek*- en regter Cloete in die *Nedcor*-saak (838H)) kan dit as verskoning dien om weer krities na van die

aannames te kyk. Vir dié doel word ook rekening gehou met die ontwikkeling in die moderne Duitse reg wat moontlik 'n navolgingswaardige voorbeeld kan bevat.

6 Doel van bepaaldheidsvereiste

Die doel van die bepaaldheidsvereiste is om te verseker dat 'n bepaalde saak aan 'n bepaalde reghebbende toegeken kan word. Daar moet, om dit so te stel, regsekerheid heers oor welke saak aan welke reghebbende behoort of minstens vir hom as verhaalsobjek, in die geval van die saaklike sekerheidsregte, in spel kom. (Sien oor die eng verband tussen bepaalbaarheid en publisiteit ook in die Duitse sakereg Wilhelm *Sachenrecht* (1993) 147–148; Baur-Stürner *Sachenrecht* (1999) 33–35; Müller *Sachenrecht* (1997) 32; Wolf *Sachenrecht* (1999) 12–14.) Die bepaaldheidsvereiste verseker dat die juiste saak as objek jeens die belanghebbende geïdentifiseer word. Afdoende bepaaldheid vervul dus 'n wesenlike rol in die publisiteitsvereiste as tipiese vereiste van die sakereg. (Daarteenoor word vir insolvensieregtelike doeleindes slegs belang gestel in die mate waarin die bates van die skuldenaar wel as onbelaste vrye oorskot bestempel kan word en daarom speel bepaaldheid geen rol by vestiging van 'n algemene notariële verband oor alle roerende bates van die skuldenaar nie.)

Die tipiese legitimeringsvereiste by roerende sake word tradisioneel vervul deur die besit van die saak. Besit legitimeer teenoor die ander regsubjekte dat daar vermoedelik 'n regsband tussen die besitter en die saak in sy besit bestaan. Die besitter is immers "vermoedelik" die reghebbende in die geval van roerende sake. Omdat besit so 'n feitelike direkte verhouding tussen 'n bepaalde saak en 'n bepaalde individu is, word besit gewoonlik ook direk in die identifisering van sake betrek. Waar die besitter nie in beheer van 'n saak is nie is dit nodig om die saak langs ander maniere te identifiseer. In die geval van onroerende sake word die legitimeringsfunksie deur die registrasie in die openbare registers vervul en speel besit gevolglik by die afgeleide wyses van regsverkryging op onroerende sake geen legitimeringsrol nie. Aan die bepaaldheidsvereiste word voldoen deur die kartering (die kadastrale bepaling van die grondstuk se grense) in die tersake registers of kaarte van die landmeter-generaal se kantoor. Sigbare besit is daarvoor eweneens nie nodig nie. Omdat geen vergelykbare oorkoepelende register van alle roerende goed of selfs sogenaamde registergoed in die Suid-Afrikaanse reg bestaan nie, is daar ruimte vir twyfel oor hóé aan die bepaaldheidsvereistes voldoen kan word by roerende goed.

7 *Markierungsvertrag* as voorbeeld?

In beginsel ken sowel die Suid-Afrikaanse as die Duitse reg geen suiwer konsensuele wyses van eiendomsverkryging nie. Die Suid-Afrikaanse reg is egter, anders as die Duitse reg, nie vir doeleindes van die besitsverskaffingskomponent van die verkryging van saaklike regte vertroud met die *Markierungsvertrag* of die *Raumsicherungsvertrag* van daardie regstelsel nie. Tot op hede is ook nog nie in die regspraak hier te lande oorweeg of daardie of soortgelyke alternatiewe omskrywingsvorme nie moontlik wel by die nuwe statutêre sekerheidsvorme in die Suid-Afrikaanse reg aanwending behoort te kan vind as identifiseringsmiddel nie.

Danksy die registrasievereiste ingevolge artikel 1(1) van Wet 57 van 1993 speel die besit, soos in die geval van die registrasievereiste by onroerende sake, geen legitimerings- of identifiseringrol by hierdie sekerheidsvorm nie en kan myns insiens wel oorweeg word om iets analoogs aan een van die gemelde alternatiewe beskrywingsvorme te benut om die tersake objekte sodanig te identifiseer dat dit afdoende bepaalbaar of kenbaar is. Die Duitse *Bundesgerichtshof* [*BGH*] het reeds in 1956

beslis dat die klem behoort te val op die behoorlike identifisering van die roerende sake wat as objek moet dien van die tersake saaklike reg wat gevestig of oorgedra moet word. Daar is reeds bepaal dat dit nie afdoende is indien slegs na 'n omslagtige deurvorsing van die boeke en interne state van die sekerheidsgewer bepaal sal kan word welke sake die objekte van die tersake regte is nie (RGZ 129, 61; RGZ 132, 183 187). Dit moet dus geredelik kenbaar wees. (Sien ook BGHZ 21, 52 56–58 en bevestig in BGHZ 28, 16 20; uitsprake van die *BGH* van 1962-06-04, viii ZR 221/61 en 1991-04-18, ix ZR 149/90.) Daardie beginsel word daar soos volg formuleer: "[Es muß] aufgrund einfacher, äußerer Abgrenzungskriterien für einen Dritten ohne weiteres ersichtlich sein . . ., welche Sachen gemeint sind" – Ott "Bestimmtheitsgrundsatz bei der Sicherungsübereignung von Sachgesamtheiten" 1992 *WuB I F* 5.

8 Geredelik kenbaar

Die enigste vereiste wat die 1993-wet hier te lande stel, is dat die sake wat onder die Wet 57-tipe notariële verband val, wel sodanig beskryf en gespesifiseer moet word dat dit afdoende of *geredelik kenbaar* sal wees. Tot op datum is deur die praktyk en die meeste skrywers aanvaar dat die vereiste dui op die tipiese reeks- of vervaardigersnommers of selfs die administratiewe registrasienommers soos wat by voertuie gebruik word, maar dat daarenteen die tipiese winkelvoorraad van die kruidenier op die hoek nie as sekerheidsobjek vir hierdie sekerheidsvorm deug nie. Die blikkies vis en groente op die kruidenier se rakke is, soos die sakkies suiker en rys in die pakstoor daarvoor te onbepaald.

Dit hoef egter myns insiens nie noodwendig net by die gebruiklike registrasienommers of enjinnommers van voertuie of swaar toerusting te bly nie. Die volgende formulering uit die Duitse reg behoort hier oorweeg te word.

> "Beim Markierungsvertrag vereinbaren Sicherungsgeber und Sicherungsnehmer, daß jedes einzelne Stück des gegenwärtigen und zukünftigen Sicherungsguts mit einem bestimmten Kennzeichen versehen (markiert) werden soll. Die Markierung ist die für den . . . [übergang von den dinglichen Rechtes] erforderliche Ausfuhrungshandlung." – Pottschmidt en Roht *Kreditsicherungsrecht* (1992) § 528.

8 1 Die juiste vorm van die merk wat ter sprake kan kom, is nie voorskrifmatig bepaal nie *mits* dit sonder misverstand die betrokke sake *kenbaar maak – dit wil sê identifiseer.*

> "Entscheidend ist, dass die Kennzeichnung eine sichere Unterscheidung der übereigneten von den anderen Waren erlaubt" (Bülow *Recht der Kreditsicherheiten* (1993) § 881).

Indien die ooreenkoms byvoorbeeld slegs sou verwys na 'n handbiblioteek van die kunsdepartement is die tersake boeke steeds onvoldoende geïdentifiseer omdat dit nie duidelik is welke boeke wel tot die handbiblioteek sou behoort nie. (Dit was trouens die bepalende aspek van die uitspraak van die *BGH* van 1992-01-13, ii ZR 11/91.) Indien die handbiblioteek dit egter in 'n bepaalde, as sodanig geïdentifiseerde ruimte bevind en uitsluitlik boeke van die aangeduide aard bevat, sou dit reeds die beslissing in dié opsig geswaai het. Daar word egter ook reeds in die Duitse regspraak voorsiening gemaak vir die afdoende identifisering van sake deur bepaalde merke daarop aan te bring.

> "[A]nerkannt ist, daß die Anbringen von tafeln, Schildern oder anderen Markierungen ein geeignetes Mittel ist, um bei einer sachgesamtheit denjenigen Teil genau zu bezeichnen, auf den sich der Übereignungswille der Vertragspartner erstrecken soll" (BGH Urteil v 2. Zivilsenat vom 1992-01-13 § 2).

(Sien ook die bespreking van die uitspraak deur Serick "Sachgesamtheit, Bestimmtheitsgrundsatz, Raumsicherungsvertrag, Sicherungsübereignung nicht markierter Teilbestände" 1992 *EwiR* 349–350 wat die klem op die "eindeutig bestimmt" laat val; Schmidt "Bestimmtheitserfordernis bei der Sicherungsübrteignung eines Warenbestandes" 1992 *JuS* 696–697.)

9 2 Die verband met die gemeenregtelike *traditio simbolica* wat ook aan die moderne Suid-Afrikaanse reg nie onbekend is nie, is maklik aantoonbaar. Die klassieke houtkoper wat die stamme van sy merk voorsien ten einde só aan die leweringsvereiste te voldoen, is nie so ver verwyder van die moderne logo-beskilderde voertuie nie. Ook vir die Suid-Afrikaanse reg is die aanwending van merke direk op die potensiële verhaalsobjekte nie onbekend nie. In *TR Services (Pty) Ltd v Poynton's Corner Ltd* 1961 1 SA 773 (D) draai alles immers om die vraag of die plaatjies wat op die apparate aangebring was voldoende opvallend was om derdes oor die regsposisie in te lig. Dit laat dus die vermoede ontstaan dat mits die markering afdoende opvallend is dat slegs 'n eenduidige afleiding daaruit gemaak sou kon word, dit wel as afdoende sou kon geld om daardie sake te vrywaar teen die stilswyende hipoteek van die verhuurder. Dit behoort dan slegs 'n klein tree verder te wees om te aanvaar dat ook positief vir doeleindes van die vestiging van saaklike sekerheidsregte kennis geneem behoort te word van afdoende markeerde sake van die skuldenaar om dit as potensiële verhaalsobjekte te kan identifiseer.

9 *Listenvertrag* of aktuele inventaris

9 1 As verfyning van die *Markierungsvertrag* erken die Duitse regspraak die sogenaamde *Listenvertrag* as variasie op dieselfde tema. Dit plaas die klem vir die identifisering van die tersake objekte nie op die fisiese merke of plakkers wat op die sake self aangebring is nie, maar op 'n werklike lys of register van die tersake bates aan die hand waarvan die individuele bates met afdoende sekerheid te eniger tyd bepaal kan word. Die inventaris word daar hanteer as 'n bykomstige identifiseringsmiddel en 'n belangrike bewysmiddel. (Sien Serick *Eigentumsvorbehalt und Sicherungsübertragung* bd 2 (1986) 140 166–170 en die bespreking van die uitspraak van die *BGH* in 1977 *WM* 218; BGHZ 28, 16 20 en BGHZ 21, 52 56.)

9 2 Kombinasie van merk en inventaris

Juis in die geval van die voertuigvloot van SNEL kan dit aantreklik wees om die lysvariasie in samehang met die behoorlik geverfde en met logo-versierde (dus gemerkte) voertuie te benut om die tersake voertuie wel te kan identifiseer.

> "Der Listenvertrag kommt in der Regel nur in Betracht, wenn die übereigneten Sachen individuelle Fabriknummern haben, die in der Liste vermerkt werden" (Bülow § 882).

Weer eens is die bepalende faktor die mate waarin die sake wat onder die sekerheidsreg val aan die hand van die lys geredelik kenbaar is. Myns insiens is daar geen rede hoekom sodanige identifiseringsvorm nie binne die raamwerk van Wet 57 van 1993 benut sou kon word nie.

> "Bestimmtheit kann aber auch dann herbeigeführt werden, wenn die Sachen vereinbaringsgemäss in eine Bestandliste augenommen werden und sich daraus ergibt, welche ursprünglichen und neuen einzelnen Sachenübereignet sind." – Bülow *Recht der Kreditsicherheiten* (1993) § 883 en Bülow "Einfürung in das Recht der Kreditsicherheiten" 1996 *Jura* 190 194–195.

Die feit dat Serick (die erkende gesaghebbendste outeur oor saaklike sekerheid in die Duitse reg) geen bedenkinge opper oor die aanwending van die *Markierungsvertrag* in dié samehang nie, mits die werklike sekerheidsobjekte net vasstelbaar is,

bevestig my vermoede dat dit ook vir die Suid-Afrikaanse reg aanwendbaar behoort te wees. (Sien Serick *Eigentumsvorbehalt und Sicherungsübertragung* bd 2 § 21 III 2 a en b–e en bd 6 § 75 V 1 c.)

Van hierdie vorme van identifisering van die sekerheidsgoed moet dus duidelik onderskei word van wat in die Suid-Afrikaanse reg veral bekend geraak het as die vae vloerplanooreenkomste – dit is vergelykbaar met die *Mantelübereignungsvertrag* van die Duitse reg. Daardie vloerplanooreenkomste is deurgaans té onbepaald om aan die sakeregtelike bepaaldheidsvereistes te voldoen. In die bekende voorbeelde uit die regspraak van die afgelope paar jaar soos *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd* 1994 3 SA 188 (A) en *Nedcor Bank Ltd v Absa Bank Ltd* 1998 2 SA 830 (W) is dit duidelik dat ten tyde van die aangaan van die vloerplanooreenkoms op geen manier bepaal kan word welke individuele voertuie wel daaronder sal val nie en word dus nie aan die sakeregtelike bepaaldheidsvereiste voldoen nie.

10 Voorbeeldformulering?

Myns insiens bestaan daar wel 'n moontlikheid om die tersake voertuie in die verbandgewer se vloot wat die objek van die sekerheidsreg (in 'n geval soos die onderhawige voorbeeld) moet vorm, in die notariële verbandakte wat by die registrateur geregistreer word, soos volg te beskryf:

> "Alle voertuie wat op 'n gegewe moment met die tipiese verf en logo as geregistreerde handelsmerke van SNEL versier is, en behoorlik na tersake voertuigsoort (model en boujaar), reeksnommer en registrasienommer as sekerheidsobjekte presies van 'n deur die sekerheidsgewer gevoerde en bygehoue register of inventaris kenbaar is, dien as sekerheidsobjek vir doeleindes van hierdie spesiale notariële verband."

11 Die klem op "alle" voertuie van die sekerheidsgewer

Dit sal waarskynlik van deurslaggewende belang wees dat alle voertuie wat deur SNEL benut word, sonder uitsondering as sekerheidsobjek kenbaar moet wees. Dit wil sê, daar moet geen ruimte vir verwarring wees nie. Ook vir die Duitse reg beklemtoon Serick dat die kanse op verwarring vir derdes wesenlik verminder word as "alle" objekte (voertuie) van die sekerheidsgewer wat as sy voertuie kenbaar is, sonder uitsondering as sekerheidsobjek aangedui word. Die oomblik wat 'n derde party hoegenaamd kennis neem van die moontlikheid dat die tipe sake van die kredietnemer as verhaalsobjekte van die verbandreghebbende ANB ter sprake kom, is dit nie verder nodig om te gaan ondersoek welke onder die sekerheidsreg val en of enige daarvan uitgeslote is nie.

Die merk moet uniek wees. Dit veronderstel dat die kleur en kleurpatroon wat benut word liefs soos die logo dermate uniek moet wees dat dit nie met enige ander reghebbende se gelyksoortige bates verwar kan word nie. Dit kan uiteraard net moontlik wees indien sowel die logo as die kleur en kleurkombinasies telkens as handelsmerke geregistreer word. Dit impliseer verder dat sou die voertuie, na bereiking van hul beplande nutstyd as voertuie in diens van SNEL, vervreem word die vervreemder allereers die voertuie só moet laat oorverf dat geen verwarring in die opsig kan bestaan nie.

Die inventarisvereiste impliseer dat 'n werklike register deurentyd deur ANB en sy besitsdienaar SNEL gehou moet word waarop die besonderhede soos aangedui afleesbaar sal wees. Die register moet te eniger tyd vir alle belanghebbendes vir insae beskikbaar wees.

Toegepas op ANB se probleem bring dit noodwendig mee dat by die uitbreiding van die bestaande voertuigvloot van SNEL telkens 'n werklike registerinskrywing by ANB en SNEL gemaak moet word, maar dit benodig dan nie telkens 'n nuwe notariële verbandreg wat afsonderlik verly en geregistreer moet word oor elke nuwe voertuig as toevoeging tot die vloot nie.

12 Gevestigde regspraak daarteen?

Omdat die statutêre posisie soos gereël in Wet 57 van 1993 bewustelik aansluit by die ou Natal-posisie soos eerder dáár gereël deur Wet 18 van 1932, is die uitsprake wat in daardie afdeling oor dié aspek gelewer is, steeds van belang. Ook in die lig van die feit dat daar behoudens *Bokomo v Standard Bank van SA Bpk* 1996 4 SA 450 (K) nog geen gerapporteerde uitspraak oor die toepassing van die nuwe wet is nie, sal minstens kennis geneem moet word van die ou uitsprake oor die Natal-posisie.

Die tersake artikel van die gemelde Wet op Notariële Verbande (Natal) 18 van 1932 lui:

> "1(1) This Act shall apply only to movables situate within the Province of Natal and shall apply to a notarial bond only in so far as such bond hypothecates movables *specially described and enumerated* therein: Provided that such bond is passed by a person (hereinafter referred to as 'mortgagor') and registered in the deeds registry at Pietermaritzburg at a time when no other notarial bond generally hypothecating such mortgagor's movables is registered in such deeds registry: Provided further that notwithstanding anything to the contrary in any law, usage or custom, no notarial bond shall have the force or effect of a pledge of movables without delivery thereof by the debtor and taking and keeping in possession by the creditor unless it has been passed and registered as aforesaid."

Ook in daardie formulering is die individuele aard van die sekerheidsobjek dus op soortgelyke wyse beklemtoon as wat tans die geval in die huidige wet is.

12 1 Met betrekking tot die ou Natal-posisie is een uitspraak gerapporteer wat oënskynlik saakvervanging by spesiale notariële verbande raak. In *Durmalingham v Bruce NO* 1964 1 SA 807 (D) is beslis dat 'n notariële verband geregistreer oor 'n bepaalde bus in die verbandakte geïdentifiseer as 'n Henschell-bus, nie outomaties ook oor die International-bus waar deur die aanvanklike verhaalsobjek later vervang is, strek nie (808E–F). Die aansoek om rektifikasie van die verbandakte om wel voorsiening te maak vir die beweerde bedoeling van die partye, is afgewys en die alternatiewe pleit dat sodanige vervangingsklousule 'n stilswyende beding van die verbandooreenkoms sou wees, was eweneens nie suksesvol nie. Dit het in daardie saak vir die hof geen verskil gemaak nie dat die sekerheidsreghebbende selfs beweer het dat die partye onderling verstaan het (ooreengekom het) dat saakvervanging sal plaasvind mits dit sou gaan oor die voertuig waarmee die bepaalde roete bedryf is. Daar is na die oordeel van die hof duidelik nie ruimte vir outomatiese saakvervanging by 'n spesiale notariële verband nie.

Die oomblik wat die aanvanklike verhaalsobjek nie meer tot die bates van die sekerheidsgewer behoort nie en met die instemming van die sekerheidsreghebbende vervreem word, verval die sekerheidsreg wat daarop gerus het outomaties, nieteenstaande die feit dat die onderliggende vorderingsreg steeds mag bestaan.

12 2 Hoewel kennis geneem moet word van daardie uitspraak, is dit stellig nie die laaste woord in die verband nie. 'n Blote beroep op daardie uitspraak behoort myns insiens dus nie afdoende te wees om die argument hierbo opgebou vir 'n verslapping van die streng registrasievereistes by spesiale notariële verbande sonder

meer te ontsenu nie. Daardie uitspraak is onderskeibaar omdat dit nie uit die geregistreerde verbandakte af te lei was dat vir saakvervanging voorsiening gemaak word nie en tweedens kon die hof nie van sodanige bedoeling van die partye oortuig word nie. Die ratio van daardie uitspraak dek dus nie werklik 'n geval wat beheers sou word deur die hierbo (§ 10) voorgestelde geregistreerde klousule in 'n geregistreerde verbandakte nie. Anders as in die *Durmalingham*-saak verskaf die voorgestelde formulering aan enige belanghebbende voldoende aanduiding welke objekte onder die verband inbegrepe is dat hy minstens op sy hoede behoort te wees ten aansien van die aldus "geredelik kenbare" objekte.

13 Gevolgtrekking

Die huidige klimaat in die howe is sodanig dat wegbeweeg word van 'n onnodige formalisme en steeds gepoog word om die reg só toe te pas dat dit die handelsbelange ten beste dien (uiteraard sonder verkragting van geykte beginsels of duidelike wetsvoorskrifte). Die huidige onderbenutting van die spesiale notariële verband as sekerheidsfiguur laat sekerlik nie reg geskied aan die bedoeling van die wetgewer met die invoering daarvan sewe jaar gelede nie. Toe is immers gehoop dat die geregistreerde mobiliêre hipoteek voortaan die sekerheidstellingsfiguur van voorkeur by roerende sake sal wees. Indien daardie onderbenutting aan die vermybare oorbeklemtoning van duur en omslagtige registrasievereistes te wyte is, wat vermy kan word sonder om die aanvanklike oogmerk van voldoende publisiteit te ondergrawe, behoort die moontlikheid ernstig oorweeg te word. Indien van meet af aan in die openbaar toeganklike geregistreerde notariële verbandakte verwys word na die benutting van die voertuigvloot van die kredietsoeker SNEL as verhaalsobjek vir ANB se vordering, is daar veel duideliker as in die *Durmalingham*-saak rede vir derdes om op hul hoede te wees en navraag te doen. Daar word dan myns insiens wel voldoen aan die bepaaldheidsvereiste en kan die voertuigvloot ook met inagneming van die aspek van saakvervanging as sekere sekerheidsobjek aangewend word.

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TRANSFORMING TEACHING AND RESEARCH AT THE LAW SCHOOLS OF HISTORICALLY BLACK UNIVERSITIES: A CASE STUDY OF THE FORT HARE LAW FACULTY*

1 Introduction and historical background

Historically Black Universities (HBUs) are a creation of the Bantu education and training system of the defunct apartheid socio-political order. Accordingly, they were designed from the outset to assist the then government of the day in achieving total segregation in the use of South Africa's tertiary education resources. A critical

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feature of the said system of education was the fact that HBUs were intended not just to be separate from, but also unequal and inferior to, their historically white counterparts. In other words, the provision of quality education for the non-white peoples of South Africa was not an important policy objective for the architects of apartheid educational policy. It is therefore no surprise that

> "[f]rom their very inception, each of these black universities started from a position of being disadvantaged . . . In physical structure, financial and material resources, and intellectual endowment, these universities were underprivileged, poorly equipped and inferior to their white counterparts . . . Furthermore, and perhaps even much more fundamental, these institutions lacked an intellectual identity and capacity. Although each of them had and could boast of an ethnic identity, all of them were generally neglected, operated in oppressive conditions and were associated with second or third rate academic standards." (Wanda "Evolving an identity of South African black law schools for the next millennium" in Iya, Rembe and Baloro (eds) *Transforming South Afric universities – Proceedings of a national conference on capacity building for HBUs: Challenges and strategies for the next millennium* (Forthcoming, 2000).)

Given that historically black law schools/faculties form an integral part of their universities and as such have been subjected to the same oppressive management and deliberate under-resourcing as their mother universities (*ibid*), it is both logical and easily understandable that they now exhibit and must contend with a myriad of problems which can best be described as apartheid's bequests to HBUs. The most difficult of those problems, which in concert threaten the very survival of HBU law schools well into the new millennium, are:

(1) Non-availability of qualified, competent and motivated staff to provide the academic support programmes and skills training required by their students.

(2) Lack of financial and institutional resources to provide legal education comparable to that available at historically white universities. Most noteworthy here is the paucity of the library collection and information technology equipment at HBU law faculties. This makes it extremely difficult to build any meaningful research capacity or post-graduate programmes.

(3) Inability to establish or sustain a law journal. The practical implication is that HBU legal academics are dependent on journals established and managed by historically white universities or institutions for the publication of their research results. There is growing consensus that the low research output of HBU law faculties can, in part, be explained on this premise. See eg Baloro "Promoting the culture of teaching, research and learning for excellence" in Iya, Rembe and Baloro in Wanda *op cit*.)

(4) Inability to attract, employ and retain good legal academics. This problem is attributable to two factors: the first has already been mentioned above, namely, limited financial resources which translates into poor salary packages; the second is the location of HBUs in rural areas far away from urban centres. It is a notorious fact that most good academics are simply not prepared to work in university towns in which quality accommodation, medical, educational and recreational facilities are unavailable. (See Omar "Opening and keynote address by the Honourable Minister of Justice" in Iya, Rembe and Baloro *op cit*.)

(5) Lack of research skills coupled with a highly underdeveloped culture of research. The historical evidence suggests that HBUs saw themselves from birth as having a limited mandate, namely, the provision of tuition in a myriad of university-level courses to non-white people. In the pursuit of that mandate, the managements of these universities did not consider it necessary to encourage the production of

publishable research by academic staff. Accordingly, academic promotion criteria were not closely tied to the production of such research or the successful completion of masters and doctoral degrees as was the case at historically white university law schools. There are two unfortunate consequences of this lack of research culture and activity at HBUs. The first is that funds generated through government subsidies for research output are not available in any meaningful amount to HBUs; secondly, and more importantly, a strong perception of management tolerance for mediocrity in the performance of duties by academic staff has firmly crystallised and now poses one of the greatest challenges for the post-apartheid managers of HBUs.

As expected, one of the fundamental objectives that the new democratically elected government of South Africa has set for itself since assuming power in 1994 is the transformation of the country's tertiary education sector. In that connection, the government has issued the Higher Education White Paper (*A Programme For Higher Education Transformation. Education White Paper 3* (1997) (hereafter *White Paper 3*)) and enacted the Higher Education Act 101 of 1997, which establishes a new set of mandatory objectives for South Africa's universities and technikons and prescribes a number of fundamental principles intended to guide those institutions in taking steps towards realising those objectives. For the purposes of the discussion pursued in this note, the most important of those objectives require the tertiary institutions to:

(a) "[m]eet, through well-planned and co-ordinated teaching, learning and research programmes, national development needs, including the high-skilled employment needs presented by a growing economy operating in a global environment" (*White Paper 3* 5); and to

(b) "[c]ontribute to the advancement of all forms of knowledge and scholarship, and in particular address the diverse problems and demands of the local, national, Southern African and African contexts, and uphold rigorous standards of academic quality" (*ibid*).

In the pursuit of these twin objectives, tertiary institutions, especially the HBUs, must adhere to, *inter alia*, the principle of mandatory assurance of relevance, standards and quality in the delivery of their educational programmes. (Kaburise "Transformation of historically black universities in South Africa: Problems and challenges" in Iya, Rembe and Baloro *op cit*.)

The new national tertiary education mandate and principles have given birth to an ongoing vigorous debate on issues such as the content of quality education and the unique needs that the HBUs must contend with if they are effectively to renew and re-position themselves to provide education that is consistent with the said mandate and principles. Desperate and persistent calls have recently been made to HBUs to "wake up from their slumber" and to implement aggressive policies of thorough-going transformation leading to massive and unmistakable institutional renewal. (See eg Baloro *op cit* and Wanda *op cit*.) It is submitted that these calls are manifestations of an unarticulated consensus that HBUs, as currently constituted, resourced and managed, are probably incapable of consistently providing across the board tertiary education of the quality envisioned by the government. Convinced that the HBUs must "enter the debate on quality, not as victims or as slow starters, but as vigorous participants in defining the needs of a new social order" (Vice-Chancellor Ramashala's installation speech made at the University of Durban-Westville 1998-05-09 (cited in Kaburise *op cit*) this note is intended as a contribution to that debate as it pertains to the quality of legal education at HBU law schools in general and at the Fort Hare Law Faculty (hereafter "the faculty") in particular.

2 Teaching

In seeking to make changes to the present policies and practices relating to teaching, the faculty must be guided by what can be objectively ascertained as being in the best interests of the students, the university, the community and the nation. It must be emphasised here that the best interests of academic staff in terms of the preservation and advancement of their personal and professional interests should not be considered an important factor in the process of deciding upon the said changes. One of the truths or lessons taught by contemporary human resource management is that employees tend to be possessive of the way things are done in their workplace and are, therefore, generally disinclined to change. In the case of the faculty, that truth is evidenced by the presence of vested personal interests in protecting a work environment that tolerates or is at least indifferent to ineptitude, complacency and even incompetence on the part of academic as well as administrative staff. Rather, the faculty's and the university's position must be that it is the primary obligation of academic staff members to give their full support and to apply all their energies to ensuring that the objectives intended to be realised through the implementation of such changes are in fact achieved. However, sensitivity to the interests of staff members should be shown, especially where their accommodation would not be incompatible with the protection and promotion of the interests of the students, university, community and or the nation.

Changes regarding the manner in which contact tuition is currently provided, must be directed primarily at improving the quality of such tuition. This will generate a number of closely related positive effects desperately desired by the faculty and the university at the present time. First and foremost, improving the quality of tuition will serve to increase the quality and confidence of Fort Hare students at the point of graduation from the university's programmes and thereby serve to facilitate their absorption by the ever-demanding labour marketplace. Secondly, improvement in the quality of tuition will serve to raise the profile of the university as a true national asset at work and therefore as a place where quality, rigorous and contemporary legal education is available. This is especially important if the university is to succeed in persuading South Africa's middle-class parents, guardians and families that it is an institution worthy of serious consideration in the decision-making process regarding the university education of their children and wards. Thirdly, the university's future survival could, in fact, depend on improvements in the quality of the tuition it provides as financial support for it from private and public sector sources may in future turn on this point alone. (It is interesting to note that all of the recently announced partnerships between private sector corporate donors and SA universities involving the creation of scholarship funds that would be exclusively available for students from historically disadvantaged backgrounds have featured historically white universities only. The latest of these partnerships are between (1) the multinational investment house Merrill Lynch and the University of Cape Town and (2) South African Breweries and the University of Port Elizabeth.)

In effecting changes in teaching policies and practices, it is imperative that the faculty, more than ever before, exhibit the utmost sensitivity to the reality of the fact that most of its enrollees are products of disadvantaged/defective primary and secondary education, which manifests itself in relatively poor English language written and oral communication skills. This should not be construed as a suggestion that teaching be conducted in the Law Faculty in the way it is done at the high school level; rather, it is that an inquiry be conducted with a view to identifying a teaching methodology that is effective in the Fort Hare environment and therefore provides the best service to the students and the local community.

Furthermore, changes in the way things are done in the faculty on the teaching front must reflect contemporary developments in information technology, in the market for legal/lawyering skills, and in the evolution of the world into a "global village". There are a number of imperatives that these developments generate for law teaching that would be able to lay any valid claims to some credibility in this new millennium. First of all, the faculty must ensure that its graduates are both computer literate and competent to undertake legal research and writing using the myriad of digital/electronic sources now in common use in the modern law office. Secondly, to the extent that the market for new lawyers has recently begun to emphasise the need for such lawyers to display basic professional skills in addition to sound understanding of basic legal principles, it is imperative that teaching methodologies in the faculty embrace the challenge of finding a balance between transmission of contemporary legal knowledge to enrollees and equipping them with the said skills. Thirdly, the world's metamorphosis into a global village suggests that Fort Hare law graduates must be equipped to compete with and function effectively and confidently in the midst of lawyers and law graduates of diverse national backgrounds. Failure by the faculty to provide tuition of the quality envisaged here would be a great disservice to the students, the university, the community and the nation at large.

It is against this background that the proposals and the supporting comments that follow must be interrogated. The objective of setting them forth is to provide ideas that would, at a minimum, serve as raw material for a rigorous debate on the nature of changes that should be made on the subject of teaching and research in the Fort Hare Law Faculty.

2 1 Course allocations

Under the *status quo*, courses are assigned to academic staff members at departmental level where meetings to address the issue are called only when there is some expressed dissatisfaction by an aggrieved academic staff member. (The faculty currently comprises five departments, namely, Mercantile Law, Private Law, African and Comparative Law, Criminal Law and Procedure, and Constitutional and Public International Law.) In making the allocations, the departments appear to have been guided by the unstated principle that a lecturer who has the fortune (or misfortune) to teach a course in any one academic year gets to teach that course for the rest of her career at Fort Hare. In other words, there is a sense in which *courses are owned* by academic staff who have been in the faculty significantly longer than others. Furthermore, the allocations appear to be made on the assumption that by teaching a course for a number of years, a lecturer becomes an expert in that subject, whether or not she has published or produced original research work on the subject. In some cases, academic staff members have not in recent memory attended any academic conference in their areas of teaching interest; have not interacted with colleagues at other South African universities; have shown no interest in doing any research work in those areas; and have no national or international profile in any subject area whatsoever. It is a truism that it is through an active and aggressive involvement in research that a law teacher can get known by her peers and vice versa; it is also by this means that the law teacher can maintain close proximity to the cutting edge of her discipline. (See Nyamafene, "The business of knowledge" *Mail and Guardian* 1999-08-20–25.) A survey of opinions held by academic staff will readily demonstrate that a majority of them are generally dissatisfied with the *status quo* and, more specifically, would dissociate themselves from the above-mentioned "unstated principle" and "assumption of expertise" currently driving decisions on course allocations.

What is more troubling, though, is the fact that under the *status quo*, decisions on course allocations are not made on the basis of what is in the best interests of the students (the faculty's clientele), the faculty or the university. It is simply assumed that if the decisions reached make "everyone happy" ("everyone" here refers solely to academic staff members), then they must be in accord with the best interests of all stakeholders. Yet a survey among the students will readily show their lack of faith in that assumption as well as their dissatisfaction with the *status quo*. Also troubling is the fact that it is currently virtually impossible for a new senior or junior colleague to pursue *teaching interest* in a subject that is already being taught by another colleague at the time of the arrival of the former in the faculty. This remains the case even if the new colleague has done credible post-graduate work in the subject area, has prior teaching experience in it and/or published in it and even if the older colleague's claim to expertise in the subject area is founded solely on having taught the subject for a number of years. This unsatisfactory situation is exacerbated by the general reluctance of colleagues to undertake *team teaching* except in those cases where it is absolutely necessary. Academic staff members of the faculty must undertake a serious and honest self-critique in this context, especially given the fact that the trend at other universities and even here in some other Fort Hare faculties is towards team teaching.

The following proposals are therefore worthy of consideration by the faculty:

(1) A *Course Allocations Committee* should be established as a committee of the Board of Faculty and charged with the responsibility of assigning courses to academic staff. In terms of its composition, the board may wish to consider electing to the committee colleagues with substantial and credible post-graduate training in law as well as credible publications records and also to ensure strong representation of the student body on it. Rules can be adopted to give a colleague aggrieved by a decision of the committee the right to appeal against the decision to the Deputy Vice-Chancellor (Academic) whose decision would be final.

(2) The faculty should adopt *team teaching* as its fundamental policy to be followed wherever possible. This should be the case where the faculty finds itself with two or more academic staff members who have a *teaching and/or research interest* in the same subject area. The decision applying this policy to the provision of tuition in any particular course should be exclusively reserved for the Course Allocations Committee.

(3) Where team teaching is not possible, then the faculty should adopt, as another fundamental policy in this context, the *principle of rotation* by which a course in which more than one staff member has a research and teaching interest will change hands annually between interested academic staff members. Again, the decision to apply this principle in any one year to any course should fall within the competence of the Course Allocations Committee.

(4) In making its decisions year after year, the said committee must be guided by, *inter alia*, lecturer-evaluation reports prepared by the committee's chairperson or the Law Students' Council (LSC) based on assessment questionnaires provided to the students for completion prior to the final examinations in any course. Other data that the committee may consider in reaching its decisions, are the recommendations (if any) furnished by the Dean, Head of Department, and the LSC. The committee may also request academic staff members to submit to it information whicht it considers relevant to its decision-making process, such as evidence of ongoing research, attendance at academic conferences and/or publications.

(5) In making its decisions, the Course Allocations Committee must be required by the Board of Faculty to ensure that it is guided primarily by what it believes in its judgment to be in the best interests of the students, the faculty, the university and the community. The need to accommodate the personal interests of academic staff members should at all times be treated as secondary in this context.

2 2 Provision of support for law teachers

At present, each law teacher is supported by one secretary shared with a number of colleagues. For those who rely on secretarial support to prepare reading materials for students, this presents problems when the materials are required as a matter of urgency. Tutors are also presently available to assist lecturers to ensure that the students truly learn the relevant materials and acquire the relevant skills. However, their availability is limited only to the 100 and 200 levels, although it is not particularly clear why this should be so. Furthermore, experience would seem to suggest that both attendance at the tutorials and supervision of the tutors themselves are very poor. The following proposals, if implemented, should bring about significant improvement:

(1) The use of tutors should be extended to undergraduate programmes at all levels. In order to make the tutorials more effective, supervision by the lecturers should be more rigorous and attendance by enrollees should be made compulsory. One way of enforcing attendance that should be considered is assigning a certain percentage of the final mark in every course to participation at tutorials. Furthermore, the purposes for which tutors are used should be broadened to allow their use by lecturers to provide teaching support by way of helping with (a) gathering and photocopying of study materials; (b) minor research; and (c) evaluation of class assignments under close supervision. While this may necessitate changing their title to "teaching assistants", it is an insignificant price to pay for the positive results that are certain to ensue.

(2) The need to provide every lecturer with her own personal computer and, if possible, a printer, cannot be overemphasised. There can be no doubt that access to a personal computer would greatly enhance the effectiveness of most lecturers in the faculty. There are certain legal subjects that can no longer be taught effectively without the use of a computer laboratory and audio-visual aids. Examples of such courses that readily come to mind are Alternative Dispute Resolution (aside from simulation or mock exercises, the effective teaching of topics such as negotiation, mediation and arbitration is easier to achieve where the teacher has access to a television and video sets or film projectors with which students can be shown local and foreign practical training materials), and International Trade Law. (The challenges of teaching the subject of International Trade Law in a SA law school are two-fold: first of all, the subject area is one that changes so rapidly that it is simply impossible to keep track of new developments by reliance on printed materials; secondly, most printed materials (textbooks, multilateral agreements, etc) on the subject are produced overseas and at present currency exchange rates are not affordable for most universities. However, these materials are generally available on the internet. Having access to computers with on-line/internet connection therefore becomes the most realistic means by which students of International Trade Law and their teachers can access most of the key educational resources in this subject area.) The faculty must find a creative way of making such facilities accessible to its staff and students if it is to provide contemporary legal education comparable to that of its competitors.

(3) The faculty must accept that, as a fundamental principle, it is unacceptable for academic staff members to be indifferent to or nonchalant about the need for them to become computer literate. They should, indeed, consistently exhibit a willingness to learn new material, new subjects, and new teaching methodologies. In this regard it is proposed that *computer training of staff* as well as their active use of the university computer network to serve the Fort Hare student body be made mandatory. In order to provide staff with the capacity to learn new subjects and/or new pedagogical methodologies, it is further proposed that the faculty explore the possibility of making some form of *re-training of staff* mandatory, especially for staff involved with subjects in which rapid/massive changes have occurred in the last few years – as a result, for example, of advancements in information technology or changes in the political system of the country.

2 3 Preparation of course manuals

Sadly, there are at least two ways in which the fact of our students' educational and economically disadvantaged backgrounds reveals itself. The first is through an almost general inability to take detailed and accurate notes from lectures; the second is also an almost general inability to purchase prescribed and recommended texts. Yet the absolute need to ensure that these students receive legal education that empowers them to be the very best that they can be, makes it imperative for the faculty to find creative ways of making sure that they have ready access to the bulk of the relevant body of information and skills.

Accordingly, the following proposals are made:

(1) It must be made mandatory for lecturers to prepare *course manuals or packs* which would be made available to the students at the commencement of each semester. The cost of producing such materials could be subsidised with funding from some of the private sector sources that the faculty currently benefits from. (Along with other SA law faculties, the Fort Hare Law Faculty annually receives substantial funding from the Attorneys' Fidelity Fund. It has also recently been a beneficiary of funds donated by the law firm of Adams and Adams.) With or without such a subsidy, it is likely that the sale of such course manuals to the students "at cost" might be an inexpensive way of making lecturers more effective in transmitting the necessary knowledge and skills.

(2) In implementing the above proposal, the faculty should look to the law faculties of the University of South Africa and Vista University which have been making use of such study manuals for several years. (It is noteworthy that Vista University is also a historically black institution. It therefore cannot be credibly suggested that academic staff of historically disadvantaged institutions are inherently incapable of producing course manuals to an acceptable standard.) This is essential if the faculty and the lecturers involved in the preparation of such manuals are not to fall foul of the copyright laws to which regard must be had if, for example, the manuals are to contain excerpts from published texts, articles, judgments, and so on.

2 4 Evaluation of teaching methodology and assessment of law teachers

There is presently no evaluation or assessment of lecturers. Further, there has been no evaluation of pedagogical methods employed by colleagues in the faculty at least over the last decade. Yet it is impossible for a faculty to improve the quality of its delivery to the student body as its clientele without a regular evaluation of how the business of teaching is being done on its behalf by academic staff members. Accordingly, the following are proposed:

(1) Mandatory assessment of the quality of tuition provided on every course should be conducted *by the university* in the last month of lectures in every semester. This assessment can be effectively conducted on the University's behalf either by the Academic Development Centre (ADC) or by academic staff of the Education Faculty. (The Academic Development Centre of the University was established in 1994. Under the leadership of a director and assistant director, its main function is to assist academic departments in developing and implementing academic support programmes aimed at achieving a satisfactory throughput rate in those departments' undergraduate and post-graduate programmes.) Again, it must be noted here that such evaluations are mandatory and therefore commonplace at other universities.

(2) The assessment of lecturers by students should also be made mandatory. Such assessment should be conducted prior to the final examinations in any course, using skilfully drafted questionnaires. At present, members of the faculty's student body desperately desire the opportunity to document their assessment of the quality of the tuition they are receiving. A failure to make this opportunity available to the students will keep the level of "client satisfaction" with the faculty at its lowest ebb ever. Again, we should note that student assessment of lecturers is mandatory at South Africa's historically white universities, to which Fort Hare is increasingly losing its present as well as prospective students.

3 Research

In the past four years at least, the members of the faculty have generally displayed a palpably lukewarm attitude towards the subject of research. This attitude is evidenced by the recent revelation that only two members of the faculty's eighteen academic staff have been actively engaged in publishable research over the last three years. (See *University of Fort Hare Review Report* (1999) 61.) This remains the case even though the university management recently indicated unequivocally that the University of Fort Hare can no longer afford to have academic staff members who function only in the classroom. (This was one of the remarks made by the Acting Vice-Chancellor of the University of Fort Hare, Prof Derrick Swartz, at his first meeting with the entire Fort Hare community in May 1999.) It appears that the simple and blunt message that management was trying to send was that the institution's future survival required all its academic staff members to become scholars and not simply lecturers or teachers. The absence of any active and constructive response from the faculty is disturbing. However, what is even more disturbing is the hostility and the lack of support that the management of the faculty has recently shown towards the subject of research in the faculty. This despite the fact that the university's coffers are swelled each time academic staff succeed at publishing in accredited (refereed) journals (the National Department of Education pays research subsidies to universities and technikons based on published research output). In other words, even though the fruits of the research work of academics effectively increase the University's research income, the present management of the faculty still appears to have no interest in providing any meaningful assistance towards such activity. While this makes absolutely no sense, this is the present reality in the faculty.

It is a notorious fact that the experience of Fort Hare and other historically black university law faculties during the apartheid era was a barren one as legal research was deliberately discouraged and exclusive emphasis was placed on teaching. Naturally, one would have expected that the end of apartheid and the birth of a democratic political dispensation would serve as a spur and a motivation for research as the new order cries out for important and radical changes to be made in

the field of law creation and administration. But alas, the Fort Hare Law Faculty remains focused on teaching and teaching only - like an automobile whose gearbox is stuck in neutral. What is worse, though, is that there are signs that suggest a determination on the part of some academic staff members to keep the faculty exclusively focused on teaching – undergraduate teaching for that matter (see par 2). That determination, it is submitted, derives from an intention to preserve the faculty in a kind of growth-stunting formaldehyde and thereby to ensure that it does not shake off the cultural and institutional shackles by which it was bound during the apartheid era.

There are a number of objectives that must be kept in view in deciding upon and implementing changes in the way and manner in which the faculty manages the subject of research. First of all, increasing the faculty's research output will be a direct contribution to the present university management's efforts to ensure that Fort Hare will survive well into the new millennium. This is absolutely important – indeed it is a matter of either survival or demise – for both the faculty and the university. (See Baloro *op cit*, who predicts the certain demise of several of the historically black university law faculties and schools unless radical policies and measures are introduced to improve the quality of teaching, research and learning taking place there.) Secondly, increased research productivity will serve to raise the faculty's "academic" profile both nationally and internationally. A higher academic profile has positive implications for the capacity of the faculty to attract, recruit and retain undergraduate and post-graduate students. Thirdly, there is a sense in which the labour market might be more generous to Fort Hare graduates if it is believed that they are products of law teachers who are active participants in the process of generating new legal knowledge or re-configuring existing legal knowledge to meet the needs of the new South Africa.

There are several deplorable aspects of the present that require express mention here. The first is the fact that undertaking research is not mandatory for academic staff and, therefore, there are no real penalties for not engaging in this all-important academic activity. More importantly, incentives for undertaking and publishing original research are few and far between. At faculty level there are absolutely no incentives. It is at present, possible for a lecturer without any record of published research or post-graduate legal education to be treated more favourably in course allocations than one who does have such a record and/or education. At university level there are two identifiable incentives. The first is the eligibility of the academic staff who have produced a number of publications to apply for promotion to a higher rank. Of course, this would be no incentive at all for those academic staff who are not interested in promotion. With the recent moratorium on promotions by the Governing Council of the University of Fort Hare, this incentive can be properly assumed to be non-existent for the time being. (The moratorium on academic staff promotions has been in place for over 12 months. According to the university management, this is a necessary aspect of the survival strategy being pursued by management in order to save the university from its financial crisis created in part by the non-payment of tuition fees by a significant majority of past and present students.) The second incentive is available only where the academic staff have been successful in publishing the results of their research in an accredited journal. In such a case, the academic is allocated certain publication funds which she could use for "academic purposes". (These funds are derived from the research subsidies received by the university from the National Department of Education. Under the university's present policy, the author of a published work is entitled to "publication funds"

consisting of one-third of the subsidy received by the university in respect of that work. Clearly qualifying as "academic purposes" are items such as attendance at academic conferences, workshops or short courses, purchase of research-related equipment such as computers, printers, and scientific equipment, and the financing of sabbatical leave. Most worthy of careful note here is that the funds are not available for personal private purposes.) Again, for those academic staff who are content with their salaries and other privately-sourced income, this is no incentive at all to undertake the physically and mentally exhausting tasks involved in original research.

The situation in the Fort Hare Law Faculty is made worse by the fact that there is no faculty law journal in which colleagues who undertake original research can publish the results. Experience has shown that the law lecturers who publish the most are those in faculties that have their own in-house journal. The idea was mooted a few years ago that the faculty start its own journal under the title "The African Jurist". It is not known how far the plans to launch the journal went before they fell through. The absence of mandatory and regular faculty seminars or discussion sessions on topical legal issues has not helped matters either. The immediate past leadership of the faculty tried to institute such a seminar series but the plan failed because of a lack of interest and enthusiasm on the part of the faculty's academic staff members. The truth is that desperate measures will be required to overcome the problem of lack of capacity as well as the institutional resource and attitudinal constraints to research productivity in the faculty.

It is against this background that the following are proposed:

(1) The faculty should, as a fundamental policy, make it mandatory for every member of the academic staff to publish at least one paper (article, case comment, statute or book review) every academic year. The modalities by which this policy could be effectively enforced should be determined by the Board of Faculty and thereafter brought to the attention of all academic staff members. It is important to note that a number of HBUs already have such a policy in place. (One such example is the University of Durban-Westville where the standard offer of appointment to academic positions has been redesigned to include a term clearly imposing an affirmative obligation on the appointee to publish at least one academic paper in a refereed journal in every academic year.) Those who believe that such a policy will not be good for Fort Hare Law Faculty must bear the heavy onus of articulating justifications for keeping the faculty focused on undergraduate teaching when its counterparts, in response to new national policies and priorities, have moved to find the appropriate balance between quality teaching and research.

(2) In determining eligibility criteria for elections to management or leadership positions in the faculty, the Board of Faculty must emphasise the need for demonstrable capacity to provide exemplary leadership in teaching and research. In that respect, it should be established that the primary means by which such capacity can be demonstrated is through a respectable record of published original research dating back to no longer than the preceding five years.

(3) In determining suitability for teaching purposes, the Faculty Course Allocations Committee referred to earlier must consider evidence of published research in reaching its decisions. It should be acknowledged as both necessary and valuable for students as well as younger lecturers to interact closely with authors of published works in the faculty with a view to pursuing joint research projects or otherwise receiving much-needed mentorship.

(4) A Faculty Research Committee should be appointed as perhaps the most important committee of the Board of Faculty. Its terms of reference should generally

consist of the responsibility to manage and encourage research within the faculty and specifically include circulating information to academic staff relating to the financial and institutional resources to which colleagues pursuing research can have access. The committee should also encourage junior colleagues to pursue post-graduate studies *by research* and to consider collaborative research projects with senior colleagues.

(5) The faculty should institute an annual award for the academic staff with the most publications in an academic year. Such an award should be made as prestigious as possible by attaching to it a significant cash price as well as an award certificate.

(6) A faculty seminar series should be instituted and made mandatory for academic staff of the faculty and optional for law students and academic staff from other faculties. Such a series could, if properly managed, effectively turn the faculty into a law school alive with intellectual discourse. The Faculty Research Committee could be charged with the responsibility of suggesting both seminar topics and names of possible speakers. The committee should, in this regard, be backed by the executive powers and resources of the office of the Dean of Law. This may be necessary in the early days of such series in order to compel co-operation from the faculty's academic staff.

(7) The Faculty Research Committee should be charged with investigating the possibility of starting a faculty journal as soon as possible. It should explore all the possible sources of funding, look into all the relevant logistical matters and report back to the Board of Faculty which will have the power to give a final go-ahead. (It should be noted here that the University of Transkei law faculty has published its *Transkei Law Journal* annually for several years. Given that the Fort Hare law faculty is significantly better resourced than its University of Transkei counterpart, it is difficult to think of any plausible justification for the inability of the Fort Hare law faculty successfully to launch and manage its own law journal.)

(8) In recruiting new members of the faculty's academic staff, emphasis should be placed not only on the possession of post-graduate legal qualifications but, more importantly, on a demonstration of capacity to undertake publishable research and the possession of a credible research agenda at the time of appointment. Obviously, strict and careful adherence to such a hiring policy will serve to ensure that all new staff members are persons capable of contributing effectively to the faculty's teaching and research enterprise.

4 Concluding remarks

There can be no doubt that HBUs in general and their law schools in particular face daunting challenges as they seek to rise above the financial, human, infrastructural and institutional resource constraints largely inherited from the defunct apartheid socio-political order. In concert, those constraints deprive HBUs of the capacity to provide tertiary education of the highest quality and to produce respectable amounts of original publishable research. The result is that there are now many in South Africa who are beginning to wonder whether HBUs can be serious, valuable and respectable partners in the advancement of the government's aggressive human resource development agenda. The process of transformation, restructuring and renewal in which virtually all of the HBUs are currently mired is, therefore, one of absolute necessity to the extent that it seeks to systematically and aggressively eliminate the said constraints. If that process succeeds, which it must, HBUs will have demonstrated that they are a manifestation of black people's famous indomitable capacity to survive.

As is the case with their mother universities, the metamorphosis of HBU law faculties/schools into centres of excellence in the provision of contemporary legal education and the production of research-bearing newly-created legal knowledge is non-negotiable if their survival well into the new millennium is to be a reality. For the Fort Hare Law Faculty, it is submitted that the implementation of the proposals made in this contribution should go a long way towards ensuring the success of that transformation process. However, those charged with providing leadership for this process at HBUs must expect and be fully prepared to respond systematically to resistance from the human actors within the precincts of their institutions (such resistance to transformational change can take the form of frivolous or nuisance lawsuits as well as conduct designed to sabotage the successful implementation of the relevant decisions); and from institutional actors outside their institutions. In this respect all they need do is constantly remember that all processes of massive or radical social or institutional transformation are inevitably accompanied by a crisis which "consists precisely in the fact that the old is dying and the new cannot be born" and that "in this interegnum, a great variety of morbid symptoms appear" (Gramsci *Selections from the prison notebooks* (1971) 276 (cited by Kaburise *op cit*)).

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ARE DECISIONS ON TRADE USAGE OR ON CUSTOM DECISIONS ON LAW OR ON FACT? DO THE RULES ON *STARE DECISIS* APPLY TO SUCH DECISIONS? IS JUDICIAL NOTICE TO BE TAKEN OF THE TRADE USAGE OR CUSTOM?

1 Introduction

To understand the discussion which follows, it is important to note that, unless the context indicates otherwise, the words "implied" and "residual" are used in the senses explained in my *The principles of the law of contract* (1998) 316–318 330–353 (*Contract*), that is "implied provisions" are unexpressed contractual provisions which pass the hypothetical bystander test, and "residual provisions" are contractual provisions which the law provides and imposes in the absence of express or implied provisions. References to any work by any author are to be understood as including references to the authorities referred to in it.

If a trade usage is known to both parties to a contract and is expressly or impliedly incorporated into their contract, it forms part of the contract by virtue of their consensus, just as any other provisions on which they agree. (See my note "Trade usage and custom" 1970 *SALJ* 403 407 (Kerr 1970 *SALJ* 403.) There is no question of a court having to consider whether or not it can take judicial notice of provisions agreed upon by the parties.

No one, so far as I am aware, questions the nature of residual provisions of a contract – by whatever title they are described. However, if the question whether a court may take judicial notice of an alleged residual provision in a particular case is raised, or it is questioned whether the rules on *stare decisis* apply, one needs to ask how the residual provision in question originated. If by statute, precedent, or the works of the old authorities (for examples see *Contract* 353) there is no question of a court having to consider whether it can take judicial notice of it or not or whether the rules on *stare decisis* apply or not: the answer in both cases is a clear "Yes". If, however, it is claimed that the residual provision is found in trade usage or custom (for examples see *Contract* 353–356) the discussion below will show that one needs to ask what stage has been reached in the recognition of the alleged provision. Customs may be of two kinds, general or particular, and particular ones may be particular to a class of persons or to a particular locality: (see my *The customary law of immovable property and of succession* (1990) 17 (*Customary law*); Hosten and Schoeman "Custom and Usage" in 5 *LAWSA* First Reissue part 2 par 373 (Hosten and Schoeman)).

Trade usages and particular customs are distinguished from each other by the spheres in which they operate (Kerr 1970 *SALJ* 403 404–407) but have much in common, so much so that some authorities maintain that there is no essential difference between them (see eg Hosten and Schoeman par 378). The common ground includes the problems discussed in this note.

Julianus says in *D* 1 3 32 1 (MacCormick's translation in Watson's edition) that the principle on which custom is recognised (the same principle underlies trade usage though neither the *Institutes* nor the *Digest* mentions the latter) is the following:

> "Given that statutes themselves are binding upon us for no other reason than that they have been accepted by the judgment of the populace, certainly it is fitting that what the populace has approved without any writing shall be binding upon everyone. What does it matter whether the people declares its will by voting or by the very substance of its actions?"

See also *I* 1 2 9; Voet *Commentarius* 1 3 27; Van der Linden *Institutes* 1 1 7.

2 The facts and decision in *Absa Bank v Retief*

In *Absa Bank Bpk t/a Volkskas Bank v Retief* [1999] 1 All SA 68 (NC); 1999 3 SA 322 (NC) (*Absa Bank v Retief*) plaintiff and defendant had entered into a contract (70f–g; 326J) in terms of which the plaintiff granted the defendant certain overdraft facilities on condition that the bank could charge interest at rates within its own discretion and adjust those rates from time to time. During a rule 37 conference it was agreed that certain points would be put to the court by notice of motion (71d–e; 327G–H). The most important of these (the "kernvraag") was stated by the court to be whether a court may take judicial notice of trade usages of commercial banks as accepted in the decisions of other courts ("[k]an 'n hof geregtelik kennis neem van die bestaan van handelsgebruike soos bevind in die uitsprake van ander howe?" per Buys J 70e; 326H–I).

It is regrettable that the report does not disclose how many previous decisions were claimed to exist, nor what numbers of witnesses had given evidence, nor what the strength of the evidence had been. For the purposes of this note it will be assumed that in at least one of them the trade usage was found

> "to be universally and uniformly observed within the particular trade concerned, long-established, notorious, reasonable and certain, and does not conflict with positive law

(in the sense of endeavouring to alter a rule of law which the parties could not alter by their agreement) or with the clear provisions of the contract" per Corbett J in *Golden Cape Fruits (Pty) Ltd v Footplate (Pty) Ltd* 1973 2 SA 642 (C) 645H quoted at 77g–h; 334B–C.

(On the meaning of "universally" in this context see *Contract* 353 fn 278.) It is necessary to make the above statement because in *Mabena v Letsoalo* 1998 2 SA 1068 (T) a custom was accepted as law when, apart from a few general statements in academic writing, the only evidence of its existence was the assertion of one of the litigants in the case, a procedure which is criticised in Kerr "[The] role of courts in developing customary law" 1999 *Obiter* 41 46–47 49–50 (Kerr 1999 *Obiter* 41).

The plaintiff in *Absa Bank v Retief* above relied heavily on the decision in *Absa Bank Bpk v Saunders* 1997 2 SA 192 (NC) (72–74; 328–331) and referred to *Eerste Nasionale Bank van Suidelike Africa Bpk v Salzman,* unreported, OPD 1184/95 (75a–f; 331D–J). In *Absa Bank v Saunders* four persons are said to have given evidence but, apart from their names (194I–J) nothing is said about their qualifications. Mr AB Fourie, the fourth, the one on whom most reliance was placed, gave evidence "dat hy baie ervaring en kundigheid in verband met gevestigde handelsgebruike in die banke het" (195G–H). It is not stated in whose service he was when he gained that experience. For the purposes of this note it is assumed that he and the other three witnesses were skilled and experienced in the field and were disinterested, meaning, *inter alia*, that they were not themselves litigants or employed by either litigant (see *Contract* 355 fn 296).

The court in *Absa Bank v Retief* above dismissed the application (83j–84a; 340E–F). It held that a court could not take judicial notice of a trade usage which another court has held to exist unless it itself (ie the court in the subsequent case) knew of the existence of the trade usage from other sources, for example, from evidence led before it (80j–81d; 337D–G). The reasons it gave raise questions about the following topics: (1) the function of a court in assessing the existence or non-existence of a trade usage; (2) whether an affirmative decision on trade usage is a decision on law or fact; (3) judicial notice; and (4) the rule on *stare decisis*. Each of these will be discussed in turn after which difficulties with the words "implied" and "impliseer" will be referred to.

3 The function of a court asked to determine the existence of a trade usage on which there is as yet no decision by any court

Cases on trade usages which at the time of the case have not yet been before any court are treated in a way similar to those on particular customs which have not yet been before any court: note the reference to *Van Breda v Jacobs* 1921 AD 300 in the *Golden Cape Fruits* case above at 646A–C. (The leading cases on trade usage are *Coutts v Jacobs* 1927 EDL 120 and *Golden Cape Fruits* above; and the leading ones on custom are *Van Breda v Jacobs* above, *Sigcau v Sigcau* 1944 AD 67 and *Sikwikwikwi v Ntwakumba* 1948 1 NAC(S) 23.)

What a court does, is to consider evidence and to determine whether the tests in the *Golden Cape Fruits* case quoted in the preceding section of this note have been passed. If the court decides that they have, it decides that the evidence has shown that a residual provision has already been established at some earlier date. The court does not say: "As from the date of this judgment a new residual provision comes into existence." If it were to say that, the provision in question would be of no use to the party then before the court who relies on it. That party is seeking a judgment that, *at the time the contract was entered into*, there was in existence a residual provision

embodying the trade usage and, because there was no express or implied provision in the contract to the contrary, the residual provision was part of the contract. This is what happened in *Coutts v Jacobs* above (see *Contract* 356). It is also what happened in *Van Breda v Jacobs* above and *Sigcau v Sigcau* above. In *Van Breda* the judgment was that *at the time the fishermen's nets were spread* the custom was already law in the area in question; and in *Sigcau* the judgment was that the order of intestate succession of the Pondo tribe of which evidence was given existed *at the time of the death of the previous Paramount Chief of Eastern Pondoland.* If the custom had come into existence only when the judgment was given, it could not have been of any relevance in the dispute then before the court – it would only have applied to succession subsequent to the date of the decision.

4 Is an affirmative decision on a trade usage a decision on law or on fact?

The court in *Absa Bank v Retief* above seems to have been of the opinion that affirmative decisions in cases dealing with trade usages on which no other court has yet given a decision are decisions on fact. This appears from

(a) the negative answer the court gave to the "kernvraag" quoted above, namely whether a court can take judicial notice "van die bestaan van handelsgebruike by handelsbanke soos bevind in die *uitsprake* [ie in the decisions, not the evidence given] van ander howe" (70e; 326H–I, emphasis added);

(b) its statement on *stare decisis* which is considered in section 6 of this note;

(c) its treatment of Professor Schmidt's statement about judicial notice of " 'n feit" (76b–c; 332F–G);

(d) its treatment of English authorities (76b–c; 333B/C–337B) and its approval of them (80i; 337C/D).

The English authorities which the court referred to, speak of frequent proof in court before judicial notice is taken of the trade usage or custom. A requirement of frequency (nowhere in the cases referred to is it stated how frequent it needs to be) before a court takes judicial notice, conflicts with the legal position in South African law shown in the Roman and Roman-Dutch law passages quoted and referred to in sections 1 and 3 of this note and the cases referred to in section 5. If the first court before which the question of recognition of an alleged trade usage is brought, finds that all of the requirements mentioned in the *Golden Cape Fruits* case quoted in section 2 of this note have been met, the position is as outlined in section 5. It is on this point that the decision in *Mabena v Letsoalo* above, in which there seems to have been no attempt to lead evidence on the requirements in *Sikwikwikwi v Ntwakumba* above (quoted in *Customary law* 17), is open to criticism (see Kerr 1999 *Obiter* 41 and the *Golden Cape Fruits* case 646H–647*pr* on the desirability of taking evidence from more than one witness). It follows that in South African law a decision of a court that a trade usage exists, even though that court be the first before which the question is brought, is a decision on law. With respect, the apparently contradictory approach of the court in *Absa Bank v Retief* ought not to be followed. (Cf the statement of Hosten and Schoeman par 379 that "a trade usage . . . constitutes positive law".)

5 Judicial notice

The treatment of trade usage and custom in the standard works on the law of evidence is, with respect, open to criticism. Schmidt and Rademeyer *Bewysreg* (2000) 184 mention that judicial notice is taken of certain facts and of law (which

is correct) but deal with trade usage and custom 189–190 in their section on "Bekende feite". The same approach in the third edition seems to have led the court in *ABSA Bank v Retief* above to cite (76b–c; 332F–G) that part of the introductory remarks (173) where judicial notice of facts is dealt with.

There is no mention of trade usage in that part of 9 *LAWSA* First Reissue "Evidence" by Schmidt and Zeffertt revised by Van der Merwe (1996) which deals with judicial notice (pars 618–623) although it is said, correctly (par 623), that a court "may hear evidence on the existence and scope of custom *having legal effect*" (emphasis added). Perhaps the authors consider that trade usage is the same as custom. (The same paragraph refers in the present tense to "courts instituted to deal with suits involving only blacks", the reviser apparently having overlooked the fact that such courts were abolished in 1986 (*Family Law Service* (ed Clark) par G2).)

The fourth edition of Hoffmann and Zeffertt's *The South African law of evidence* by Zeffertt (1988) (Hoffmann and Zeffertt) deals with the subject in the section on legal matters (427) and makes the correct statement in the introductory remarks (415) that "[o]nce judicial notice is taken of a custom it is a precedent and the custom will not have to be proved in a later case". Similarly, in Schwikkard, Skeen and Van der Merwe *Principles of evidence* (1997) 331 it is said that "[w]hen judicial notice is taken a precedent is established". However, the only authority cited for the statement in Hoffmann and Zeffert both on 415 and 427 is *George v Davies* [1911] 2 KB 445, the *ratio decidendi* of which, as the court in *Absa Bank v Retief* pointed out (76g/h–77f/g; 333B/C–334A/B), does not go so far as to affirm the proposition *simpliciter*. What the court did, was to uphold the decision of the court *a quo* in which the custom had been affirmed repeatedly in court (how often is not stated).

After reviewing a number of English cases which mention repeated proof in court, the court in *Absa Bank v Retief* (80i; 337C) said that it could not see why the approach in English law should not also be adopted in our law. Buys J stated (80a; 336D/E) the *ratio decidendi* of *Ex parte Crawcour. In re Robertson* (1878) 9 ChD 419, as he saw it, saying that "as die betrokke Regter bekend is met die handelsgebruik daar geregtelik kennis van geneem kan word". With respect, this is not in accordance with South African law (see the discussion of *Sigcau v Sigcau* in the next section of this note). What the law lays down as a residual provision is the *conclusion* of the court before which the matter is first brought. That court, if the proper procedure has been followed, has heard evidence which persuades it that the requirements in the *Golden Cape Fruits* case quoted above in section 2 of this note have been complied with. Those requirements could not have been complied with if the trade usage had not been repeatedly observed, but observed *before* the matter was brought to court, not *after* the court had given its judgment.

6 *Stare decisis*

In *Absa Bank v Retief* Buys J said:

> " 'n Hof kan slegs van die [handels]praktyk kennis neem as dit so welbekend is dat getuienis omtrent die bestaan en inhoud daarvan oorbodig sou wees. 'n Uitspraak van 'n hof ten opsigte van die bestaan van 'n handelsgebruik val nie in 'n spesiale kategorie nie. Die blote feit dat 'n hof bevind het dat 'n handelspraktyk bestaan bind nie 'n ander hof nie. Die beginsel van *stare decisis* geld nie by feite bevindings nie" (80j–81b; 337D/E–E/F).

If this were correct, it would follow, as the court realised and propounded (77b/c–80a; 333G–337C (see the preceding section of this note), that evidence of a trade usage

or custom would need to be proved by evidence in a number of cases before each magistrate or judge (the number nowhere being stated) before it could be recognised that the law contained the residual provision in question. (On the point that the court meant before each magistrate or judge, not before each court – whoever was presiding, see the reference to "die betrokke Regter" at 80a; 336D/E.) That this is not what South African law requires may be illustrated by reference to *Sigcau v Sigcau* and *Coutts v Jacobs*. It has already been mentioned in section 3 of this note that *Sigcau*'s case established the order of intestate succession in default of a male heir in the great house of a member of the Pondo tribe in so far as the then supreme court was concerned: it had already been decided in the then Native Appeal Court in 1913 and 1929 (see *Customary law* 149 fn 18) but the theory in those days, though lacking a firm foundation, was that customary law had to be proved as a custom particular to the tribe in question if the case began in the supreme court. Innumerable members of the Pondo tribe, whether in Pondoland or elsewhere (customary law is personal, not territorial, in application), died in the years following the decision in *Sigcau*'s case and some would have left no male heir in the great house. The fact that there has been no reported instance, so far as I am aware, of another case being brought to hear further evidence similar to that in *Sigcau*'s case, or the evidence of the same witnesses again, shows that the estates of such persons were wound up in accordance with the rule stated in *Sigcau*'s case. Similarly, why were there no cases after *Coutts v Jacobs* in which similar evidence or the evidence of the same witnesses was led? The answer is that the rule in *Coutts*'s case was being followed. The reason in both instances was that the rules on *stare decisis* apply to such decisions because they are decisions on law and not on fact, even though in the first cases facts have to be proved which will allow the court to come to the conclusion that the custom or trade usage already exists. The *conclusions* of the courts first called upon to adjudicate on particular customs or trade usages are conclusions on law as is explained in the preceding section of this note. In parenthesis, it should be remembered that among the "facts" of which evidence may be given is the belief on the part of witnesses, or of some of them, that the trade usage or custom is enforceable as law (cf the authorities on misrepresentation of facts in *Contract* 249–250 esp fn 49). With respect, a misapprehension similar to that of the court in *Absa Bank v Retief* appears to have been in the mind of the court in *Maisela v Kgolane NO* [2000] 1 All SA 658 (T); 2000 2 SA 370 (T) in which Hartzenberg J, with whom Lewis J concurred, said on the second of the procedural requirements listed (663i–664a; 376I–377A/B) that the respondent "had to allege the particular system of indigenous law which he alleges is applicable. Again it is a factual question which can be admitted or denied".

With respect, what is a factual question is the evidence from which the rule of customary (indigenous) law can be deduced. The rule itself, and the rest of the "*system of law*" (emphasis added), is not a fact, it is law. (Other aspects of the decision in this case are not relevant to the present enquiry.)

The Appellate Division having been at the time the highest court, its decision in *Sigcau v Sigcau* bound all lower courts. The ordinary rules of *stare decisis* allow a court of equal jurisdiction to depart from a decision of another court of equal jurisdiction if persuaded that the earlier decision is erroneous. Hence a high court in which a single judge is sitting alone may depart from the decision in *Mabena v Letsoalo* above.

It is suggested, with respect, that the statement on *stare decisis* in *Absa Bank v Retief* above ought not to be followed.

7 Difficulties with the words "implied" in English and "impliseer" in Afrikaans

The court in *Absa Bank v Retief* said:

> "As 'n kliënt van die fasiliteite van 'n bank gebruik maak is daar 'n ooreenkoms tussen hulle. *Hierdie ooreenkoms hoef nie uitdruklik te wees nie maar stilswyend* en die gebondenheid van 'n kliënt aan die handelsgebruike van 'n bank vloei voort uit die ooreenkoms tussen die bank en sy kliënt. *Dit kan op geen ander manier as by ooreenkoms ontstaan nie.* Natuurlik hoef die ooreenkoms, of die terme, nie uitdruklik te wees nie; *dit kan stilswyend of inbegrepe (implisiet) wees*" (82g–h; 339B–C (emphasis added)).

When I wrote the last two lines of *Contract* 317 and the first of 318 I hoped that Afrikaans would not encounter the same confusion as English; but the use of "implisiet" in this passage in a way contrary to that in the authorities in *Contract* 318 fn 17 shows that my hope has not been fulfilled. It can now be said that Afrikaans shares with English the confusion of terminology in this field as "stilswyend" and "inbegrepe" can bear the same meaning. Thus Smuts and Smuts *Woordeboek van regs- en handelsterme* (1992) has for the second meaning of "impliseer", "noodwendig veronderstel, stilswyend inbegryp" and for "implisiet", "natuurlik of noodwendig by iets betrokke, inbegrepe". Hiemstra and Gonin *Drietalige regswoordeboek* (1992) *sv* "implicit" has "implisiet, stilswyend inbegrepe . . ." and *sv* "imply" has "stilswyend inbegryp". To use two different words which have the same meaning and can be used interchangeably to describe two quite different legal concepts, is bound to result in confusion and has done so in the past (*Contract* 316ff). Afrikaans authorities would be well advised to choose a word different from both "stilswyend" and "inbegrepe" to describe residual provisions.

If, as the tenor of the whole opinion indicates, the court meant by its statement in the quotation above that "[d]it kan op geen ander manier as by ooreenkoms ontstaan nie" to *exclude* trade usage, and if by "by ooreenkoms" it meant, as the last sentence of the above quotation indicates, to *include* residual provisions of whatever contract is in issue, it must, with respect, be pointed out that trade usages cannot be excluded from residual provisions because trade usage is one of the methods by which a residual provision is brought into being (*Contract* 353).

Immediately after the quotation with which this section begins the court quoted (82h–i; 339D–E) the statement in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531D/E in which Corbett AJA drew attention to the fact that "[i]n legal parlance the expression 'implied term' is an ambiguous one in that it is often used, without discrimination, to denote two, possibly three, distinct concepts".

The court in *Absa Bank v Retief* then cited Christie *The law of contract in South Africa* (1996) 180–187 claiming that he shows that "daar 'n kontrak tussen die partye is en dat die handelsgebruik 'n inbegrepe term van die kontrak vorm" (83d; 339H–I). If "inbegrepe" is used to mean "residual" the proposition quoted, by itself, is correct; but Christie's approach needs reconsideration. He claims that there are three, not two, categories of unexpressed provisions of contracts (see my note "To which category of provisions of a contract do provisions originating in trade usage belong? Problems in regard to quasi-mutual assent" 1996 *THRHR* 331). What Christie says on this is open to criticism and ought not to be followed (*ibid*).

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SISHEN REVISITED: THE DECLINE AND FALL OF THE "GEMENEREG"

1 Introduction

Commodus usus (comfortable/convenient/undisturbed use) has been the lessee's right to the use and enjoyment of the leased thing. In *Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Industriële Korporasie Bpk* 1989 2 SA 931 (A) the Appellate Division extended this right by interpreting the lessee's right against the lessor to include a restraint upon the latter to refrain from direct or indirect conduct which negatively affects the profitability of the leased thing. This rather drastic extension of the rights of the lessee was in keeping with the changing face of the law of contract. Although the method used, namely legal paternalism, reeks of the nineteenth century, it must be applauded that the traditionally weak position of the lessee was ameliorated by the court. While in the past the lessor was accepted without question as the dominant party, whose interests had to be safeguarded against unreliable and uncreditworthy tenants, Botha AJ in the *Sishen* case introduced the principle of equality into the law of lease by protecting the interests of the lessee against both direct and indirect interference with the profitable use of the leased thing by the lessee, by way of his interpretation of *commodus usus.* This extension of the traditional meaning of *commodus usus* has now been challenged by the decision in *Sweets From Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd* 1999 1 SA 796.

2 The interpretation of *commodus usus* in *Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Industriële Korporasie Bpk* 1987 2 SA 931 (A)

In this case the parties had concluded a twenty-year lease for an hotel. The site of the hotel was next to a national road and because of this, the hotel attracted considerable custom. About eight years after the conclusion of the lease the national road was diverted on application and at the expense of the lessor in order to expand its mining operations in the area. As a result the hotel's profits declined and eventually turned into losses. About three years later the hotel was closed down and the lessee instituted an action against respondent for the payment of damages for breach of contract. This claim was dismissed by the court *a quo.*

The appellant raised the argument that it was an implied term of the lease that the respondent would not take any steps to interfere with the access to the hotel and prevent the flow of custom to the hotel.

In regard to the contention that the contract contained an implied term to this effect Botha JA held that firstly, the common-law duties of the lessor had to be determined. Relying on *Hollandsche Consultatien* 2 185 and Pothier par 75–80 Botha JA came to the conclusion that *commodus usus* could include the idea of profit where the lessee runs a business from the leased premises (952F). The judge had no doubt that the lessee would conduct the hotel business to make a profit and found that closing/diverting the road indirectly infringed the lessee's *commodus usus* (953B).

The result of this decision was that the *commodus usus* of lessees conducting a business on the property let, includes the profitability. Furthermore, such *commodus usus* can be infringed in both a direct and an indirect manner. Finally, reliance in the event of such infringement on an implied term of the lease was rejected. The judge found this approach "ietwat koddig", and held that the logical approach should be to determine the common-law duties of the lessor, since these are the *naturalia* of the contract of lease (948E–949B). This approach was reinforced in his finding: "[M]y gevolgtrekking is dus dat die respondent kontrakbreuk gepleeg het ten opsigte van sy gemeenregtelike verpligting om die *commodus usus* van die huursaak aan die appellant te laat toekom" (959E).

3 Profitability included in *commodus usus* in all commercial leases?

The conclusion that the right to profitability is an *ex lege* term in all commercial leases appears to have been received with mixed feelings and remains under suspicion.

Although Cooper introduced deprivation of benefits/profits under undisturbed use and enjoyment in the second edition of his *Landlord and tenant* (1994) 124, and provides an extensive discussion of the *Sishen* case 125ff, he nevertheless sows the seeds of doubt. After admitting that it is self-evident that the lessee of business premises *may* claim damages from a lessor who causes the profitability of the premises to be reduced (127), he adds the proviso that the lessor's obligation is not absolute. He gives the example where both parties knew at the time of conclusion of the lease that Iscor intended to divert the national road once it had obtained the necessary approval (127 fn 55) and concludes that for a successful claim based on reduced profitability "the lessee must prove that the parties either tacitly agreed that they would abstain from such conduct" (127). This view is, however, in sharp contrast to Botha JA, who held in the *Sishen* case that "[d]ie vermelding in die pleitstukke van 'n stilswyende beding . . . is ietwat koddig" (948E). Cooper reasons, however, that the deduction of the judge from the combination of Pothier para 76 and 152 was not correct and concludes:

> "The only ground on which the lessee in the Sishen Hotel case was entitled to recover damages from the lessor was if it could prove that the lessor was contractually bound to abstain from the conduct which caused the lessee's loss. As the terms of the lease did not explicitly prohibit such conduct the lessee had to rely upon a tacit term." (128)

Although this approach had explicitly been rejected by Botha JA, Cooper concludes nevertheless that "on the facts of the case there can be no doubt that the lessee proved the tacit term pleaded and that the appeal court's order was correct" (128). Thus, although accepting that *commodus usus* can comprise profitability, Cooper rejected the common-law obligation/*naturalia* approach of the court.

The question whether profitability is one of the *naturalia* of a commercial lease or whether the lessee has to rely on a tacit term has once again come under the scrutiny of the courts.

In *Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd* 1999 1 SA 796 (A) the question of future profitability of leased premises arose when the lessor let property in the close vicinity of the lessee's premises to a business competitor of the first lessee.

In this case the first respondent, Ster Kinekor, is the lessee of an entertainment centre. Ster Kinekor in turn sublets premises to third parties. The first applicant, Sweets from Heaven, has a five-year sublease with Ster Kinekor. The second applicant is a franchisee of first applicant and occupies the premises through first

applicant with the consent of Ster Kinekor. The present dispute concerns the first respondent's right to sublet to second respondent a shop situated virtually next door to the sweet shop of the second appellant. Both second respondent and second applicant sell sweets, confectionery and related products (799A–H). The court *a quo* granted an interim interdict prohibiting the first respondent from giving the second respondent occupation of the premises (798I–J).

The applicants based their claim, first of all on the first respondent's failure to ensure free and undisturbed use and enjoyment, *commodus usus*, of the leased premises in allowing second respondent to compete with the second applicant (800A–C), and secondly on a tacit or alternatively implied term that the lessor would not permit the conduct of a business in competition with the business of the second applicant in close proximity of the latter's shop (800B–D).

In regard to the contention that the lessor failed to grant the lessee *commodus usus*, Malan J consulted Pothier *Treatise on the contract of letting and hiring* para 76 and 152. The example cited by Pothier in par 152 illustrates a disturbance of the *commodus usus* by conduct affecting the property indirectly (801E–G). The example of the diversion of the main road was relied upon by the court in the *Sishen* case and it was held that *commodus usus* can constitute profitability. However, Malan J continued with para 152 and cited another example by Pothier:

> "But if the inn, which I have leased to an innkeeper, was, at the time of letting the only inn in the locality, and during the currency of the lease other inns were set up in that locality, causing a great diminution in my lessee's profits, can he, in those circumstances, claim a reduction of rent? The answer is in the negative. The reason for the distinction is that it was easy to foresee, and my lessee ought to have foreseen, that other inns might be set up in the locality; whereas the alteration of the main road could not have been foreseen" (801F–G).

Thus armed, Malan J gave the facts of *Sishen*, acknowledged that the Appellate Division (as it was then) had held that the diversion of the road indirectly affected the *commodus usus*, but continued that

> "impairment of the *commodus usus* alone, however, is not sufficient to found liability. The defendant will only be liable if his conduct constitutes a breach of contract . . . Whether or not the first respondent has committed a breach of the contract of lease can be determined only with reference to the terms of the contract. These terms can be express, implied or tacit" (802E–H).

In the *Sishen* case, Botha JA approached the question whether breach of the duty to provide *commodus usus* by the lessor constitutes a breach of contract as a question of the content of the lessor's common law obligations to the lessee. Malan J followed the approach submitted by Cooper, namely that the question whether a lessor has committed a breach of contract can be decided only with reference to the terms of the contract.

In consequence, Malan J dispensed with the argument that the lessor failed to ensure the lessee's *commodus usus* of the leased premises by allowing second respondent to compete with the second applicant by relying on Cooper (*supra* 127), who is of the opinion that a lessee of business premises will succeed in a claim against a lessor for reduced profitability caused by the lessor's conduct only if the lessee is able to prove that the parties either explicitly or tacitly agreed that they would refrain from such conduct.

To reconcile this approach with the common law, Malan J reached the conclusion that the quotation from Pothier should be understood to mean that the lessee can succeed only if the lease tacitly or otherwise prohibited the conduct of the lessor (803E–F).

4 Tacit or implied term

It is trite law that the terms of contracts may be either express (where they are fixed by the actual verbal agreement of the parties), or implied (where they are binding on the parties without their having made any explicit agreement as to the exact content). Implied terms are of two types, depending on how they arise. A term may be implied by law (*ex lege*) or on the facts from the unarticulated intentions of the parties.

A term implied on the facts is usually referred to as a tacit term. A tacit term is implied where the contract is silent on the point but it is clear that the parties intended the term to be part of their agreement and that they would not have contracted otherwise than on the basis of that term. In such a case the common intention of the parties is inferred by the court from the express terms of the contract and the surrounding circumstances (*Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 533). It is not necessary that the parties should have consciously envisaged the situation. It is sufficient that their common intention was such that a reference to such a situation by the hypothetical bystander would have obtained a unanimous assertion of the implied term (Joubert *General principles of the law of contract* 68ff; Murray and Lubbe *Farlam and Hathaway Contract* 418).

On the other hand, a term implied by law is one that the law attaches to the particular class of contract in the absence of agreement to the contrary by the parties (*Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration supra* 531). These terms implied by law are the *naturalia* of a contract (Joubert 65). The obligation to provide the lessee with *commodus usus* is a *naturale* of the contract of lease (Kerr *The law of sale and lease* (1996) 268). Consequently, where the parties do not explicitly include a term in the lease contract which excludes this obligation, it will be implied by law. The lessor will therefore have to provide the lessee with *commodus usus.*

In the *Sweets from Heaven* case the court still had to deal with the second ground relied upon by the applicants, namely that by giving occupation to a business competitor of the lessee, at a location so close as to be practically next door to the lessee, the lessor would be acting in breach of a tacit or implied term in the lease. The judge declared himself willing to assume that the *commodus usus* of the lessee was impaired by letting a shop to the latter's competitor (804C–D). Thus, according to Malan J, the only question is whether the lessor in doing so, has breached his obligations in terms of the contract. Malan J was of the opinion that this would be the case only if a term to that effect can be read into the lease (804D). In support of his statement he quoted *Wilkins NO v Voges* 1994 3 SA 130 (A) which deals with tacit terms. After an analysis of the pertinent contract and observing that "whether a tacit term should be imputed depends on whether both parties at the conclusion of the lease, had they thought of it, would have regulated the matter in the manner suggested" (805H), Malan J reached the conclusion that it is highly improbable that the lessor would have agreed to a term limiting its own conduct in the manner suggested (805I) and dismissed the application.

This decision has already been discussed and rightly criticised by Kerr ("The need to use words with different meanings to describe different categories of provisions of contract" 1999 *SALJ* 116 711). Kerr points out that the formulation of the application clearly indicates that applicants meant to differ between tacit and implied terms (712). He points out the confusion in respect of the different terms in the *Sweets from Heaven* case and suggests the correct position (713). Kerr raises the possibility that the court may have overlooked the distinction between the two

categories and recommends the introduction of a different word, namely "residual terms" for provisions which the law adds in the absence of agreement by the parties (714).

Of paramount importance for the present discussion is Kerr's statement of the law (713), where he suggests that

> "the lessee needs to prove that the deprivation of *commodus usus* is the result of a breach of a provision of the contract, whether that provision is express or passes the hypothetical bystander test or is added by law in the absence of agreement by the parties".

The reliance by the court on the *Wilkins* case and the near similarity in the meaning of the words "implied" and "tacit" had the result that Malan J failed to deal with the alternative pleading regarding the residual term, which the law adds in the absence of agreement by the parties.

5 Conclusion

Ultimately, the lessor's obligation to provide the lessee with *commodus usus* is one of the *naturalia* of the contract of lease, and unless explicitly excluded in the contract, an *ex lege* term of all leases. It has not been disputed that profitability is included in *commodus usus* in commercial leases and correct perusal of all contractual terms would have led Malan J to the same conclusion as Botha JA in the Sishen case. That judge found that breach of the common-law obligation to afford the lessee *commodus usus* of the property rendered the lessor liable for damages (*Sishen* 959E). Moreover, he was of the opinion that "*vermelding in die pleitstukke van 'n stilswyende beding, ietwat koddig* [*is*]" (948E).

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ATTACHMENT *AD FUNDANDAM JURISDICTIONEM* OF THE RIGHTS UNDER A DOCUMENTARY LETTER OF CREDIT – SOME QUESTIONS ANSWERED, SOME QUESTIONS RAISED

1 Introduction

The letter of credit was first used by business people to effect payment and finance their international-trade transactions over 170 years ago. Since then a number of practices and customary usages have evolved between banks that deal with documentary credits and their clients. Many of these practices and usages have since been incorporated in the different versions of the Uniform Customs and Practice for Documentary Credits (UCP) which were compiled by the International Chamber of Commerce. These practices and usages are also entrenched in the latest version of these Customs and Practices, the UCP 500 which came into force on 1 January 1994. These practices or usages include the following: that the banks assume no liability for the form, sufficiency, accuracy and genuineness of the documents that the beneficiary submits to the issuing bank to procure payment under the letter of

credit (art 15 of the UCP); and that banks are exempt from any liability for the acts of third parties in paying out under a letter of credit (art 18 of the UCP).

Two of the practices and usages peculiar to letters of credit have attained the status of fundamental doctrines governing these instruments, namely:

- the doctrine of the autonomy of the letter of credit; and
- the doctrine of strict compliance which entails that the letter of credit deals purely with documents and that the documents must strictly conform to the terms and conditions in the credit.

These two doctrines are also acknowledged and entrenched in article 3 of the UCP (see par 2 below). (For a detailed discussion of these two doctrines, see Horn and Schmitthoff (eds) *The transnational law of international commercial transactions* Vol 2 (1982) 255–262; Jack *Documentary credits* (1993) 17–19 150 *et seq* 208 220–221; Hugo "The 1993 Revision of the Uniform Customs and Practice for Documentary Credits" 1996 *SA Merc LJ* 151 152–156; Oelofse *The law of documentary letters of credit in comparative perspective* (1997) 354 *et seq*; Chuah *Law of international trade* (1998) 336–343; Gillies and Moens *International trade and business: law, policy and ethics* (1998) 397 *et seq*; and Van Niekerk and Schulze *The South African law of international trade: Selected topics* (2000) 244 *et seq*.)

It is trite that a letter of credit serves two important functions, namely a payment function and a security function. In a recent case it has been reasoned that both the fundamental doctrines underlying doctrines underlying letters of credit (viz the independence of the bank's undertaking and strict compliance of the documents with the terms of the credit) arise from the security function of a letter of credit (see *Rosen v Ekon* [2000] 3 All SA 24 (W) 32a–b and the authorities referred to there).

Although these two doctrines are to a large extent intertwined, the present discussion focuses only on the first of them, namely that the letter of credit constitutes an autonomous contract independent of the underlying contract between the applicant for the letter of credit and the beneficiary in terms of it. In two recently reported judgments the court had to decide to what extent the autonomy and independence of the letter of credit could be raised as a defence against an application for an attachment of the letter of credit to found jurisdiction over a *peregrinus* beneficiary under the credit. This is also referred to as an attachment *ad fundandam jurisdictionem*. But first, what does the doctrine of autonomy of the letter of credit entail?

2 The doctrine of autonomy of the letter of credit

The doctrine that underpins the letter of credit as a revered method of payment in international trade is that it is independent of any underlying transaction, for example the contract of sale, and the contract between the issuing bank and the buyer as applicant for the credit (see Malan "Letters of credit and attachment *ad fundandam jurisdictionem*" 1994 *TSAR* 150 152).

This doctrine of autonomy of the letter of credit has been entrenched in article 3 of the UCP which declares that letters of credit, by their nature, are separate transactions from the underlying contract of sale or other contract on which they may be based. Article 3 further provides that banks are in no way concerned with or bound by the underlying contract, even if the letter of credit contains a reference to the underlying contract. As a result, the undertaking by the bank to pay in cash or to accept and pay bills of exchange or drafts or to fulfil any other obligation under the letter of credit, is not subject to claims or defences by the applicant resulting from its relationship with the issuing bank or with the beneficiary (art 3(a)).

Similarly, the beneficiary cannot avail himself of the contractual relationship existing between the applicant and the issuing bank (art 3(b)) (see Jack *op cit* 18–19).

This doctrine underlies the value of the letter of credit in international trade as an independent and separate undertaking by the bank to pay the beneficiary (see *Phillips v Standard Bank of South Africa Ltd* 1985 3 SA 301 (W) 304C–E; *Ex Parte Sapan Trading (Pty) Ltd* 1995 1 SA 218 (W) 224H–225G).

In *Union Carriage and Wagon Company Ltd v Nedcor Bank Ltd* 1996 CLR 724 (W) 731–732 the court confirmed that the doctrine of autonomy applies with equal force to standby letters of credit and advance payment guarantees. It is obvious that the doctrine deters applicant-inspired litigation – on the basis of the beneficiary's breach of contract with the applicant – that seeks to interfere with the issuing bank's payment obligations towards the beneficiary, when the terms and conditions of the letter of credit have been satisfied by the beneficiary.

In practice, the doctrine entails that the issuing bank is bound only by the terms of the letter of credit when carrying out its obligation towards the beneficiary. The bank cannot and should not take into account any terms of the underlying contract in so far as they differ from the terms of the letter of credit. The bank may not unilaterally alter the terms of its agreement with the applicant as reflected in the application form, neither may it alter its undertaking towards the beneficiary contained in the letter of credit. At the same time, the beneficiary may not tender documents which differ from those stipulated in the letter of credit, even if the tendered documents may correspond to those stipulated for in the underlying contract of sale.

It is trite that an issuing bank will not lightly ignore the autonomy and independence of the letter of credit. In Australian law it has been stated that the autonomy doctrine is necessary to ensure that letters of credit remain "as good as cash" (see *Wood Hall Ltd v Pipeline Authority* (1979) 141 CLR 443 457). In the absence of fraud on the part of the beneficiary, the applicant for the letter of credit will therefore not be able to rely successfully on breach of the underlying contract by the beneficiary to stop the bank from making payment to the beneficiary on the credit. (On the so-called "fraud exception", see *Loomcraft Fabrics CC v Nedbank Ltd* 1996 1 SA 812 (A); Jack *op cit* 207 *et seq*; Oelofse *op cit* 453 470–474.) There are also three other less important exceptions on the doctrine of autonomy, none of which is relevant for the present discussion. (For a discussion of these other exceptions, as well as letters of credit in general, see Aronstam "Letters of credit I" 1978 *BML* 23–24; "Letters of Credit II" 1978 *BML* 53–55; and "Letters of Credit III" 1979 *BML* 115–117.)

But the question remains whether a letter of credit, despite its autonomy and independence, can be attached by the court on application by the applicant for the letter of credit to found jurisdiction over the *peregrinus* beneficiary. Such application for an attachment *ad fundandam jurisdictionem* may be made for a number of reasons. For example, the applicant for the letter of credit (who is usually the buyer under the underlying contract of sale) may have a valid but unrelated counterclaim against the beneficiary (usually the seller under the underlying contract of sale); or the applicant may simply use the procedure of an attachment *ad fundandam jurisdictionem* to circumvent the doctrine of autonomy or independence of the letter of credit in his quest to stop payment on the credit because of a breach of the underlying contract by the beneficiary. (For a discussion of the Mareva injunction in English law to restrain a beneficiary under a letter of credit from using the proceeds of the credit, see Jack *op cit* 227–228. Because a Mareva injunction does

not interfere with the operation of the credit, but merely restrains the use of the proceeds of the credit, the applicant (buyer) need not bring itself within the fraud exception to the autonomy doctrine to claim a Mareva order: see Jack *op cit* 228.)

The question to what extent the autonomy doctrine can be raised by a beneficiary to prevent an attachment of the letter of credit (by the beneficiary under the credit or by a third party) has been considered in two decisions of the Witwatersrand Local Division of the High Court. These two decisions, as well as the subsequent questions regarding the attachment of a letter of credit which were raised (only some of which were answered) in them, will be discussed below.

3 *Ex Parte Sapan Trading (Pty) Ltd*

3 1 The facts

The extent to which South African courts are prepared to honour the doctrine of autonomy under a letter of credit has been illustrated vividly in *Ex Parte Sapan Trading* 1995 1 SA 218 (W). In this case the court was asked to pronounce on the question whether the applicant under a letter of credit could in effect stop payment of an irrevocable letter of credit to the beneficiary by obtaining an attachment of the beneficiary's claim against the issuing bank in order to find or confirm jurisdiction in an action which the applicant intended to institute against the beneficiary. The court rejected the applicant in terms of the letter of credit's application for attachment on a number of grounds. Three of these reasons are relevant for present purposes and will be referred to here.

First, the court decided that the applicant had failed to make out a cause of action against the beneficiary. Secondly, it held that it was not apparent that the letters of credit evidenced claims by the beneficiary against the issuing banks. Thirdly, it decided that the granting of the application would infringe on the generally recognised principle of the autonomy and independence of a letter of credit from the underlying relationship. The applicant appealed to a full bench of the Witwatersrand Local Division of the High Court.

3 2 The decision

On appeal, the full bench confirmed the dismissal of the application. Although the court on appeal did not agree with the court *a quo*'s first two reasons mentioned above for dismissing the application, it confirmed the dismissal on the third ground. It also mentioned further reasons for dismissing the application. Some of these reasons include the following: First, it referred with approval to the *Phillips* case (*supra*) and to a number of English cases which confirmed the recognition of the doctrine of autonomy. It was argued on behalf of the applicant that there was no obstacle to ordering attachment of the claim to the proceeds of such a letter of credit. The effect of such an attachment, so the argument ran, would not be that payment by the bank would be prohibited, but merely that payment would be made to the sheriff who would receive payment on behalf of the beneficiary. The sheriff would then hold the proceeds of the letter of credit as security for the applicant's alleged claim. The court rejected this argument and reasoned that

> "[i]nsofar as the beneficiary is concerned there is no real difference between preventing the issuing bank from honouring its obligation to effect payment in a foreign country in terms of a letter of credit by effectively ordering it to effect payment locally to the deputy sheriff who would be receiving it on behalf of the beneficiary" (226A–B).

It further held that in both these cases

> "the effect is that the beneficiary would, despite an irrevocable undertaking by a bank to pay him in the foreign country, not receive his money until a local court has decided upon an alleged counterclaim against him" (226B).

Notwithstanding the court's strong inclination towards upholding the doctrine of autonomy, the matter was not as simple as that. The court pointed out that an *incola* (such as the applicant) has the right to attach the property of a *peregrinus* in order to found or confirm jurisdiction in an action to be instituted against the *peregrinus*, and the court has no discretion in this matter. The court solved this procedural "problem" by inferring the existence of an implied term in the relationship between the applicant and the beneficiary. It reasoned that such a term would imply an undertaking by the applicant (in the underlying contract) to arrange for an irrevocable letter of credit, and that the applicant would not, by an application to attach the proceeds of the letter of credit, prevent the payment of the letter of credit in accordance with its terms (227D–E). In its reasoning the court found itself in good company: a similar approach was followed in *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607 (CA) 613c–d where it was decided that "[b]y opening the letter of credit in favour of the seller [the applicant] has implicitly agreed that he will not raise any set-off or counterclaim – such as to delay or resist payment". (By chance the *Power Curber* case also dealt with an order for the attachment of the proceeds of a letter of credit. For a discussion of the *Power Curber* case, see Jack *op cit* 297–300.)

3 3 Comment

Generally the finding of the court on appeal in *Ex parte Sapan Trading* cannot be faulted. However, a few questions regarding the attachment of letters of credit remained unanswered. Some of them may be mentioned here. First, the court expressly refrained from answering the question whether another person (ie someone other than the applicant for the letter of credit) would have the right to attach payment in terms of the letter of credit. It has been argued that in view of the court's reasoning regarding the doctrine of autonomy, it seems clear that a court cannot refuse attachment to found or confirm jurisdiction at the instance of a third party who wants to prosecute a claim against the beneficiary (see Oelofse *op cit* 470).

Another instance where payment under the credit can be frustrated by one of the parties to the letter of credit transaction without any fraud on the part of the beneficiary, involved the situation where the bank has a valid claim against the seller. In such a case it has been decided that the bank has a right of set-off against the sum due under the credit to the beneficiary, and can therefore lawfully withhold payment (see Chuah *op cit* 339 and the authority referred to there).

Secondly, if one accepts for the moment that an attachment by such a third party would indeed be possible, under which circumstances would such application for attachment be successful? Is the amount of the third party's claim against the beneficiary relevant at all? For example, if the amount of the third party's claim against the beneficiary is considerably less than the amount stipulated in the letter of credit, the court may perhaps be hesitant to order an attachment and so infringe on the doctrine of autonomy. It has been said that if the court should interfere with the obligations of a bank (by ordering it not to pay under a letter of credit) it would strike at the very heart of that country's trade (see Malan *op cit* 152 at the authority referred to there). Further, should the court take cognisance of any possible personal or business link which may exist between the third party applicant and the applicant for the letter of credit in considering the application for attachment?

Thirdly, would a court be more easily persuaded to grant an order for attachment to the third party where fraud on the part of the beneficiary is alleged, in contrast to, say, mere breach of contract? And would the applicant for the letter of credit be entitled to an order for attachment where there is fraud on the part of the beneficiary? Bear in mind that the applicant in the *Ex Parte Sapan Trading* case did not aver or rely on the fraud of the beneficiary. Although it is true that the applicant may interdict the issuing bank to pay on the credit where there was fraud by the beneficiary and that the applicant does not need to rely on an order for attachment, it may in certain circumstances be beneficial to the applicant to obtain an order for attachment, and not merely to interdict the bank from paying. For example, where the applicant wants to found jurisdiction because it intends to litigate against the beneficiary, also on grounds unrelated to the letter of credit and the underlying contract, an attachment order would usually be preferable to the applicant to an interdict stopping the bank from paying on the document.

Fourthly, the court (in the principal judgment delivered by Streicher J) implied a term in the contract between the applicant and the beneficiary to the effect that "the applicant would not, by an attachment to found or confirm jurisdiction in order to prosecute a counterclaim against [the beneficiary] prevent the payment of the letter of credit". In his concurring judgment Schutz J expanded the application of this term and also inferred it in the contract between the applicant for the credit and the issuing bank. Would the requirements for implying such a term necessarily always be the same (or present) in both types of contract?

Fifthly, and closely linked to the previous point, is the legal basis for introducing the term into the contract between the applicant and the beneficiary, on the one hand, and the one between the applicant and the issuing bank, on the other. In the *locus classicus* on implied contractual terms, *Alfred McAlpine & Son (Pty) Ltd v Tvl Provincial Administration* 1974 3 SA 506 (A) 531 it was said that the expression "implied term" is an ambiguous one in that it is often used to denote two, possibly three distinct concepts. Implied terms are either implied by law, or by trade usage, or by the facts from the case (so-called tacit terms) (see Christie *The law of contract in South Africa* (1996) 177–194). The court in *Ex Parte Sapan Trading* reasoned that such a term "should be implied *by law* into the agreement" (227D–E) and further that "when the applicant agreed with [the beneficiary] to establish an irrevocable letter of credit, it *implicitly agreed* that it would not . . . prevent the payment of the letter of credit" (227E–F). In his concurring judgment Schutz J held that "the same term *is to be implied* in [the contract between the applicant and the issuing bank]" (228D).

If one is to accept that the court in *Ex Parte Sapan Trading* meant the said term to be implied *by law*, it would qualify as a *naturale* of the contract, in which case it can be excluded by the parties provided that such exclusion is not against public policy (see Lubbe "Die verbod op die oploop van rente *ultra duplum* – 'n Konkretisering van die norm van *bona fides*?" 1990 *THRHR* 190 200–201). *Naturale*, in turn, may derive from common law, trade usage or custom or statute. Unfortunately the court refrained from stating which of these would be the basis of the term implied in the contract in *Ex Parte Sapan Trading*. Or did the court perhaps mean that the true nature of the basis of the implied term should rather be sought in a tacit (implied) term, in which case the term, albeit implied, rests, like an express term, on consensus between the parties? The distinction between the different types of implied term (ie, by law (*a naturale*), trade usage or tacit term) is not a mere academic exercise. I will restrict myself to mentioning that a *naturale* and a trade usage will be implied in a contract irrespective of whether the parties knew of the

naturale or trade usage. Put differently, neither a *naturale* nor a trade usage rests on consensus between the parties. But a tacit term (or a term implied from the facts) is based on the unexpressed or tacit common intention of the parties (see Christie *op cit* 187; Schulze "The South African banking adjudicator – A brief overview" 2000 *SA Merc LJ* 38 49). These and other questions concerning the nature of the term implied in the contract by the court in *Ex Parte Sapan Trading* require further careful thought. (For further perspectives on the *Ex Parte Sapan Trading* case, see Malan *op cit* 154–155; Oelofse *op cit* 355 465–470 and Van Niekerk and Schulze *op cit* 246.)

4 *Transcontinental Procurement Services CC v ZVL & ZKL International AS*

4 1 Introduction

The second case which concerned the question regarding the attachment of a peregrinus beneficiary's right to payment under a letter of credit was that of *Transcontinental Procurement Services CC v ZVL & ZKL International AS* 2000 CLR 67 (W). Although judgment in this case was handed down on 4 June 1998 it has, until recently, escaped the net of the editors of the various sets of law reports currently in circulation in South Africa. Fortunately it has now been reported in the Commercial Law Reports.

4 2 The facts

Some of the questions which arose from the *Ex Parte Sapan Trading* case, were answered in the *Transcontinental* case. The facts in the *Transcontinental* case were simple. First National Bank of SA Ltd issued a documentary credit in favour of ZVL & ZKL International AS. The credit was issued electronically by means of a communication to a bank in the Slovak Republic. The Slovak bank confirmed the letter of credit and so assumed a separate and independent liability on the credit. ZVL was a company which operated in the Slovak Republic and had no office or place of business in South Africa. The applicant for the letter of a credit was not the applicant in the present proceedings – Transcontinental Procurement Services – but a third party who had no interest in the proceedings. For purposes of the letter of credit Transcontinental could therefore be regarded as a third party. Transcontinental, an incola of the court, alleged that ZVL owed it US$16 129,81. It brought an application for the attachment of the claims of ZVL against the issuing bank (FNB), in order to found or confirm the jurisdiction of the court for the purposes of bringing its claim for payment. After it obtained an interim order to this effect, it applied for confirmation of the attachment order.

4 3 The decision

The court decided a number of important issues. First, it considered the question of jurisdiction. It held that in the realm of letters of credit it is trite in English law that a debt under a credit is payable at the place where "it is in fact payable against documents" (see *Power Curber International Ltd v National Bank of Kuwait SAK* 1981 1 WLR 1233 (CA) 1240F). In South Africa the *situs* of a debt is the place of residence of the debtor. It was common cause that FNB became the debtor of the beneficiary under the letter of credit. Since Johannesburg was the place of residence of FNB, the *situs* of the debt owing by FNB to the beneficiary was in Johannesburg. It was therefore clear that the Witwatersrand Local Division had jurisdiction to hear the application for attachment of the proceeds of the letter of credit.

Secondly, the court discussed the question whether the proceeds of a letter of credit can, in principle, be attached by a third party in the position of the applicant to found or confirm jurisdiction. This question was raised, but expressly left open in *Ex Parte Sapan Trading*. The court in *Transcontinental* acknowledged the principle that once an *incola* has established a *prima facie* cause of action as well as the other requirements for an order to found or confirm jurisdiction, the court has no discretion to refuse such an order. The court in *Ex Parte Sapan Trading* overcame the problem which this principle posed by inferring a term in the contract between the applicant and the beneficiary that the former would not frustrate the latter's claim for payment under the credit by applying for an order to attach the proceeds of the credit (see again par 3 2 above). The court in *Transcontinental* decided that generally the right of payment under a letter of credit can be attached by a party other than the applicant in order to found or confirm jurisdiction of the court, where the applicant for attachment is able to show that it has a *prima facie* cause of action against the beneficiary of the letter of credit. It reasoned that this principle is subject to the certainty that the beneficiary has not been paid and cannot be paid in terms of the letter of credit.

The court's remark that it could not "imagine that the applicant [ie the third party and not the applicant for the credit], had any connection with the issue of the letter of credit and there was no suggestion at all that it did" is also instructive. The court therefore took into account that in certain circumstances the applicant for the letter of credit may be indirectly involved (eg where there exists a business or other relationship between itself and the third party) in attaching the proceeds of the credit and so frustrate the implied term referred to in *Ex Parte Sapan Trading* (see again my comments in this regard under par 3 3 above). The court correctly held that there was in the present case no basis to infer any term similar to that implied into the letter-of-credit applicant and the beneficiary in the *Ex Parte Sapan Trading* case to the effect that the applicant would not apply for an attachment order to found or confirm jurisdiction in order to prosecute a claim against the beneficiary (72).

The court acknowledged that allowing a third party to attach the proceeds under a letter of credit may bring about the disastrous consequences (ie infringing on the nature of a letter of credit as a revered method of payment in international trade) which the court in *Ex Parte Sapan Trading* wanted to avoid. But it emphasised that in deciding whether to allow a third party to attach the proceeds of a letter of credit, a court should scrutinise the provisions of the letter of credit and all other relevant circumstances closely. It further reasoned that the onus which rests on the applicant to establish a cause of action "is not a heavy one". This indicates that no special degree of proof is required where the court considers an application for the attachment of the proceeds of a letter of credit. This "ordinary" degree of proof should be contrasted with the "heavier" burden of proof which rests on the applicant for the letter of credit if it wants to interdict the bank from payment where it alleges fraud on the part of the beneficiary (see *Loomcraft Fabrics supra* 817F–G where it is stated that "the fraud on the part of the beneficiary will have to be clearly established . . . [the] *onus*, of course, remains the ordinary civil one which has to be discharged on a balance of probabilities but, as in any other case where fraud is alleged, it will not be lightly inferred"; and Oelofse *op cit* 472 where he argues that although no special standard of proof applies to interdicts against payment, the decision in *Loomcraft* has the *practical effect* of demanding substantially more than a mere balance of probabilities).

The court in *Transcontinental* concluded that in order to satisfy the onus of proof for an attachment of the credit, the applicant must prove that

- what it seeks to have attached is indeed capable of attachment;
- the attachment will be effective; and
- where possible, the consequences postulated in *Ex Parte Sapan* will be avoided (73).

Of crucial importance in the present case was the fact that the Slovakian bank confirmed the letter of credit which was issued by FNB. This caused the Slovakian bank to be jointly and severally liable with FNB to the beneficiary for payment under the letter of credit. That being so, the beneficiary became entitled to bypass FNB, present the stipulated documents to the Slovakian bank and demand payment from it under the letter of credit. That in turn, would have entitled the Slovakian bank, in terms of the provisions of the credit, to reimburse itself from FNB's agent in New York (73). This entails that two possibilities might have existed which the court had to consider. First, that the beneficiary had (already) been paid by the Slovakian bank. In that event, FNB's debt to the beneficiary had been discharged and the "asset" which the applicant wanted to attach did not exist, or at least not in South Africa (73). Secondly, that the beneficiary had not yet been paid by the Slovakian bank. But even where the beneficiary had not yet been paid by the Slovakian bank, the court reasoned that it could not have been certain that the beneficiary would not have been entitled lawfully to claim payment from the Slovakian bank notwithstanding the attachment of the rights under the letter of credit in South Africa. Because of the uncertainty about whether the beneficiary in the present case had not already been paid or would not be paid by the Slovakian bank in terms of the confirmed letter of credit, the court decided that, on the facts of the present case, the attachment order could not be confirmed (73–74).

The third aspect of the court's judgment which is noteworthy is that it ordered each party to pay its own costs. Suffice to say that in ordinary circumstances the second respondent (FNB) would have been entitled to an order for costs. But in the present case the answering affidavit which was filed on behalf of the second respondent contained what the court referred to as "remarkable allegations", some of which were even labelled by the court as "nonsense" (76 77).

4 4 Comment

The decision by the court in the *Transcontinental* case is instructive for a number of reasons.

First, the reasons advanced by the court why it decided not to confirm the order for an attachment of the proceeds of a *confirmed* letter of credit have serious practical repercussions for future third-party applicants for an order of attachment. The large majority of letters of credit are confirmed by a second (usually overseas) bank. The uncertainties regarding whether the beneficiary in the *Transcontinental* case had not already been paid by the confirming bank in its own country at the time when the application for attachment was lodged, will therefore also be present in most similar applications for an order for attachment by a third party. I believe that the uncertainties which prevented the court in the *Transcontinental* case from confirming the attachment are of a procedural-law nature, and not necessarily of a letter-of-credit nature. I believe that these uncertainties in similar types of application may in future be removed by joining the confirming bank as a co-respondent in an application for a prohibitory interdict. It is submitted that a South African court

will in such circumstances have jurisdiction to interdict the foreign (confirming) bank. It is submitted that a South African court granting a prohibitory interdict (in contrast with a mandatory order) against the confirming bank prohibiting such bank from performing an act in another country (outside South Africa), such as paying under a confirmed letter of credit, does not infringe the sovereignty of that other country (see Prest *The law and practice of interdicts* (1996) 286).

It is only by joining and interdicting both the issuing and the confirming bank (and, for that matter, any other bank which may have assumed a separate and independent paying duty) under a confirmed letter of credit that the uncertainties which prevailed in the *Transcontinental* case can be removed (see Van Niekerk and Schulze *op cit* 246–247).

In this regard a distinction must be made at the outset between a prohibitory interdict, on the one hand, and a mandatory interdict on the other. A mandatory order, in the form of an interdict, which has the effect of compelling conduct outside the jurisdiction of a South African court, will not be granted because the court does not have jurisdiction to do so (Prest *loc cit*). But a distinction must also be made between the jurisdiction of a court to grant a prohibitory interdict, and the enforcement of such an interdict. Although a South African court will usually have jurisdiction to grant a prohibitory interdict against an overseas confirming bank (in terms of which it is prohibited to pay under a letter of credit which was applied for and opened in South Africa), the question remains whether a South African court can actually enforce the interdict regarding the performance of an act in a foreign country. Perhaps the solution to the problem of enforcement lies in considerations of good business practice. If the confirming foreign bank is joined as a co-respondent in the application for a prohibitory order interdicting the South African bank to pay the beneficiary or the confirming bank (should the latter decide the pay the beneficiary under the letter of credit and then claim the money from the South African bank), the court can ascertain whether the confirming bank has already paid the beneficiary. (This the court in the *Transcontinental* case could not do because the confirming bank was not joined as a co-respondent and there was apparently no evidence led about the question whether the confirming bank had paid the beneficiary.) If neither bank has paid the beneficiary under the credit, both banks must be interdicted by the South African court from paying under the letter of credit. The confirming bank will then be aware of the fact that, should it decide to pay the beneficiary under the letter of credit, notwithstanding the South African court's prohibitory interdict not to pay, it will be paying from its own funds. It will therefore not be able to recoup the money from its principal (the South African bank which issued the letter of credit and requested the overseas bank to confirm and issue the credit to the beneficiary) (see *Loomcraft Fabrics CC v Nedbank Ltd supra* 823H–J; and Oelofse 474 fn 460). Should it decide to pay the beneficiary under the credit notwithstanding the South African court's order to the contrary and should it wish to recoup the money from the South African bank, it (ie the overseas confirming bank) will have to institute a claim against the South African bank in a South African court. The South African bank will then in all probability be able to rely successfully on the earlier prohibitory interdict obtained against it by the third-party applicant.

Secondly, it would appear that the fact that the claim of the third party was considerably less than the amount under the letter of credit it sought to attach, played no role at all in the court's decision to dismiss the application. (The third party applicant alleged that the beneficiary owed it US$16 129,81, while the amount payable under the letter of credit was US$48 620,72: see the *Transcontinental* case

at 76 where it is mentioned that the confirming bank "negotiated" that amount to the beneficiary. See also the question which I raised in this regard under par 3.3 above.)

One final aspect of the court's judgment remains. In the present case the issuing bank (FNB) issued an electronic communication (letter of credit) to the Slovakian bank in which it instructed the latter bank to issue the letter of credit to the beneficiary. It was alleged by FNB that because it did not actually issue a (paper-based) copy of the letter of credit to the beneficiary, the electronic version of the letter of credit that it had in its possession did not qualify as a letter of credit, and therefore did not create any rights or obligations. The court gave this allegation short shrift. In the process the court confirmed that the legal principles which apply to traditional paper-based letters of credit apply with equal force to electronic letters of credit. It further provided an interesting insight into the operation of an electronic letter of credit in practice. In the present case the communication (letter of credit) was issued by FNB to the Slovakian bank. These documentation was generated by FNB's own equipment as confirmation of its instructions to the Slovakian bank to issue the letter of credit. The paper-based document (letter of credit) which the Slovakian bank issued to the beneficiary, was not available before the court, but it had nevertheless no quibble in accepting a copy of the electronically generated document bearing the caption "Issue of a Documentary Credit" which FNB had produced in its communication with the Slovakian bank. It confirmed that our courts have consistently accepted such electronically generated documents as sufficient proof of the existence of a letter-of-credit obligation owing by a South African bank to a foreign entity (77).

In this regard the court remarked that the old style letter of credit (ie a paper-based document) is unlikely to exist any more and if it does, must be a rarity. This remark is somewhat misleading. What the court perhaps should have said, is that the issue of an old style paper-based document by the issuing or opening bank to the confirming bank or advising bank is a rarity. But the issue of a paper-based letter of credit to the beneficiary by the confirming or advising bank is still the rule. Thus old-style paper-based letters of credit as such are not a rarity, but they are no longer issued in that form by the issuing or opening bank to the confirming or advising bank. It is nowadays common practice for a local issuing bank to advise a foreign bank via an electronic communication that the former requires the latter to issue a letter of credit on behalf of the former. The local bank would then have a documentary computerised version of that which would be produced on the electronic equipment of the foreign bank (77–78). The foreign confirming or advising bank then issues a paper-based letter of credit to the beneficiary.

The court further explained that when the issuing bank instructs the foreign bank by means of electronic communication to issue a letter of credit to the beneficiary the question remains whether the telex or other telecommunication is the operative instrument or whether it is only an indication that a letter will follow, which is intended to constitute the actual operative letter of credit. If the UCP applies to the letter of credit, the answer is provided by article 11 of the UCP. Article 11 states that if the issuing bank instructs an advising bank by telecommunication and wishes the subsequent paper-based confirmation of its instruction to be the operative document, it should state so in express terms in the telecommunication. In the absence of such express terms (or other words such as "full details to follow") to the contrary, the telecommunication is regarded as the operative document.

One small point, though. In explaining the operation of electronic letters of credit the court in the *Transcontinental* case referred with approval to the textbook by

Schmitthoff (*Export trade – the law and practice of international trade* (1990)). But because this work was published in 1990, four years before the latest version of the UCP came into force, the court's reliance on Schmitthoff's reference to article 12 of the UCP is misplaced. The provisions contained in article 12 of the previous version of the UCP (UCP 400 of 1983) are now contained in article 11 of UCP 500 which deals with teletransmitted and pre-advised letters of credit.

5 Conclusion

Neither the *Ex Parte Sapan Trading* case, nor the *Transcontinental* case can be faulted. Both cases have contributed admirably in providing guidelines in the application of the doctrine of autonomy of letters of credit, being a method of payment in international trade. But a number of questions still remain to be answered, some of which have been referred to in paragraphs 3 3 and 4 3 above.

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THE GHOST OF THE LAW: IN SEARCH OF JUSTICE (AND/OR VENGEANCE)

> "Urge to come to terms with the 'Outside', by absorbing, interiorizing it. I won't come out, you must come in to me. Into my womb-garden where I peer out. Where I can construct a universe within the skull, to rival the Real."

The original published poetry of Jim Morrison *The lords and the new creatures* (1985).

1 Introducing the ghost of the law

My seven-year-old stepson introduced the tortured anti-hero Ghost Rider to me. It was while paging through one of his well-worn Marvel comics that I began to see the resemblance between the acts of vengeance perpetrated by the formidable skull-headed hero (also known as Vengeance) and the search for justice as embodied in the "law". It is this similarity which I shall explore in this essay.

The origins of Ghost Rider stem from a witch-cursed bloodline and a deal struck over the soul of Dan Ketch by the demon Mephisto and his celestial brother, the angel Uriel. It was decided that Ketch would be blessed/cursed with both the attributes of Heaven and Hell. The story holds an exquisite balance between these paths. Ketch and his bloodline cannot become Ghost Rider/Vengeance by an act of will or a change of costume, but are forced into an agonising metamorphosis where hell-fire burns away face and thus humanity. It is only the shedding of innocent blood by another that provokes this change into a fanged, flaming skull. The only emotion, which the meta-human is then capable of, is the desire for vengeance. Thus

Ketch (or the more recent incarnation of the bloodline, Lt Badlino of the New York Police Department) is compelled to watch a situation develop, unable to intervene, waiting for that searing moment when the powerless victims in the story feel pain, a pain that is reflected in the flaming transformation into Ghost Rider. It is at this point of transformation when Badlino usually utters the catch phrase "vengeance will be mine!"

The theme of pain is again reflected in the punishment inflicted by Ghost Rider on the perpetrator of the crime against the innocent. Punishment consists of either a violent summary execution or more usually the sophisticated "penance stare", whereby the criminal is forced by thought induction to experience the pain of all his/her victims. Every hurt, however petty, which has been inflicted on the innocent, is compressed into a fraction of a second and replayed in the perpetrator's mind. This admixture of pain, guilt and self-realisation is sufficient to render the perpetrator of the unjust act permanently catatonic and in so doing, justice is done through an act of vengeance.

In the Ghost Rider comic entitled *Snowblinded* (Vol 2 No 21 Jan (1992), the similarity between Dan Ketch/Lt Badlino as a policeman in the NYPD and Ghost Rider is well illustrated in the first few pages:

> "Often they must wait in the shadows, observers of the violence of others. The waiting is what they hate most. These are individuals of action, they are not content in the watching, but sometimes they must watch and wait in order to act. And when innocent blood has been spilled . . . or a crime has been committed . . . then they act . . . with a vengeance."

It is this interesting relationship between the law and vengeance as/or justice which is worth an exploration, albeit a tentative one.

2 Law, justice and violence

Jacques Derrida ("Force of law: The mystical foundation of authority" in *Deconstruction and the possibility of justice* (1992)), in his exploration of the concept of justice as deconstruction and, specifically, deconstruction as justice, considers the "enforceability of the law" as an authorised force (6):

> "There are, to be sure, laws that are not enforced, but here is no law without enforceability and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth."

The question which we are faced with then, is whether there is such a thing as "just force" ("the sword of the law")? The submission is that justice in the form of punishment, vengeance, penalty, coercion, trial and so forth encompasses injustice as well (Derrida 6):

> "Force without justice is tyrannical. Justice without force is contradictory, as there are always the wicked; force without justice is accused of wrong. And so it is necessary to put force and justice together; and, for this, to make sure that what is just be strong, or what is strong be just." (*idem* 11)

Derrida therefore holds that the law *as law* is different from justice and cannot be justice as the very foundation and continuance of the law is in itself embedded in violence ("enforcement" or "force"). Justice is therefore "the experience which we are not able to experience" or "the experience of the impossible" (Derrida 16). As Derrida puts it, in order to "attain" justice one needs to address oneself to the "Other

in the language of the Other", which is not possible. As Levinas would have it, justice can never be identified with any descriptive set of conditions or rights. (For a fuller discussion of the complex relationship between Derrida and Levinas, see Cornell *The philosophy of the limit: Justice and legal interpretation* (1991).) Levinas's messianic conception of justice demands the recognition of the call of the Other, which always remains as a call which can never be fully answered. For Levinas, to try to know the Other is itself unethical, because to do so would be to deny his/her otherness/difference. Instead our *responsibility* is to hear his/her call, which demands that we address him/her and *seek redress from the wrongs done to him/her*. The Other, then is "there" in the ethical relationship, only as the subject's responsibility to him/her (see Cornell "The philosophy of the limit: Systems theory and feminist legal reform" in *Deconstruction and the possibility of justice* (1992) 88). There is therefore a responsibility without limits towards the Other. But the paradox is that the law itself and therefore justice as law is founded and conserved through violence. The law can only be violence itself, since it is always too late to be anything other than en-*forced*. The law is both threatening to citizens and threatened by itself by its use of violent means to enforce the law. The threat therefore does not come from the outside but from within. It may be said to deconstruct itself.

It should be mentioned here that it is not only the criminal law and criminal justice system which are inherently violent. Violence is not limited to the criminal law, but also inhabits the functioning of the legal system as a whole. The accusatorial character of the law reflects the competitive nature of the trial process in South Africa. According to Leslie Bender ("A lawyer's primer on feminist theory and tort" 1988 *J of Legal Education* 37) such a system is the intellectual counterpart of earlier masculine practices of duelling and mediaeval jousting tournaments. One needs only to consider the methods used in cross-examining a rape victim to realise that trial advocacy can be seen as a tool whereby the violence of the past is brought back into the courtroom and the victim suffers the violation all over again.

3 The (im)possibility of justice

In order to attain justice, one must therefore respond to the call of the Other, but it is always too late; there can never be the possibility of justice *in the present* (Derrida 23). There is only what Derrida calls the "ghost of the undecidable" (25):

> "The undecidable remains caught, lodged, at least as a ghost – but an essential ghost – in every decision, in every event of decision. Its ghostliness deconstructs from within any assurance of presence, any certitude or any supposed criteriology that would assure us of the justice of a decision, in truth of the very event of a decision."

The instant of the decision (to "do" justice) is madness, since justice must rend time and defy dialectics, no matter how late it comes; "Justice remains, is yet, to come" (Derrida 27) and as such it is the experience of the impossible.

Kafka ("Before the law" in *Kafka and the contemporary critical performance: Centenary readings* (1987)) writes of "a being before the law" where "a being" is always trying to "catch up with" the law. I propose the opposite view. As Derrida (36) says:

> "The law is transcendent and theological, and so always to come, always promised, because it is immanent, finite and so *already past*. Every 'subject' is caught up in this aporetic structure in advance."

The issue then lies with situations of legal intervention where, for example, the police (Ghost Rider) are able to intervene only once "innocent blood has already been spilled". They enforce the law *ex post facto*. They must watch and wait until it is too late. However it can also be said that to intervene beforehand could lead to interference with the privacy of individuals, albeit dangerous ones. The law cannot interfere with the law-abiding – which would be unjust.

The police practice of entrapment is an example of interference by the law. The police set traps in order to "draw out" criminals, and then arrest them for conduct encouraged by the police themselves (Bohler "Eating the forbidden fruit: The morality of police trapping practice" 1999 (2) *Codicillus* 2). This amounts to the creation of crime in order to combat crime. In their frustration at watching and waiting the police become proactive and in their pro-activity they violate the interests of the individuals who may wander unsuspectingly into their traps.

The behaviour of the police is an issue here (Whelan "Lead us not into (unwarranted) temptation: A proposal to replace the entrapment defence with a reasonable suspicion requirement" 133 *Univ Penn LR* 1193 1212):

> "Just because the defendant is more vulnerable to temptation than the average law-abiding citizen, it is not apparent that any legitimate purpose is served by subjecting that individual to a randomly administered morality test. In fact, one can argue that the weak are far more in need of protection from police encouragement than the strong."

It is therefore possible to say that justice once again escapes us and the search continues: Derrida refers to the police as "haunting" or "spectral" (45) as they are present in all places and they possess the force of law and enforce the law. But they cannot bring about "justice" without force/violence in one of its many forms. We can therefore refer to the spectre of the law, always somewhere where we are not.

Another interesting aspect of the acts of Ghost Rider is his "penance stare", which is a retributive and preventative form of punishment. The violent and invasive nature of this punishment brings down the vengeance of the community on the wrongdoer and would prevent future violations, because the victim of such a stare is rendered catatonic at the terrible moment of self-realisation. The horror of Self as seen by the Other (or as seen by the Self?).

4 The stories of characters before the law

As Vengeance/Ghost Rider (in *Route 666* Vol 1 No 149 March 1994), Badlino makes a snap decision to kill a man robbing a convenience store. All that Vengeance sees is the crime committed in that moment and he acts upon it. Afterwards Badlino discovers that the man who Vengeance has killed was a policeman. On the telecast of the funeral, Badlino (once again) watches as the dead policeman's son, Billy, weeps for the loss of his father. The realisation dawns upon Badlino that there are more actors involved in the drama besides the so-called criminal and his victim: others whose calls for justice have been silenced. The face of humanity has been burnt away to be replaced by the burning skull of Vengeance, in the same way the law *as law* (*lex talionis*) loses its own humanity when exercised without due consideration of all the stories and characters involved in the narrative. (See Van Niekerk "Indigenous law and narrative: Rethinking methodology" 1999 *CILSA* 208 for a discussion of the narrative or storytelling approach to the law.) Lt Badlino visits the widow of the dead policeman, who explains to him that her husband was a good man driven to crime in order to pay for his son's heart condition: "What were we supposed to do? What was *David* supposed to do?? Watch his son *die?!?*"

The businesses hit by the dead father had been suspected of drug involvement. Badlino later discovers the son with his father's gun attempting to draw Ghost Rider out by threatening to shoot an innocent passer-by. Badlino then tells the boy to start by shooting him, and Billy collapses and hands over the gun. Badlino takes the boy into his arms and says the following:

> "Vengeance is a *cold, hard* thing, son. It doesn't know *mercy* . . . or consider the *high price*, of the lives it ruins. It *consumes* your humanity."

This story is an attempt to illustrate the need to act with responsibility to the Other when enforcing the law. Therefore, presiding officers, who are law enforcers, should take care to listen to the narrative of the individuals who stand before them and only thereafter to judge.

It is delusional to believe that we will in the future leave Plato's cave and the truth of the law and/as justice will become known to us – that the shadows will dissipate to reveal the shining truth (*The Republic* (1970)). The future in which the secret of the law will be revealed to us will never come, yet we cannot escape the need for the law. Post-modernism is a realisation that there can be no utopia of a just society – the voyage is doomed – and, by implication, that we are at the destination; the problem is that the destination is no conclusion, it is the journey. There is no end(ing). It is a continual search; an impossibility.

The law may therefore be said to have a "kafkaesque" character (see Kafka *The trial* Scott and Walker (trans) (1977) 7). The meaning of "kafkaesque" ranges from "weird", "mysterious", "tortuously bureaucratic" to "nightmarish". In the story of K the judicial officials, including K's own defence layer, are "hamstrung by the legal system and lack[ed] a proper feeling for human relations" (Kafka 140).

The need for judicial officers to have "a proper feeling for human relations" is a consideration which should be viewed seriously. Technicalities and rules should not displace human relations. Where, for example, a presiding officer is required to consider the importance of a cultural right in the light of constitutional equality (s 9(4) of the Constitution of the Republic of South Africa Act 108 of 1996), he/she should be called upon to consider carefully the stories of the persons whose lives will be affected by the decision of the court. It would be unjust merely to enforce a legal-technical rule in such hard cases. (See Woolman "Out of order? Out of balance? The limitation clause of the final Constitution" 1997 *SAJHR* 102 for a discussion of the importance of adopting a storytelling, or narrative, approach to legal decision-making.)

5 Continuing the search for justice

Deconstruction may be seen to be a form of humanism (Morrison *Jurisprudence from the Greeks to post-modernism* (1997) 522). It is a call to remember that the cause of philosophy is to enable us to live in a spirit of truth, in the realisation that such truth cannot be attained (*idem* 524):

> "Perhaps in the post-modern condition, we must acknowledge the impossibility of escaping from our existential inadequacy; we need to recognise the mystery of a depth we can do little other than to call the realm of the sacred. That we will always be defeated by our attempts to know it, is no reason not to live by its spirit."

Thus, in closing, it is not enough to merely say:

> Law, says the judge as he looks down his nose,
> Speaking clearly and most severely,
> Law is as I've told you before,

Law is as you know, I suppose,
Law is but let me explain it once more,
Law is The Law.
(WH Auden *Collected poems* (1976) 208)

We must strive to (re)consider the impossibility of justice and thereby to take care wielding the sword of the law when enforcing our ideas of what is deemed "just". Let us take care to act with a sense of *responsibility* to the suffering face, bleeding body and personal story of the Other, least we fall into the dilemma of Ghost Rider (as Vengeance) in his eternal cursed/blessed quest. To put it another way, we need, as a legal community, to stop seeing the law as an inflexible instrument whereby we enforce existing rules. We need to place the law in the context of human relations and thereby become responsible beings.

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This Court now finds itself in the position of a chain novelist. The first chapter has been written by another Court and this Court is now expected to complete the work on the basis of a framework determined by another author.

Davis J in S v Swartz 1999 2 SACR 380 383c–f, *quoted by Lewis J in* S v Dzukuda 2000 10 BCLR 1101 (W) 1107H *(regarding the issue of referral for sentencing from the regional court to the high court).*

VONNISSE

APPLICATION FOR A MINING LICENCE AND THE *AUDI ALTERAM PARTEM* RULE

Director: Mineral Development, Gauteng Region v Save the Vaal Environment [1999] 2 All SA 381 (A)

1 Introduction

1 1 A holder of a mineral right or person who has acquired the consent to mine from such holder may not mine for any mineral without the necessary statutory mining authorisation granted to him (s 5(2) of the Minerals Act 50 of 1991). An application for a mining authorisation must be lodged with the Director: Mineral Development (s 9(5) of the Minerals Act). (The expression "Director Mineral Development" was substituted for the former expression "regional director". The term "director" will be used henceforth.) There are two types of mining authorisations, namely a mining permit and a mining licence. A mining licence is issued for a period exceeding two years, whilst a mining permit is issued for a period of less than two years (see definitions of "mining licence" and "mining permit" in s 1). The application must be made in the prescribed form together with the payment of the prescribed application fee (s 9(1)).

1 2 An application for a mining authorisation must be accompanied by: (a) proof of the mineral right; (b) a sketch plan indicating the location of the intended mining area, the land, the lay-out of the intended mining operations and the location of the surface structures connected therewith; (c) particulars about the manner in which and scale on which the applicant intends to mine such mineral optimally and to rehabilitate disturbances of the surface which may be caused by the intended mining operations; (d) particulars about the mineralisation of the land; (e) particulars about the applicant's ability to make the necessary provision to mine a mineral optimally and to rehabilitate disturbances of the surface (s 9(5)). The stated information must be acceptable to the director (s 9(5)).

1 3 Before a mining authorisation is furnished, the director must be satisfied: (a) with the manner in which and scale on which the applicant intends to mine the mineral optimally; (b) with the manner in which an applicant intends to rehabilitate disturbances of the surface which may be caused by his mining operations; (c) that the applicant has the ability and can make the necessary provision to mine the mineral optimally and to rehabilitate the disturbances of the surface; and (d) that the mineral (i) occurs in limited quantities in or on the land; or (ii) will be mined on a limited scale; and (iii) will be mined on a temporary basis; or (e) that there are reasonable grounds to believe that the mineral (i) occurs in more than limited quantities in or on the land; or (ii) will be mined on a larger than limited scale; and (iii) will be mined for a longer period than two years (s 9(3)).

1 4 An environmental management programme in respect of the surface of the land must also be submitted by the holder of the mining authorisation to the director for his approval (s 39(1)). No mining operations may be commenced with before obtaining any such approval (s 39(1)). The director may, pending the approval of the environmental management programme, grant temporary authorisation that the mining operations may be commenced with (s 39(4)). The grant of temporary authorisation is subject to such conditions as may be determined by the director (s 39(4)). The director may exempt the holder of a mining authorisation from submitting an environmental management programme or grant an extension of time within which to submit an environmental management programme (s 39(2)(a)).

2 Legal issue

The appeal raised the question whether interested parties, wishing to oppose an application by the holder of mineral rights for a mining licence in terms of section 9 of the Minerals Act, are entitled to raise environmental objections and be heard by the director, who is the official designated to grant or refuse such licence (383h–i).

3 Facts

3 1 Sasol Mining (Pty) Ltd (the second appellant) was the holder of mineral rights in respect of an area comprising three farms fronting on the Vaal River (384a). Sasol Mining, which intended to mine by open-cast mining for coal in the area close to the bank of the Vaal River, applied to the director for a mining licence in terms of section 9 of the Minerals Act. It was established that the only feasible manner of mining for coal in that area was by open-cast mining (384b) Save (the first respondent) was an unincorporated association whose members were concerned people who owned property and lived along the Vaal River. Its object was to assist its members to protect and maintain the environmental integrity of the Vaal River and its environs (384c). The other respondents were either members of Save or property owners in the affected area. All the respondents were united in their opposition to the development and exploitation of the coal resources by open-cast mining in the area. Their concerns were primarily of an environmental nature (384d-e; the environmental concerns raised by the respondents are summarised in paragraph [6]).

3 2 During July 1996, whilst Sasol Mining's application was still under con-sideration by the director, Save contended it was entitled to be heard in opposing the application. The director, taking the view that consideration of such objections would be premature at that stage, twice informed Save that it was not prepared to do so. On 22 May 1997 the Director issued a mining licence to Sasol Mining in respect of the envisaged open-cast mine (384e–f; 383i–j). The director was successfully taken on review in the Witwatersrand Local Division. The present appeal was aimed at reversing the outcome of that review (383j).

4 Decision

The appeal was, however, dismissed with costs by the Supreme Court of Appeal (389d).

4 1 The court was of the opinion that the *audi alteram partem* rule applies when application for a mining licence is made to the director in terms of section 9 of the Minerals Act (388i–j). As to the *ratio decidendi* Olivier JA held:

> "Nothing in section 9 or in the rest of the Act either expressly or by necessary implication excludes the application of the rule, and there are no considerations of public policy militating against its application. On the contrary, the application of the rule is indicated by virtue of the enormous damage mining can do to the environment and ecological systems. What has to be ensured when application is made for the issuing of a mining licence is that development which meets present needs will take place without compromising the ability of future generations to meet their own needs (the criterion proposed in the *Brundtland Report*: *World Commission on Environment and Development, Our Common Future*, Oxford University Press 1987). Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns"(389a–d).

4 2 The court indicated that a hearing during an application for a mining licence need not necessarily be a formal one, but interested parties should at least be notified of the application and be given an opportunity to raise their objections in writing. If necessary, a more formal procedure can then be initiated (388j–389a).

4 3 The court decided that some of the matters referred to in section 9(3)(a) to (e) of the Minerals Act involve environmental issues (387e). According to the court an example is to be found in paragraph (b), which requires an enquiry into the manner in which an applicant intends to rehabilitate disturbances to the surface which may be caused by mining operations (387e; see *13* above). *In casu*, the director would have to take into account the alleged likelihood of damage to the Rietspruit wetland and the question if, and to what extent, the wetland could be rehabilitated (387f). The court held that these are environmental matters about which the respondents had legitimate concerns and therefore the director would have to give them an opportunity to be heard during the application (387f–g).

4 4 The argument advanced by the appellants that no environmental rights are violated by a decision in terms of section 9, since mining may only commence after approval of an environmental management programme, was rejected by the court. The court held that the granting of a mining licence enables the holder to proceed with the preparation of an environmental management programme, which, if approved, will enable him to commence mining operations (388d). The court regarded it as settled law that a mere preliminary decision can have serious consequences in particular cases, *inter alia* where it lays the necessary foundation for a possible decision which may have grave results. In such a case the court was of the opinion that the *audi alteram partem* rule applies to the consideration of the preliminary decision (388d–e). The court relied on *Van Wyk v Van der Merwe* 1957 1 SA 181 (A) 188B–189A. The court perceived a decision in an application for a mining licence in terms of section 9 to be such a case (388e).

4 5 The court distinguished the different objects of section 9 and section 39, respectively whether a mining licence should be granted and the consideration of the environmental management programme (388g). It was pointed out that the granting of a licence in terms of section 9 empowered the holder to apply to the director to be exempted from the obligation to submit an environmental management programme or to obtain temporary authorisation for mining to commence, pending the approval of the environmental management programme (388g–i; see *1 4* above). The court rejected the appellant's argument that the *audi alteram partem* rule should be applied only at the section 39 stage because "a hearing in terms of section 39 may not address the appellants'(sic) basic objection to the manner of mining, and may never take place or only take place after mining has already commenced" (388i; see *3 2* above).

5 Discussion

The decision is to be welcomed from an administrative-law and environmental-law perspective:

5 1 Administrative law

5 1 1 This decision is to be welcomed from an administrative-law perspective in that it is one of various judgments that confirm the importance of the common-law rules of natural justice in questions of administrative justice (*inter alia, Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 1 SA 283 (C) 305; *Kotze v Minister of Health* 1996 3 BCLR 417 (T) 423f–g; *Fasjas (Pty) Ltd v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 2 SA 900 (LCC) 911–919; *IMATU v MEC, Environmental Affairs, NC* 1999 4 SA 267 (NC) 297c; *Commissioner for Customs and Excise v Container Logistics* 1999 8 BCLR 833 (SCA) 843i–j).

The *audi alteram partem* rule is only one rule or principle of the common-law rules of natural justice (De Waal *et al The Bill of Rights handbook* (1999) 493). Traditionally, the approach to this rule was controversial, as the rule applied only to the exercise of administrative action which affected the existing rights, privileges or liberties of a person (Baxter *Administrative law* (1994) 577–578; Burns *Administrative law under the 1996 Constitution* (1998) 175). This was subsequently extended to include a legitimate expectation of an affected person (*Administrateur Transvaal v Traub* 1989 4 SA 731 (A) 761e–f; Burns 174). The affected persons "may also include persons less directly affected, such as objectors to the granting of licences or a permit. Entitlement to natural justice is in this sense a question of degree, having regard to the interests threatened . . ." (Baxter 543 fn 57). Traditionally, legislation could expressly or by necessary implication exclude the application of the *audi alteram partem* rule in common law (*Du Preez v TRC* 1997 3 SA 204 (A) 231c–f). De Waal is of the opinion the constitutional right may in certain circumstances preclude original legislation from excluding the application of the rules of natural justice expressly or by implication (494).

5 1 2 Subsequently however, the Constitutional Court in *Pharmaceutical Manufacturers Association In Re: ex parte The President of the Republic of South Africa* 2000 3 BCLR 241 (CC) 257b refined the role of the common-law principles of natural justice in relation to the constitutional right to just administrative action as a measure to control public power in judicial review procedures. Since the Constitution is supreme, a reviewing court must determine the lawfulness of the administrative action in terms of section 33 of the Constitution as read with the common-law principles. These common-law principles are not a separate body of law, but entwined with the Constitution and relevant to inform the contents of the administrative justice clause and to contribute to its further development (261b–c).

The constitutional right to procedural fairness is therefore not restricted to the common-law rules of natural justice, but is more comprehensive "to give individuals the full measure of their fundamental rights" (*Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 1 SA 283 (C) 305; Burns 165–169). The existence of the constitutional right clearly does not preclude development of the common-law rules and is encouraged by s 39(2) and (3) (Chaskalson *Constitutional law of South Africa* (1996) 25–1).The development of the common-law rules is part of the development of the single body of rules relating to the constitutional principles of administrative justice (*Pharmaceutical Manufacturers* 261b–c).

However, it is not only the common-law rules of natural justice that would influence constitutional administrative justice, but also the new Promotion of Administrative Justice Act 3 of 2000, which has been promulgated to give effect to the constitutional clause. Naturally, too, the enabling legislation would also play a role (Burns 139 – 140).

5 1 3 Although all the provisions of the Bill of Rights in the 1996 Constitution affect the existing rules and principles of administrative law (Rautenbach *General provisions of the South African Bill of Rights* (1995) 61), the constitutional right to administrative justice is contained in section 33. It is accepted, for the sake of this discussion, that the promulgation of the Promotion of Administrative Justice Act, even though it has not yet entered into force, is sufficient in terms of section 23 (2)(b) of Schedule 6 of the Constitution, for section 33 to read as follows:

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

It is formulated in wider terms than the previously applicable section 24 of the interim Constitution (or s 23 (2)(b) of Sch 6 of the Constitution) which read:

> "Every person shall have the right to – . . . (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened."

The Promotion of Administrative Justice Act was enacted to give effect to these rights, but *in casu* does not fundamentally assist in the interpretation of section 33. Where relevant, it states:

> "3 (1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
>
> (2) (a) A fair administrative procedure depends on the circumstances of each case.
>
> (b) In order to give effect to the right to procedurally fair administrative action, an administrator must give a person . . . reasonable opportunity to make representations.
>
> (4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
>
> (b) In determining whether a departure . . . is reasonable and justifiable, an administrator must take into account all relevant factors, including –
>
> (i) the objects of the empowering provision;
>
> (ii) the nature and purpose of, and the need to take, the administrative action;
>
> (iii) the likely effect of the administrative action;
>
> (iv) the urgency of taking the administrative action or the urgency of the matter;
>
> (v) the need to promote an efficient administration and good governance."

The facts in each case still have to be evaluated in the light of the circumstances. Again, the jurisprudence of the common-law rules of natural justice would be applicable.

5 1 4 It has been argued that the interpretation of section 33 of the Constitution should be wide and flexible to afford a wide range of protection for persons affected by administrative action (Davis *et al Fundamental rights in the Constitution* (1997) 159). This section is relevant to two aspects. It reaches not only the administrative decision, but also the regulatory statutory framework itself. One does not only have the right to the procedures laid down in the legislation; the procedures themselves can be tested under this section (Chaskalson 25–3; 25–4; Burns 167). What will be

regarded as fair procedure in a particular case, depends on the circumstances and must be determined within the context of the claim (De Waal 493).

The Constitutional Court has indicated that it would apply a balancing approach in determining the content of the section, with the jurisprudence on natural justice (including the *audi alteram partem* rule) as a starting point and by proper contextual statutory interpretation in the light of the Constitution (Chaskalson 25–12; 25–3; *Pharmaceutical Manufacturers* 261a–d; *Transvaal Agricultural Union v Minister of Land Affairs* 1997 2 SA 621 (CC) 631b–c). In *Deacon v Controller of Customs and Excise* [1999] 2 All SA 405 (SE) the court noted that

> "in order to ascertain whether the rules of natural justice are applicable to a decision taken by an organ or official of government in terms of a statute, regard must be had to the objects of the statute, the nature of the discretionary powers conferred on the authority concerned, the conduct which is being controlled in terms of the statute and in particular, the potential prejudice for the individual concerned. Prejudice to the organ of state is also a factor to be considered" (415b–c).

The court continued that a balance should be struck between the interests of society and public policy on the one hand, and the complexities, demands and practicalities of government on the other at the same time not losing sight of the continual interaction between organs of state and the public generally (415c–e).

5 1 4 Even before the *Pharmaceutical Manufacturers* judgment, Farlam J's judgment in *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 1 SA 283 (C), could have been of invaluable assistance to the Supreme Court of Appeal. In this case Iscor intended to erect a steel mill near the wetlands of the Langebaan lagoon which were of international importance and which South Africa undertook to protect in terms of an international convention (289f–290a). Iscor applied for the rezoning of the land, but experts disagreed on the desirability of the mill. The applicants, as members of a trust, instituted proceedings to prevent the rezoning decision until the outcome of an environmental investigation in terms of the Environmental Conservation Act 73 of 1989 had been reported on and taken into consideration. It was contended that a decision taken prior to finalisation of the report on the investigation, would infringe their right to procedurally fair administrative action, entrenched in section 24(b) of the interim constitution (288 d–e). The enabling legislation did not require consideration of such a report before a rezoning decision was taken (303a–b). The court held that the constitutional right to administrative justice does not codify the common-law rules of natural justice (304h–i) and described the test applicable to the section (as well as the common law) as "the principle and procedures which, in the particular situation or set of circumstances are right and just and fair" (305d–e). The administrative action should promote the "values which underlie an open and democratic society based on freedom and equality" and, in interpreting any law and in the application and development of the common law "have due regard to the spirit, purport and objects of (the) chapter" (305e–f). The constitutional right must therefore be generously interpreted, to give individuals the full measure of the fundamental rights as approved by the Constitutional Court in *S v Zuma* 1995 2 SA 642 (CC) 651a–d 305e–h. (This test was also used in *Maharaj v Chairman of the Liquor Board* [1996] 2 All SA 185 (N) 189b–d.)

5 1 5 *In casu*, the respondents should also have succeeded had they based their claim on the constitutional right to procedurally fair administrative action and not the common-law rules. After the *Pharmaceutical Manufacturers* judgment, the review can no longer be brought merely on the common-law rules since there is only one body of law. The control of public power by the courts through judicial review will always be a constitutional matter (*Pharmaceutical Manufacturers* 257b–c).

5 1 5 1 The respondents as a group have *locus standi* in terms of section 38 of the 1996 Constitution. Section 38 reads (where relevant):

> "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 the court are –
>
> (e) an association acting in the interest of its members."

In the *Van Huyssteen* case the court held that the interim Constitution intended to end the restrictive approach to *locus standi* by our courts and that the section is wide enough to cover the interest of trustees whose constitutional rights are infringed (301f–i). This was noted with approval, albeit *obiter,* in *Wildlife Society v Minister of Environmental Affairs and Tourism* 1996 3 SA 1095 (TkSC) 1104i–j and 1106i–j. Since the respondent *in casu* is an association acting in the interests of its members, alleging that their constitutional environmental rights in terms of section 24 of the Constitution have been infringed or threatened, it would have had *locus standi* in terms of the Constitution.

Section 24 of the 1996 Constitution reads as follows:

> "Everyone has a right –
>
> (a) . . .
>
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
>
> (i) prevent pollution and ecological degeneration;
>
> (ii) promote conservation and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

5 1 5 2 The Constitution is applicable to the decision of the director, since he is an officer of a state department appointed by the Minister of Mineral and Energy Affairs to exercise the powers and perform the duties conferred upon or assigned to him (s 4 of the Minerals Act). Since he falls within the definition of an "organ of state" (s 239 of the 1996 Constitution), his administrative actions are subject to the provision of the Bill of Rights (s 8(1) of the 1996 Constitution; De Waal 481). Actions by the director also fall within the definitions of "administrative action" and "decision" in terms of the Promotion of Administrative Justice Act (s 1(i) and 1(v) respectively).

5 1 5 3 In terms of the Promotion of Administrative Justice Act, to be successful the respondents must have "rights or legitimate expectations" which are "materially and adversely affected". These rights include, but are not restricted to constitutional rights such as the environmental rights contained in section 24 (De Waal 486; Burns 136). In the case under discussion the court held that since the preliminary decision can have serious consequences for persons, it follows that their rights are "affected". This is in line with the *Van Huyssteen* decision that a decision to rezone a property would undoubtedly affect an individual's rights to a neighbouring property if the effect of the operation of the proposed steel mill would be to pollute or otherwise detrimentally affect an adjacent lagoon (303h).

5 1 5 4 The interpretation of section 33 of the 1996 Constitution is flexible and applicable to two aspects, namely the procedures provided for in the legislation and the application of the procedures. Two questions have to be answered. Is the procedure provided in the Act fair? And, was the administrative decision fair? By analogy with the *Van Huyssteen* decision, certain aspects are important to determine the "right and just and fair principles and procedures":

(a) As in the *Van Huyssteen* decision, the mere fact that the Minerals Act does not make provision for any input or comment by the public or other interested persons with regard to the issuing of mining licences even in circumstances that might be highly prejudicial to individuals, does not mean that there is no such right (*Transvaal Agricultural Union v Minister of Land Affairs* 361a–b). After all, one of the aims of the Constitution is to test governmental decisions affecting the rights of citizens, against constitutional principles (Davis 3). Non-participation by an affected person does not promote the "values which underlie an open and democratic society based on freedom and equality" unless there are compelling reasons for this (Singh "Just administrative action" 1996 *SAHRCLJ* 9). It should be noted that in terms of the Promotion of Administrative Justice Act, provision is made for a public inquiry or notice and comment procedure (s 4(1)) where administrative action affects the public. In future, once the Act comes into operation, it is presumed that the scenario/legislation in this case could be dealt with in terms of this section.

(b) The permit applied for *in casu* was for an open cast coal mine with the potential to damage the ecosystem and the environment.

(c) The court acknowledged that a new administrative approach was needed for environmental concerns, implying that the procedure in the Act is unsatisfactory. The court noted that the type of hearing required was not necessarily formal, but should include the giving of notice and an opportunity to object in writing. This is in line with the decision of *South African Roads Board v Johannesburg City Council* 1991 4 SA 1 (A) (De Waal 493). See also the comment made under (a) and the Promotion of Administrative Justice Act (s 3(2)).

(d) The *Brundtland Report* sustainable development criteria that "development which meet present needs will take place without compromising the ability of future generations to meet their own needs" was adhered to (see *4 1* above).

(e) In terms of the Promotion of Administrative Justice Act (s 4), had it been applicable at the time of the judgment, departure from the requirements in the Act would only have been possible under certain circumstances and if it was reasonable and justifiable. Factors to be taken into account are stipulated in section 4(b) and include the objects of the provision, the nature, purpose and likely effect of the administrative action as well as the urgency of the matter. On the facts presented in the case *in casu*, there is no reason why it would be regarded as reasonable and justifiable to depart from the requirements in the Act.

It is submitted that both the questions posed earlier are to be answered in the negative. Neither the procedure provided for in the Minerals Act nor the procedures followed by the director are "right and just and fair" and in line with section 33 of the 1996 Constitution as read with or without the Promotion of Administrative Justice Act.

5 1 6 The decision of the court that, since the *audi alteram partem* rule was applicable, the matter had to be referred back to the director, is in line with common-law authority that the court will not, in the absence of prejudice to a party, usurp the decision-making power of the administrative authority (Burns 227). This principle is also found in the Promotion of Administrative Justice Act, since the reviewing court may grant any order that is just and equitable, including orders setting aside the administrative action and remitting the matter for reconsideration by the administrator (s 8(1)(c)).

5 2 Environmental law

From an environmental perspective it is important to distinguish between the granting of a mining licence and the commencement of mining operations. Commencement of mining operations does not necessarily take place after consideration of the environmental management programme. In the light of the possibility of commencement of mining operations (after granting of the licence) in the absence of or before approval of an environmental management programme (see *4 5* above), the raising of objections during approval of the environmental management programme would be impossible or ineffective in such instances. Because it is likely that mining operations commence after granting of a prospecting licence, it is submitted that environmental matters should be raised and heard during the preliminary decision. An input from the Department of Environmental Affairs and Tourism during the preliminary decision stage could be extremely valuable in arriving at a decision. This would be the case, particularly in the absence of private objectors. Consultation with the chief inspector (appointed in terms of s 48 of the Mine Health and Safety Act 29 of 1996) regarding the ability of the applicant to make provision to mine, and to do so in a healthy and safe manner, is already required before a mining authorisation is issued by the director (s 9 (7)). Amendment of the Minerals Act to make provision for input from the Department of Environmental Affairs could perhaps be considered. This decision should not be interpreted to mean that application of the *audi alteram partem* rule during the consideration of the environmental management programme should not take place, if there are still environmental matters or concerns to be raised.

By implication, the court recognised the environmental concerns of the respondents as fundamental rights in terms of the 1996 Constitution (389c).

6 Conclusion

The *audi alteram partem* rule applies not only to an applicant for a mining licence in terms of section 9 of the Minerals Act, but also to less directly interested parties with environmental concerns, wishing to oppose an application for such a mining licence. Such interested parties are entitled to raise environmental objections and to be heard by the director.

The granting of a prospecting licence by the director is a preliminary decision which can, and in the ordinary course of events might well, result in the commencement of mining operations and (possibly) the infringement of environmental rights upon (a) approval of an environmental management programme; (b) granting of exemption from the obligation to submit an environmental management programme; or (c) granting of temporary authorisation for mining to commence, pending the approval of the environmental management programme by the director. The *audi alteram partem* rule applies to consideration of such a preliminary decision.

Although judicial review of administrative action on common-law principles alone is no longer possible after the *Pharmaceutical Manufacturers* judgment, the judgment under discussion once again underlines the importance of the development of the common-law rules. This decision confirms further the entitlement to natural justice by persons less directly affected by administrative decisions and the principle that the contents of natural justice remain a matter of degree depending on the circumstances.

The following *dictum* of Horn AJ in the *Deacon* decision (413e–f) summarises the issue aptly:

"Once a functionary exercises a discretionary power in terms of an Act of Parliament, he cannot do so without having regard to the spirit and objects contemplated by section 33 of the Constitution . . . The notion of the untouchable bureaucrat is a thing of the past. He can no longer act in disregard of the rights of the individual."

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AANGEPASTE NOODWEERSGRENSE BY 'N AANVAL DEUR 'N BESKONKENE?*

BayObLG, Beschl v 14/8/1998, NStZ-RR 1999, 9

1 Inleiding

Die feite van dié saak was kortliks soos volg: A, die beskuldigde, en die hoog beskonke klaer, S, het die bymekaarkomplek, die Agora, besoek. Hulle het aanvanklik in 'n strydgesprek betrokke geraak. A het egter die gesprek beëindig met die woorde: "Laat my asseblief met rus!" Hy het vervolgens in die rigting van die muntoutomate, wat agter S was, beweeg. Dáár het S hom 'n klap in die gesig gegee. A het S daarop met die vuis in die gesig geslaan, met die gevolg dat hy teen die muntoutomate geval het. S het 'n blou oog opgedoen wat eers na twee tot drie weke genees het. A is in die verhoorhof aan aanranding ("vorzätzliche Körperverletzung") skuldig bevind en is 'n boete opgelê. A se appèl na die Landgericht (LG) word van die hand gewys. Hy beroep hom vervolgens, met sukses, op die Bayerisches Oberstes Landesgericht (BayObLG) in München. Die beslissing van laasgenoemde hof word eerstens, binne konteks van die Duitse reg onder die loep geneem, en tweedens word die waarde daarvan vir die Suid-Afrikaanse reg verduidelik. Hierdie bespreking moet voorts as 'n glos op 'n vorige publikasie, waar die onderliggende problematiek in dié verband in 'n breëre konteks behandel is, gelees word (Labuschagne "Die proses van dekonkretisering van noodweer in die strafreg: 'n Regsantropologiese evaluasie" 1999 *Stell LR* 56–68). Onnodige duplisering van inligting en argumente daarin opgeneem, word doelbewus hier vermy.

2 Die beslissing van die BayObLG

Die LG het van die standpunt uitgegaan dat A nie in noodweer kon opgetree het nie, aangesien die aanval reeds afgeloop was. Volgens die LG het A in weerwraak opgetree. Die BayObLG wys daarop dat vir 'n geldige beroep op noodweer 'n afweerswil as subjektiewe regverdigingsgrond vereis word. 'n Noodweerhandeling word nie in beginsel van sy regmatige karakter onthef deur die feit dat die noodweerdader,

* 'n Deel van dié navorsing is in 1999 met die finansiële steun van die Alexander von Humboldt-Stiftung en die Universiteit van Pretoria aan die Ludwig Maximilians-Universität in München, Duitsland, onderneem. Die menings hierin uitgespreek, word egter nie noodwendig deur dié instellings gedeel nie.

benewens die afweerswil, ook byvoorbeeld met haat, woede of in wraak optree nie (sien ook Roxin *Strafrecht AT* (1997) 604–605). Die Duitse Hooggeregs-hof (Bundesgerichtshof; BGH) het hierdie standpunt in 'n beslissing van 5 November 1982 (NStZ 1983, 117) uiteengesit. Die BayObLG wys daarop dat die uitgangspunt van die LG dat A bloot in wraak opgetree het, nie ondersteuning in die feite van die saak vind nie. Uit 'n beslissing van die BGH van 5 November 1990 (1991 *NJW*, 503 504) blyk in ieder geval dat indien daar twyfel bestaan oor die vraag of 'n beskuldigde in noodweer opgetree het, hy die voordeel van die twyfel moet geniet.

Die LG het vervolgens ook van die siening uitgegaan dat A bewus was van die hoë graad van beskonkenheid waarin S verkeer het. A moes in die lig hiervan hom uit die voete gemaak het of bloot die opgeligte hand van S vasgehou het. Die BayObLG wys daarop dat die werklike vlak van alkoholisering van S nie vasgestel kon word nie, selfs al het 'n asemtoets dit later op 1,8% vasgestel. Selfs al sou mens van die standpunt uitgaan dat S ontoerekeningsvatbaar was, blyk uit die benadering van die BGH dat 'n noodweerdader, in geval van 'n skuldlose handeling, slegs hoef te vlug of 'n ander uitweg hoef te volg indien dit sonder (wesenlike) gevaar moontlik is (Urt v 2 Oktober 1953, BGHSt 5, 245 248–249).

Die omvang van die toelaatbare afweersoptrede word bepaal teen die agtergrond van al die omstandighede waaronder die aanvals- en afweerhandelinge plaasgevind het, in besonder, in die lig van die krag en gevaarlikheid van die aanvaller asook die afweersmoontlikhede ter beskikking van die aangevallene. Uit die getuienis blyk dit dat A homself na afloop van die verbale stryd onttrek het, maar dat S hom agtervolg het en hom eerste geslaan het. Daarbenewens het S sy hand omhoog gehou, wat aanduidend daarvan is dat verdere houe moontlik geslaan sou word. Die BayObLG merk vervolgens op dat die maatreëls wat (*in abstracto*) ter afweer geskik was, onbelangrik is. Van beslissende belang is slegs dat die afweersoptrede regtens die gepaste reaksie was. Uit riglyne deur die BGH neergelê, blyk dat diegene wat onregmatig aangeval word geregtig is om 'n afweermiddel te gebruik wat die sekerheid van 'n werklike beëindiging van die gevaar daarstel (BGH, Urt v 28/2/1989, 1989 NJW 3027). Die aanname van die LG dat A 'n dreigende verdere aanval kon buffer, word veral deur die opponerende "kragverhouding" van die partye weerlê. Dieselfde geld vir die moontlikheid wat A sou kon gehad het om hom uit die voete te maak. In dié verband is dit van nog wesenliker belang of A hoegenaamd in 'n posisie was om te oordeel of vlug nog moontlik was en of 'n minder gevaarlike afweermiddel as die vuisslag moontlik was.

Die voorafgaande omvangryke regspraak in dié verband in Duitsland handel, vir sover dit die begrensing van noodweer betref, in hoofsaak met die problematiek rondom die aanwending van ongelyksoortige wapens. Die vraag wat in dié sake ter beantwoording gestaan het, was meesal of 'n mes of 'n vuurwapen teen 'n ongewapene aangewend kon word en of eerskending met liggaamlike geweld afgeweer kon word (sien bv BGH, Urt v 30/10/1986, 1987 NStZ 172; BGH, Urt v 10/5/1990, 1991 NJW 503; Roxin 569ff. Sien ook Labuschagne "Noodweer ten aansien van nie-fisiese persoonlikheidsgoedere" 1975 *De Jure* 59). By gelykwaardige optrede waar wapens nie betrokke is nie, soos in die onderhawige geval waar 'n dreigende hou met 'n teenhou afgeweer is, sal oorskryding van die grense van noodweer nie maklik deur 'n hof bevind word nie. Dit geld te meer nog indien die aanvaller ontoerekeningsvatbaar ("Schuldunfähig") of verminderd toerekeningsvatbaar is. Waar proporsionaliteit tussen aanval en afweer bestaan en die aanvaller 'n beskonkene is wat verminderd ontoerekeningsvatbaar is, sou die oorskryding van die noodweersgrense volgens die BayObLG beswaarlik moontlik wees (10).

3 Betekenis van die beslissing van die BayObLG vir die Suid-Afrikaanse reg

Uit inligting wat ons gemeneregskrywers verskaf, blyk duidelik dat in noodweer teen geesteskrankes, kinders en beskonkenes opgetree sou kon word (vir meer gedetailleerde inligting sien Labuschagne "Noodweer teen 'n regmatige aanval?" 1974 *De Jure* 108). In *R v K* 1956 3 SA 353 (A) 359 verwys hoofregter Centlivres na noodweer teen 'n aanval van 'n persoon "who was apparently in a state of frenzy". Ek glo nie daar kan enige twyfel bestaan dat, volgens die bestaande Suid-Afrikaanse positiewe reg, in noodweer teen 'n beskonkene opgetree sou kon word nie (sien ook Snyman *Strafreg* (1999) 103–104; Burchell *South African criminal law and procedure*, vol 1 (1997) 74. Vgl Price "Defence, necessity and acts of authority" 1954 *Butterworths SA LR* 17; Labuschagne 1974 *De Jure* 117–118). Enige persoon wat al in Suid-Afrikaanse strafhowe opgetree het, sal kan bevestig dat 'n groot persentasie vervolgings vir geweldsmisdade verband hou met drankmisbruik en oorskryding van die noodweersgrense. Dit word as vanselfsprekend deur die howe aanvaar dat in noodweer teen 'n aanval van 'n beskonkene opgetree mag word.

'n Vraag wat in die beslissing van die BayObLG, hierbo bespreek, pertinent na vore kom, is: Het die feit dat die aanvaller ten tyde van die aanval in 'n swaar toestand van beskonkenheid was 'n effek op die bepaling van die noodweergrense? Die eerste en primêre reël wat in dié verband gestel moet word, is dat die feitestel van elke geval deurslaggewend behoort te wees. In die lig hiervan kan die graad van beskonkenheid van die aanvaller myns insiens in twee opsigte relevant wees: (i) alkohol het die effek dat 'n persoon se inhibisies losgelaat word. Die gedrag van so 'n persoon word gevolglik minder voorspelbaar en is meer irrasioneel gefundeer (Anoniem "Intoxication as a criminal defense" 1955 *Columbia LR* 1210 1211; Labuschagne "Strafregtelike aanspreeklikheid van die beskonkene" 1987 *SASK* 21 22). Dit wil voorkom of dit die werklike rede is waarom die BayObLG die standpunt gestel het dat waar die aanvaller beskonke is en gelyksoortige aanval- en afweermiddelle of -wyses ter sprake is, daar selde sprake van oorskryding van die noodweergrense sou wees. (ii) die toestand van 'n beskonke aanvaller kan óf alleenstaande óf in kombinasie met ander faktore die effek hê dat die aanval sonder moeite afgeweer sou kon word. 'n Beskonke aanvaller kan byvoorbeeld so onvas op sy voete wees dat hy bloot weggestamp sou kon word of die aangevallene sou sonder blootstelling aan enige gevaar eenvoudig kon omdraai en wegstap. Dit moet weer eens beklemtoon word dat welke een van dié twee scenario's, of moontlike skakeringe tussen-in, toepaslik is, van die omstandighede van elke saak sou afhang.

4 Gevolgtrekking

Uit die beslissing van die BayObLG blyk in die eerste instansie duidelik hoe belangrik subjektiewe faktore, in dié geval ten aansien van die aanvaller, by vasstelling van die noodweersgrense is. Tweedens beklemtoon dit, aansluitend hierby, dat hierdie faktore by bepaling van die noodweergrense net in berekening geneem behoort te word vir sover dit nie die noodweerdader se vermoë om homself effektief te verweer, affekteer nie.

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